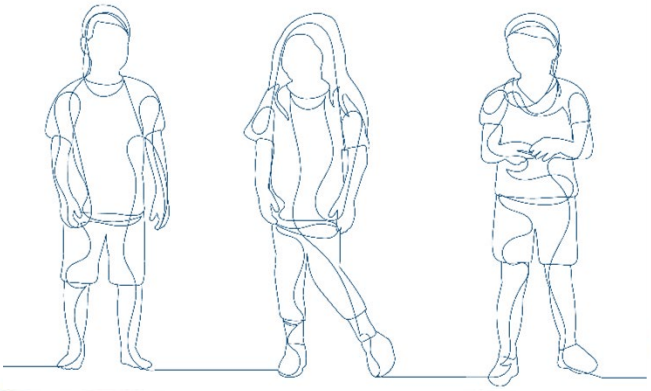
Minimum Age of Criminal Responsibility – alternative diversion model

Discussion Paper

January 2024



Government of South Australia
Attorney-General's Department

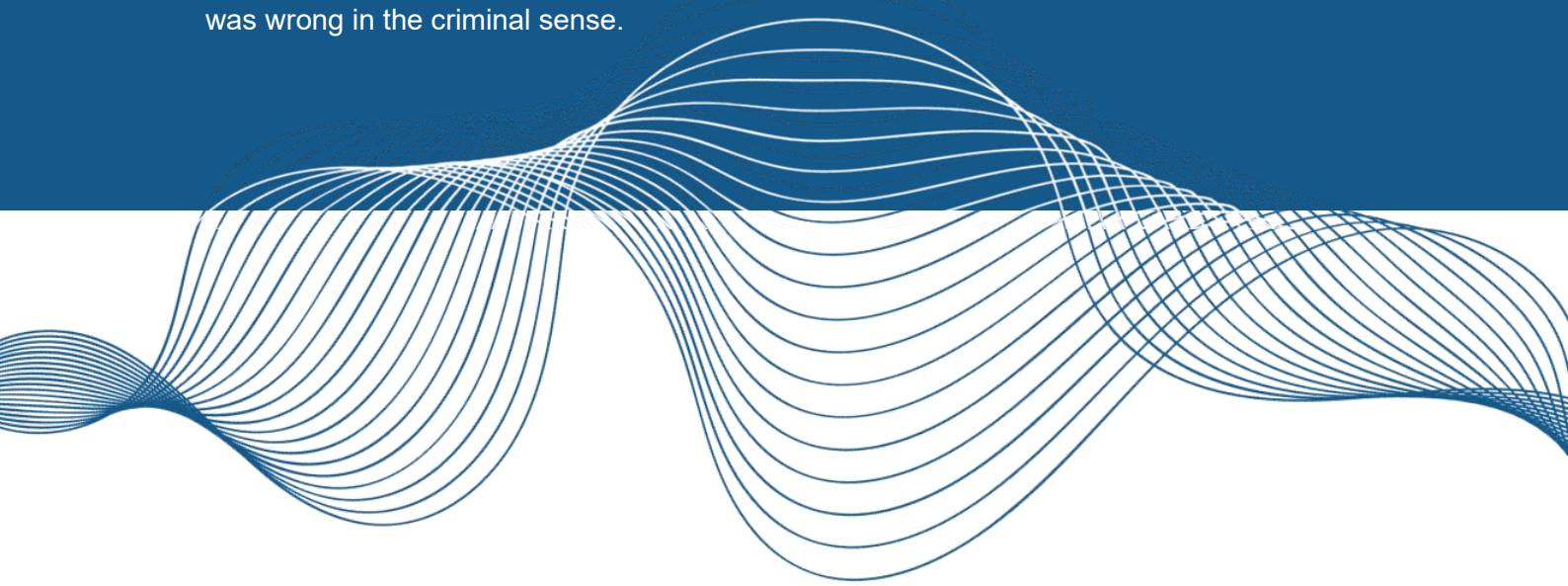
Introduction

The minimum age of criminal responsibly (the MACR) in South Australia is enacted by section 5 of the *Young Offenders Act 1993* and is currently 10 years of age. This means that children under the age of 10 cannot be held criminally responsible and cannot be charged with a criminal offence.

Until very recently, the MACR in all Australian jurisdictions was 10 years of age.

Currently, children aged between 10 to 14 years are presumed incapable of forming the requisite mental intent to commit a crime. This is known as the *doli incapax* presumption. Some jurisdictions have codified this presumption in legislation, however South Australia relies on the common law formulation of the presumption.

