



The Hon Stephen Wade MLC
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Cc: The Hon Vickie Chapman MP, Deputy Premier and Attorney General

1 August 2018

Dear Minister Wade

Response to the *Controlled Substances (Youth Treatment Orders) Amendment Bill 2018*

I am writing to provide some broad comments responding to the *Controlled Substances (Youth Treatment Orders) Amendment Bill 2018* (the Bill) introduced in the Legislative Council on 21 June 2018. I do so as Guardian for Children and Young People under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* and as Training Centre Visitor under the *Youth Justice Administration Act 2016*. I also will be making these comments available on the GCYP website.

The Bill seeks to amend the *Controlled Substances Act 1984* to allow for applications to the Youth Court for orders compelling a child or young person to be assessed for, and to undergo, mandatory treatment for a drug dependency for a period of up to 12 months.¹ As the order necessarily would be enforced in the absence of a child or young person's consent, it is anticipated that the mandated treatment would occur in a secure facility and that non-compliance would bring them into contact with the youth justice system.

I believe that the Government's election commitment to introduce Youth Treatment Orders could achieve better results if the current Bill were withdrawn and, in its place, a process initiated to develop a comprehensive proposal that addresses the personal, family and community impacts of child and youth drug misuse. This would clarify and situate the concept within relevant service provision, legal and systemic arrangements and distinguish what really should be available as a 'last resort' option.

Without going into much detail about these matters at this stage, I offer the following broad comments –

¹ "Our Youth Treatment Orders will provide children with a residency at a treatment facility for up to 12 months." <https://strongplan.com.au/wp-content/uploads/2018/01/64-DRUG-TREATMENT-ORDERS.pdf>

- The Bill pays insufficient attention to the fact that children and young people have fundamental rights, including the right to understand and have a say in decisions that affect them, and that these rights should have explicit recognition in the substantive legislation rather than merely being addressed by regulation or stated simply in policy. A relevant test is whether the proposed measures will reflect the best interests of the child. Access to independent legal support and advocacy must be guaranteed at all procedural stages.
- For more than 30 years Australia has been committed to the United Nations standard that children and young people will be placed in institutions only as a measure of last resort, and for the minimum amount of time possible.² Youth Treatment Orders as proposed do not meet either of these requirements.
- The Australian Government ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) in December 2017. A secure treatment facility would qualify as a place of detention for OPCAT purposes so must be OPCAT compliant.
- It is not clear why an order would be countenanced for a period of up to twelve months. This seems arbitrary, bears little relation to any likely treatment regime, and is proposed in the absence of statutorily embedded review and appeal mechanisms.
- In any event, there is little evidence to indicate that mandatory treatment programs for children and young people work.³
- Proposing such a punitive response when the current system has inadequate early intervention and voluntary treatment options available risks masking the reality noted in the Liberal Policy on Drug Treatment Orders which acknowledges that “Options for drug treatment in South Australia are narrow and services are either very expensive or inadequate”.
- The Bill ignores the reality that children and young people who may come within its scope are likely to have multiple problems in addition to drug misuse that will impact upon the success of any rehabilitative regime. This larger array of issues potentially includes the ongoing effects of trauma, psychosocial disorder and/or disabilities, family breakdown and socio-economic deprivation.
- Research demonstrates that children and young people who are brought into contact with the youth justice system are more likely to be involved in the adult system. Treating a health problem as a criminal issue may simply result in a greater number of people being

² United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘the Beijing Rules’), rule 19.1; see also the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (‘the Havana Rules’), rule 1.

³ See media release in response to this Bill by the South Australian Network of Drug & Alcohol Services entitled ‘*Youth Treatment Orders: the alcohol and other drug sector seeks meaningful engagement*’.

incarcerated as adults.⁴ Youth Treatment Orders will increase the potential for children and young people to be drawn into the youth justice system.

- Children and young people in care often have an extensive trauma history exacerbated by living in residential or commercial care. Some therefore adopt maladaptive coping strategies, including self-medicating with illegal drugs. It is important to recognise that these young people often exhibit antisocial behaviour because the system has failed them while they are in care and/or detention.
- Measures in the current Bill are likely to mean that children and young people in care and/or detention who often have already experienced significant trauma will be re-traumatised by the proposed process. This concern is heightened for Aboriginal children and those with a disability who are over-represented in the child protection and youth justice systems. The Bill contains no safeguards to ensure that these marginalised groups have access to appropriate support and would not be disproportionately affected by Youth Treatment Orders.
- Should new secure facilities be established to compulsorily treat children and young people, they would need to be consistent with the findings of Commissioner Lander in the Oakden Report, and presumably subject to an independent visiting scheme as discussed in that paper.