In criminal proceedings against a child between the ages of 10 to 14, the prosecution is required to rebut the presumption with evidence that the child knew that their conduct was wrong in the criminal sense.



Submissions and confidentiality

We are inviting submissions in response to this discussion paper. Please provide your submission to LLPSubmissions@sa.gov.au by **Monday 25 March 2024**.

Please be aware that, unless a request for confidentiality is made, information contained in any submission may be referred to publicly or published. Any material identified as 'confidential' is still subject to the *Freedom of Information Act 1991* and, while efforts will be made to keep the material confidential, in some circumstances it may be disclosed under that Act.

Where disclosure of information may identify you attempts will be made to consult with you under the *Freedom of Information Act 1991* before the documents are disclosed.

Background

Until 2023, the MACR was 10 years of age in all Australian jurisdictions. The MACR has been a consistent agenda item at meetings of the Standing Council of Attorneys-General (SCAG) and its predecessor bodies, which comprise Attorneys-General from the Australian Government, all states and territories, and the New Zealand Minister for Justice.

In 2018, a national working group was established to consider the matter and make recommendations about the MACR. At the meeting of the SCAG in November 2021, state Attorneys-General supported development of 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 requirements.

In December 2023 the SCAG publicly released the Age of Criminal Responsibility Working Group Report on the services and supports needed to support children diverted from the criminal justice system under a raised MACR.[1]

In August 2023 the Northern Territory (NT) Government became the first Australian jurisdiction to raise the MACR to 12 years, with no exceptions. The NT Government has committed to review the legislation, with a view to further raising the age to 14, in two years.

The MACR has been raised to 12 years in the Australian Capital Territory (ACT) to 12 years, and will further increase to 14 years in 2025, where limited exceptions will apply.

Victoria has announced that it will raise the MACR to 12 years initially, and to 14 years in 2027 after a period of consultation regarding exceptions and other matters.

The Tasmanian Government has accepted a recommendation of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse to introduce legislation to increase the MACR to 14 years, without exception, which it will implement completely by 2029. The Tasmanian Government had already committed to implementing a minimum age of detention of 14 years.

The United Nations supports a MACR of at least 14 years of age with no exceptions or conditions. The United Nations Committee on the Rights of the Child cites the large volume of documented evidence in the fields of child development and neuroscience that supports its reasoning. A MACR of 10 years of age is non-compliant with international standards and among the lowest of all Organization for Economic Co-operation and Development (OECD) nations.

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[1] Standing Council of Attorneys-General communiqués | Attorney-General's Department (ag.gov.au)

Evidence for raising the minimum age of criminal responsibility

There have been significant evidence-based research findings that support raising the MACR. The evidence was extensively discussed in the 2020 report from the National Working Group under the auspices of the Council of Attorneys-General.[2]

A draft form of this report was publicly released in December 2022. In summary, the evidence for raising the MACR is as follows.

- Early contact with the justice system is a strong predictor of future offending.
- Criminalising and stigmatising childhood behaviours, including the recording of a criminal conviction, often leads to a trajectory of further harm and reoffending.
- The complex needs of younger children exhibiting anti-social and criminal behaviours are better addressed outside the criminal justice system.
- There is a direct correlation between criminality and entrenched social and economic disadvantage. The major risk factors for youth criminality include poverty, homelessness, abuse and neglect, mental illness, intellectual impairment, and having one or more parents with a criminal record.
- Evidence-based research shows that typically, children who come into contact with the criminal justice system have complex needs and vulnerabilities, including the following:
    - a disproportionate number are Indigenous, mostly males;
    - they have faced significant prior disadvantage or complex trauma and may have been exposed to violence, abuse, homelessness, drug and alcohol abuse;
    - they have disengaged with school;
    - they are affected by disability or mental health conditions.
- In practice, the presumption of *doli incapax* does not operate effectively to safeguard vulnerable children.
- The younger a child is when first having contact with youth justice, the more likely it is the child will become entrenched in the justice system.
- A justice reinvestment approach is likely to deliver significant long-term savings.
- There are very few children in the justice system between 10 and 11 years of age.

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[2] Standing Council of Attorneys-General communiqués | Attorney-General's Department (ag.gov.au)

Raising the age

It is proposed to raise the MACR in South Australia from 10 years to **12 years** of age.

It is further proposed to commit to a review of the MACR after two years of the age being raised to assess if any changes are warranted.

Exceptions for serious offences

Limited exceptions to the MACR are proposed for certain serious offences. The exceptions would apply to children younger than the MACR, allowing them to be prosecuted for those offences.

The proposed list of **serious offences** is:

- Murder (section 12 *Criminal Law Consolidation Act 1935* (CLCA))
- Manslaughter (section 13 CLCA)
- Cause serious harm (section 23 CLCA)
- Rape (section 48 CLCA).

The presumption of *doli incapax* will be retained for these children, with the prosecution required to rebut the presumption and provide evidence that the child knew that their conduct was wrong in the criminal sense.

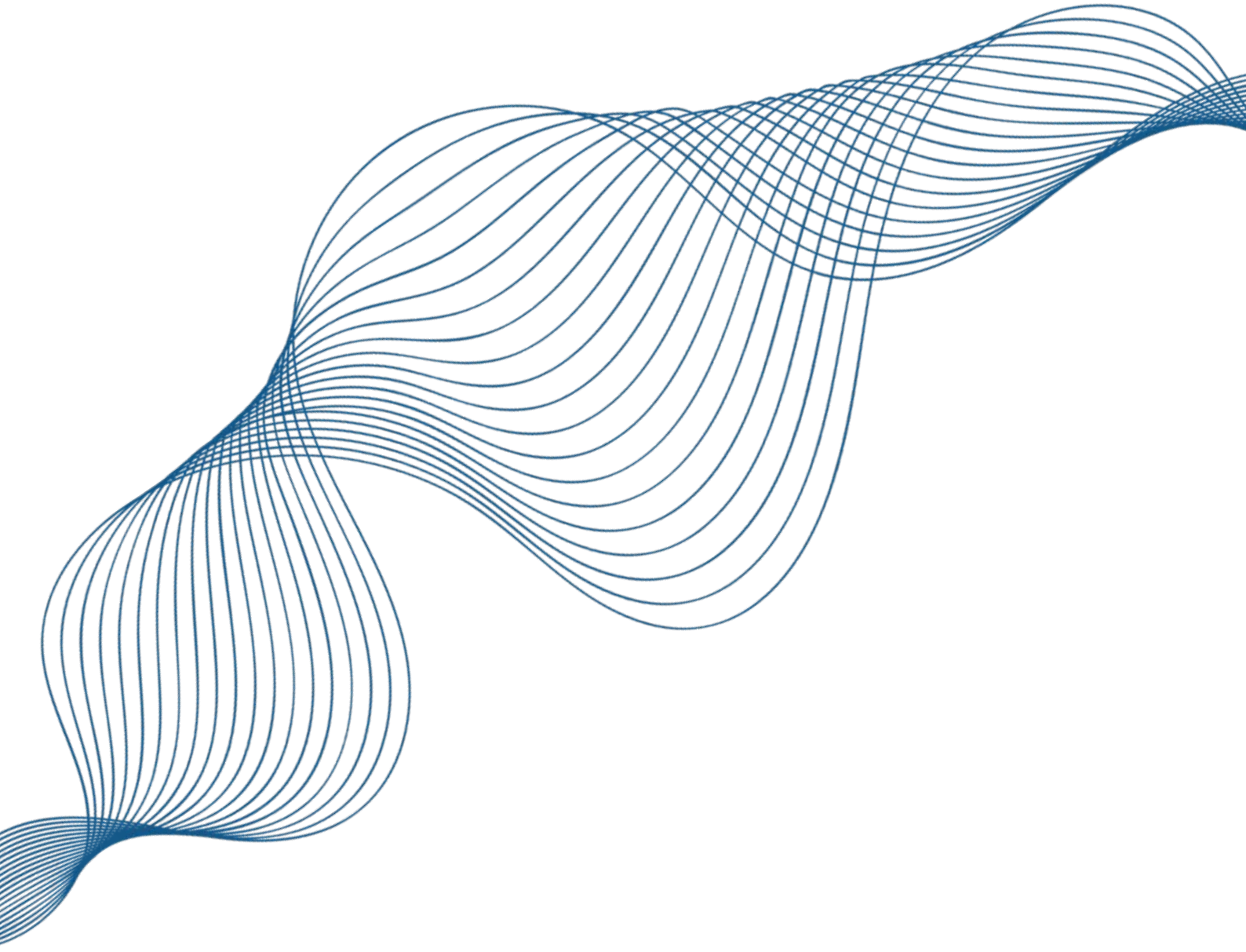
The presumption will be codified in the legislation, based on the common law standard, and the standard used by the ACT and the Commonwealth, which requires the child to have had actual knowledge that their conduct was wrong in the criminal sense.