It is extremely concerning that orders of the sort proposed could be issued by the Youth Court in the absence of a statutory requirement for guaranteed personalised and holistic services responsive to the assessed needs of a specific child or young person. This should be a precondition for a Youth Treatment Order being imposed. Orders should not just respond to a substance dependency but also ensure a therapeutic environment where a child or young person can receive all the treatment necessary to identify and deal with any underlying issues, during and after a period of mandatory treatment.

I have appended two attachments that may be useful in terms of considering the essential attributes of secure therapeutic environments, as are the findings of various high-level inquiries. The Layton Review recommended safekeeping orders where children and young people may require secure care and restraint for a short period of time, when it is in their best interests, and explicitly refers to situations where drug addiction problems may be seriously affecting their health or safety.⁵ The Mullighan Inquiry stated that secure treatment must be a last-resort, while the Nyland Report recommended that an order should be made in the Supreme Court, and involve regular evaluation of outcomes for the children subject to detention.⁶

I note the constructive analyses already submitted in response to this Bill by various parties including the South Australian Network of Drug & Alcohol Services, the Law Society, the Child Development Council and comments made by the Youth Affairs Council of South Australia and the Commissioner for Children and Young People.

⁴ Commentary on Rule 8 of the Beijing Rules states that 'Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal".'

⁵ Layton Review (2003), recommendation 73.

⁶ The Mullighan Inquiry (2008), recommendation 43; The Nyland Report (2016), recommendation 152.

In concluding my comments, I refer you to a joint statement released in 2012 by several United Nations entities that called on member States to close compulsory drug detention and rehabilitation facilities.⁷ It urged States to adopt and implement voluntary, evidence-informed and rights-based health and social services in the community. These sentiments were echoed in the April 2018 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.⁸

Thank you for the opportunity to offer my views. I look forward to being involved in further discussion of the *Controlled Substances (Youth Treatment Orders) Amendment Bill 2018* and I strongly support a vigorous public conversation about the need to provide better support for children and young people suffering from substance misuse issues, as well as the impact this can have on their families and the broader community.

Your staff also can contact my Senior Policy Officer, Ms Jess Flynn for this purpose on 8226 8570 or at jessica.flynn@gcyp.sa.gov.au .

Yours sincerely

**Penny Wright | Guardian and Training Centre Visitor
Office of the Guardian for Children and Young People**

⁷ International Labour Organisation; Office of the High Commissioner for Human Rights; United Nations Development Programme; United Nations Educational, Scientific and Cultural Organisation; United Nations Population Fund; United Nations High Commissioner for Refugees; United Nations Children’s Fund; United Nations Office on Drugs and Crime; United Nations Entity for Gender Equality and the Empowerment of Women; World Food Programme; World Health Organisation; and Joint United Nations Programme on HIV/AIDS. *Joint Statement: Compulsory drug detention and rehabilitation centres*. Geneva: UNAIDS; 2012. Available [here](#).

⁸ See p 1, Note by the Secretariat. Available [here](#).

What is Therapeutic Residential Care?

The Guardian for Children and Young People uses the following description of the factors that need to be considered to substantiate a suggestion that a service or program provides Therapeutic Residential Care.

THERAPEUTIC RESIDENTIAL CARE refers to the child-focussed service provided to children and young people in statutory out of home care that integrates accommodation and other services with therapeutic support responsive to their individual needs and rights.

THERAPEUTIC RESIDENTIAL CARE has a number of essential characteristics -

Documented processes ensure that children and young people are at the centre of the care model and that they are informed about and can influence decisions that affect their lives.

The wellbeing and safety of residents and those who work with them is paramount.

Service providers systematically apply an evidence based service model in individual care environments and when implementing individual therapeutic care plans.

Therapeutic care plans are purposefully planned with clear goals and progress indicators placed within broader organisational service principles that are regularly reflected upon, reviewed and adapted as needed.

Therapeutic care plans are resourced adequately to ensure consistent therapeutic support in suitable facilities and with qualified staff able to deliver that plan.

A child or young person's developmentally appropriate therapeutic care plan is informed by regular assessment and review that guarantees their informed input and responds to unique factors such as age, culture and life experience.

Following an assessment of relationships and connections that are critical to healing and growth, children and young people are connected with their cultural and other communities in safe, respectful and active ways in order to strengthen their sense of identity and belonging.

Comprehensively trained and appropriately skilled staff can implement all aspects of an intensive service model to support children and young people to achieve successful outcomes in therapeutic home environments.