Doli incapax is the presumption that children younger than 14 do not have the requisite mental capacity to be held criminally responsible.

South Australia currently uses the common law formulation of *doli incapax.*

Transitional arrangements will be required dealing with criminal justice proceedings on foot when the MACR is raised, the status of past convictions and children who are in custody when the MACR is raised. Careful consideration will be given as to how past convictions incurred when a person was younger than the MACR could be used in any context. For example, in the ACT past convictions will be able to be used for the purposes of working with children checks, but not for police history checks or future proceedings.

It will also be vital that access to victim support services and the victims of crime compensation scheme is maintained, such that victims are still able to access the supports they need. Importantly, the *Victims of Crime Act 2001* is already drafted to include in the definition of "criminal offence" behaviour that would constitute an offence had the person committing the behaviour been older.



The alternative diversion model

The alternative diversion model is the system that is put in place to replace the criminal justice response to behaviour from children that would otherwise have constituted a criminal offence had that child been older than the MACR (referred to hereafter as “harmful behaviour”, noting that the behaviour may not always necessarily involve a risk of harm to another person. It may also encompass behaviour that is antisocial such as property damage).

The alternative model should be restorative, culturally led, trauma-informed, and include professionally developed and led diversionary programs. The alternative model should also engage universal services in direct service responses as required.

The basic structure of an alternative model consists of:

a **first response** to the harmful behaviour

(including early intervention through community-based programs, a referral or assessment process)

leading to

a **secondary response** that can be scaled in intensity

(focused on the needs of the child and how to prevent the harmful behaviour in the future)

Features of the first response

The first response is the initial, immediate response to the behaviour of the child.

First responders will very often be police officers, as members of the public will likely call police if they witness what may be criminal offending, no matter the age of the person involved.

First responders may also be medical professionals, security guards, educators, social or youth workers, caregivers, or cultural leaders.

Places of safety

It is proposed to set up a network of ‘places of safety’ where a child younger than the MACR can be taken by first responders (including police) if they are engaging in behaviour that is harmful or there is a risk to the child’s safety, the safety of others or the community, and it is not possible or safe to return the child to their parent or guardian.

A time limit on how long a child may remain at a place of safety is proposed to be set (at this stage, 24 hours). The intention is to prevent immediate harm and allow time for longer-term arrangements to be made for the child. This may mean the child protection system being activated, including early intervention services, if those legislative thresholds are met.

It is recommended that police facilities will be places of safety of last resort when no alternative options are available.

Police powers

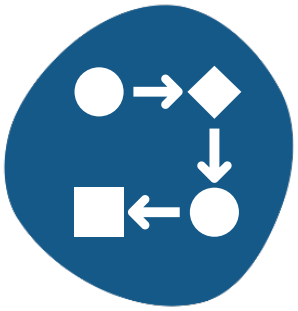
It is proposed to include specific powers for police to interview children younger than the MACR in an investigative capacity, as well as take forensic samples in some circumstances.

South Australia Police (SAPOL) has emphasised the need for officers to be able to respond appropriately when children are engaging in behaviour that presents a risk to the safety of the community.

The powers will be based on the model used in Scotland, and will encompass safeguards for the child, such as:

- their right to have a parent or guardian present;
- the right to legal representation;
- the use of specialist interviews to minimise the risk of a traumatic experience for the child;
- restrictions on the use and retention of the forensic samples.

Where police have a reasonable suspicion that a child younger than the MACR is committing (or has committed) one of the offences that acts as an exception to the MACR, the ordinary youth justice procedures would apply.



Referral process

There should be a flexible approach to referring children into pathways to support them to reduce harmful behaviour including early intervention programs in the community.

Following this (as necessary), a secondary pathway would be available with a range of persons able to begin the process of involving a child in the secondary response.

This would be where ordinary interventions by parents, family, carers, teachers, or medical professionals have not been sufficient to address the harmful behaviour of a child.

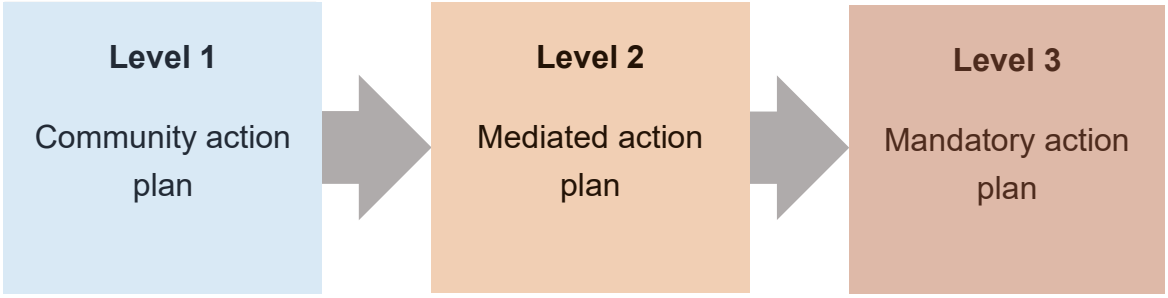
It is recommended that those able to refer a child to the secondary response pathway should include:

- the child, who may voluntarily request to go into the secondary response
- parents, guardians, carers, or kinship carers
- medical professionals
- educators
- social or youth workers
- police
- Aboriginal or culturally and linguistically diverse (CALD) community leaders.

The secondary response

The secondary response should also be scalable in intensity to respond appropriately to the needs of the child and include appropriate diversionary programs and opportunities.

A flexible 3-level scaled secondary response should be developed, similar to the following.



Level 1: Community action plan

A community action plan would be a **voluntary** agreement setting out the path for the child to address their harmful behaviour.

It would be made between the child and other relevant parties such as:

- their parents, guardians, or caregivers
- educators, medical practitioners, or police
- youth workers, social workers, or service agencies
- victims, Aboriginal Elders, or CALD Leaders where appropriate

The community action plans are intended to be a more formal way to set out the supports and interventions that the child needs. It should set out clear expectations, goals, milestones, and timeframes for the child, their caregivers and, where appropriate, service agencies to complete the plan.

The plan should also aim to address the underlying causes of their harmful behaviour, with a view to prevent future harmful behaviour.

A community action plan will be flexible, but it is proposed that the plans will generally be time limited to a maximum of 12 weeks with an option to extend for a further 12 weeks. After this time, a new plan must be made.

A community action plan is framed as a restorative and therapeutic undertaking and should be trauma informed and age specific. It may include:

- attending diversion, cultural, or education programs
- attending counselling, drug and alcohol treatment
- the completion of other diversion or behavioural support programs.

The action plans would be flexible, and able to be appropriately adapted for each child.

A community action plan could also involve the child taking steps to remediate any harm caused by their behaviour, such as helping to repair vandalism, or apologising to or compensating a victim.

The types of undertakings that could be required of the child under a community action plan could be similar to some of the requirements when police caution a child. See section 8 of the *Young Offenders Act 1993.*

Level 2: Mediated action plan

A mediated action plan is a more intensive response than a community action plan, but participation by the child would still be **voluntary**.

This level of response may be necessary when:

- a community action plan has failed to address the child's harmful behaviour (which has continued or escalated)
- the child is experiencing an increased need for support

A mediated action plan is analogous to the family conferencing process within the youth justice system (see section 12, Young Offenders Act), and similar requirements or undertakings to family conferencing outcomes could be included.

A mediated action plan will generally be time limited to a maximum of 12 weeks with an option to extend for a further 12 weeks. After this time either: a new plan must be made; the child is stepped down to a community action plan; or the child is stepped up to a mandatory action plan.

A mediated action plan could involve a mediation session involving a child (and their representative), the child's family or caregivers, other relevant parties such as medical practitioners or psychologists, social workers, police, or Aboriginal Elders or CALD community leaders. The plans will be reviewed regularly and could be varied as needed.

The aim of the session would be to come to an agreement for a more formal action plan to address the child's behaviour. In most cases it would also be a necessary pre-condition for a mandatory action plan should the mediated action plan be unsuccessful in addressing the child's harmful behaviour.

At this stage, the preferred option for a body to oversee mediated and mandatory action plans is the South Australian Civil and Administrative Tribunal (SACAT). As SACAT sits outside the existing youth justice system it therefore clearly signals to participants that it is not a criminal justice response. SACAT has experience in undertaking mediation and less formal proceedings, but also has legally qualified and judicial members who are experienced in making orders related to mandated treatment (such as mental health treatment orders) and vulnerable persons.

However, further consultation with relevant stakeholders is required prior to finalising this aspect of the alternative diversion model. There are other options that could be explored, such as situating the level 2 and level 3 responses within the Youth Court.