Appropriately trained staff work to build therapeutic relationships with children and young people that are responsive to attachment-related and developmental needs, are trauma informed, and in turn build the capacity of children and young people to form positive relationships with others including through the modelling of prosocial behaviour.

Service providers ensure the provision of comprehensive and coordinated services to meet the full range of a child or young person's needs, including through access to other appropriate services or agencies.

Service providers actively plan for properly resourced transition and support for children and young people into and out of transparently organised placements using a child-inclusive approach.

Where safe, contact is maintained with family and significant others to support the achievement of therapeutic goals.

Children and young people are supported and empowered to know their rights, are involved in creating and managing their records, and can raise any concerns in formal and informal ways and have these responded to and resolved in a timely manner.

Formal and regular monitoring and review is undertaken of outcomes for children and young people to ensure that service delivery is responsive, appropriate and therapeutic, including through access to independent monitoring and grievance mechanisms.

Children and young people from diverse backgrounds have equitable access to therapeutic residential care, noting in particular those from Aboriginal and Torres Strait Islander and other culturally and linguistically diverse communities, as well as children and young people with disabilities and those from rural and regional areas.

ADVICE TO: MINISTER FOR EDUCATION AND CHILD DEVELOPMENT

16 October 2017

SECURE THERAPEUTIC CARE - FRAMING PRINCIPLES

The secure detention of young people for their own well-being highlights tensions between the child's right to freedom and self-determination, and the need for state parties to take appropriate steps to protect a child from danger and to aid the psychological recovery of affected children.⁹

CONTEXT & QUESTION

The basis upon which the state detains or otherwise limits the freedoms of children and young people is the subject of recent and ongoing debate.

Two relevant bills are currently before parliament, neither of which was distributed for prior consultation or detailed analysis. Both suffer from this omission.

The *Statutes Amendment (Youths Sentenced as Adults) Bill 2017* has passed to the Legislative Council for debate, which probably will occur this week. The *Statutes Amendment (Recidivist and Repeat Offenders) Bill 2017* (R&RO Bill) also is likely to be before parliament again this week. Discussion in this note relates primarily to the latter bill.

In any event, a fundamental issue has arisen again in this context, an issue that is regularly raised in the broader child welfare and youth justice contexts: on what basis and under what conditions should the state intervene to deprive children and young people of liberty?

This note frames this matter in a particular way. It accepts that some stakeholders advocate for a capacity for state intervention to make an order to restrain or detain a child or young person for reasons other than those available currently through mental health or youth justice processes (and thereby potentially leading to custody in the Adelaide Youth Training Centre (AYTC) or Boylan Ward).

Relevant issues were canvassed last year for the South Australian Child Protection Systems Royal Commission in Dr Sara McLean's valuable review of the evidence and practice of the therapeutic use of secure care within child protection systems. A feature of Dr McLean's discussion is her opinion that there is limited published information and that this is difficult to interpret, and that "the distinction between evidence and ideology is difficult to discern in the reviews that have been published".¹⁰

⁹ McLean S 2016, page 24.

¹⁰ McLean S 2016, page 11.

This third option relies on the argument that an order should be available to protect an individual child or young person, as well as those with whom they may come into contact, because they have and are likely to express serious violent and/or sexual behaviours that may damage themselves or others. Some say it also should apply to serious anti-social behaviour.

Essentially, it would be sought in situations where a child or young person has not committed or been accused of committing a serious crime that could lead to formal custody in the AYTC or where that child or young person does not meet requirements that would justify detention under the *Mental Health Act 2009*.

The immediate question therefore is: what framing principles should we apply to an order of this third sort if it were to be made available in South Australia?

Discussion in this paper does not address core issues such as whether a secure therapeutic care option is justifiable for South Australia nor the more complex matters of why things have proceeded to a point where such a drastic option is invoked.

It is not clear whether advocates for the imposition of an order of this sort assume that it can only be applied to a child or young person who is already subject to state intervention i.e. through the child protection, youth justice or mental health systems.

ASSUMPTIONS

The framing principles suggested below are developed on the basis of several assumptions, including that -

- they must be able to apply to an individual child or young person
- they must comply with relevant international and national conventions and standards¹¹
- the child or young person is highly likely to engage in serious behaviour that cannot be addressed under the *Young Offenders Act 1993* or other applicable youth justice instruments
- the child or young person is highly likely to engage in serious behaviour that cannot be managed under the *Mental Health Act 2009* or other applicable mental health instruments
- the anticipated behaviour creates a serious risk of substantial harm to the child or young person and/or others
- any order must clearly distinguish the factors which influence the concerning behaviour/s (or propensity?) such as neuro-disability, intellectual disability and/or trauma backgrounds.