Level 3: Mandatory action plan

A mandatory action plan would represent the most intensive response available for children who have very serious and complex needs.

It would involve formal orders made by SACAT (or other body).

Mandatory action plans are the most serious level of response.

A mandatory action plan could be in place for a maximum of 12 weeks, with an option to extend it for a further 12 weeks. There is no limit to the number of mandatory action plans to which a child can be subject. They will be reviewed regularly and can be adjusted as needed.

Once the mandatory action plan has ended, there may be no need for further formal intervention, or a child may step down onto a mediated action plan or community action plan to ensure the appropriate support continues.

Compliance and secure therapeutic facilities

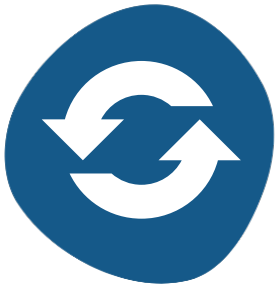
Voluntary engagement with the therapeutic programs and services via a mediated action plan is the preferrable path, as voluntary engagement is more likely to lead to better outcomes for the child. For example, with programs that involve restorative justice initiatives, mandatory engagement undermines the premise of the process.

However, there may be a situation where a child refuses to comply with or engage in voluntary therapeutic programs and services set out in their mediated action plan. Where the child is at risk of causing further harm to themselves or others, it may be necessary to be able to make a mandatory order that compels the child to undertake specific treatments or engage with specific programs.

It may also be necessary, in extreme cases, to compel a child to reside in a secure therapeutic facility to receive treatment if it is not safe for them to reside at home or within the community.

This type of facility is not currently available and would need to be scoped and developed – however, one option for consideration would be a renovation or extension of the existing space at Kurlana Tapa.

Children showing extreme or repeated harmful behaviour



It is also proposed to introduce an option of last resort to deal with children younger than the MACR who repeatedly engage in extreme or repeated harmful or violent behaviour and where a mandatory action plan has not been effective.

This will allow for the criminal prosecution of the child.

It is intended that this option would be required where:

- all other avenues to engage with the child and address their behaviour via the alternative model process have been tried but were unsuccessful;
- the child continues to engage in behaviour that poses an appreciable risk to the safety of the community;
- if the child were older than the MACR, their behaviour would constitute a 'serious criminal offence' (as defined, see attachment 1).

Criminal prosecution

In order for a child younger than the MACR to be criminally prosecuted for an offence that is **not** one of the serious offence exceptions, the following process would apply:

1. The child is subject to a mandatory action plan for the second time within a 12-month period.
2. In the 3-month period following the completion or termination of a mandatory action plan, the child engages in behaviour that would constitute a 'serious criminal offence' if they were older than the MACR on at least 3 separate occasions.
3. SAPOL may proceed to charge the child with a serious criminal offence if SAPOL is of the view that:
    a. the behaviour of the child poses a risk of harm to the community; and
    b. there is a reasonable prospect of a successful prosecution; and
    c. there is a reasonable prospect of the prosecution being able to rebut the *doli incapax* presumption; and
    d. there is no other satisfactory option to address the behaviour through the alternative model; and
    e. having consulted with the Office of the Director of Public Prosecutions (ODPP), that Office agrees with SAPOL's assessment of the matter.

4. SAPOL or the ODPP can then apply to the Youth Court for permission to proceed with the prosecution, and SAPOL is able to satisfy the Court that the abovementioned criteria at points a-e have been fulfilled.

5. If the Court grants permission to proceed, the normal youth justice process will apply in relation to that charge.

Proposed definition of serious criminal offence

The term 'serious offence' or similar versions of this term, such as 'serious offence of violence', are used and defined in various Acts within South Australia.

Having reviewed these definitions and considered the relevance of offences to children below the MACR, it is proposed that a 'serious criminal offence' be defined to include:

a) cause death by use of a motor vehicle (section 19A(1) CLCA);

b) a serious firearm offence;

c) robbery (s 137 CLCA);

d) serious criminal trespass in a place of residence (s 170 CLCA);

e) property damage to a building or motor vehicle by fire or explosives (s 85(1) CLCA);

f) causing a bushfire (s 85B CLCA);

g) indecent assault (s 56 CLCA);

h) acts of gross indecency (s 23(2) *Summary Offences Act 1953*);

i) causing serious harm (s 23 CLCA);

j) shooting at police officers (s 29A CLCA); or

k) possession of object with intent to kill or cause harm (s 31 CLCA).

Submissions invited

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