Entitlements enshrined in the *Charter of Rights for Youths Detained in Training Centres* under the *Youth Justice Administration Act 2016* (s22) also could inform practice in relation to affected children and young people.

These framing principles draw from international instruments such as the *Beijing Rules*¹² that, while applying to youth justice specifically, also can apply to the protection of core civil rights in the analogous situation of secure therapeutic care.

¹¹ McLean S 2016 has a useful list on page 24.

FRAMING PRINCIPLES

A court order to deprive an individual child or young person of liberty that is not subject to processes currently enabled through the *Young Offenders Act 1993* or *Mental Health Act 2009* would need to be subject to the following framing principles.

A secure therapeutic care order is a measure of last resort and for a specified, limited amount of time

It could be sought only in specific, limited circumstances as a measure of last resort.

It should always be of a stated and limited duration, with no provision for automatic roll over.¹³

Article 37(b) of the *Convention on the Rights of the Child* obliges governments to ensure that “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.¹⁴

Human Rights Commissioner Chris Sidoti has argued, in relation to the analogous situation of mandatory sentencing, that it offends Article 37(b) precisely because there is no judicial discretion to consider other alternatives to detention.¹⁵

A secure therapeutic care order can be imposed only if it respects and gives effect to the rights and interests of an affected child or young person

It should reflect the primacy of the best interests of the child or young person.¹⁶

In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (UNCROC Article 3.1).

Best interests can be assured only if protections are in place for the enjoyment of core rights and entitlements.¹⁷

¹² **Beijing Rules 1985.**

¹³ **McLean S 2016**, describes this as a feature of models in other jurisdictions including WA, the NT, Victoria, and NSW as well as Scotland and England.

¹⁴ **UNCROC** Article 37(b).

¹⁵ **Sidoti S 1999**, page 7.

¹⁶ **UNCROC**, Article 3, and see discussion in **Sidoti S 1999**.

¹⁷ With helpful guidance available through the prescription of the **ICCPR** (*International Covenant on Civil and Political Rights*), including in relation to Article 14 4, which requires that “[i]n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation”. Article 9 is the basic statement about the “right to liberty and security of person”.

An order must reinforce and build a sense of inherent dignity in the affected child or young person,¹⁸ including through the provision of comfortable and age appropriate accommodation and associated facilities.

Children and young people and their advocates must have informed input to any processes that bear upon the application for, or continuation of, an order.

Orders must give due weight and be responsive to cultural and other relationship considerations, especially for Aboriginal and Torres Strait Islander children and young people.

Orders must give due weight and be responsive to other valued relationships and 'communities of identification' of an affected child or young person.

No order should be imposed without a formal, professionally competent assessment accessible to the child or young person and their advocates.

At all times an affected child or young person shall have access to relevant advice and advocacy.

All orders must be subject to guaranteed and regular independent review.¹⁹

A secure therapeutic care order must be comprehensive and have clear terms

An order must address an individual's specific issues and identify how relevant needs will be met.

Assessment must assess all relevant influencing factors e.g. to identify and respond to the complexity of characteristics associated with a 'disability'.²⁰

An order must include a review of what previous efforts have been made to address the presenting issues and why these have failed to prevent the need for a secure therapeutic care order.

¹⁸ As **Sidoti S 1999** argues in relation to the application of UNCROC Article 40 "All action must be 'consistent with the promotion of the child's sense of dignity and worth', must take into account the child's age and also 'the desirability of promoting the child's re-integration and the child's assuming a constructive role in society'. Here the principle of 'rehabilitation' is clearly spelt out as the aim of actions taken in the case of all juvenile offenders".

¹⁹ **UNCROC**, Article 37(d).

²⁰ e.g. **UNCRPD** Article 14 protection against unlawful or arbitrary deprivation of liberty. See relevant discussion in **Melbourne Social Equity Institute 2016**, page 21 See also, for example, that **UNHCR 2010** refers to the preamble to the UNCRPD which "clearly endorses a social approach to disability—referred to as the social model of disability—by recognizing that "disability is an evolving concept and that disability results from interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

Therapeutic and rehabilitative goals must be identified within a case plan in a way that their achievement to be monitored, reviewed and evaluated.²¹

The individual case plan must meet the usual expectations of such a plan across a child or young person's life domains.

Robust provision should be made for equivalent protections for the best interests of the child or young person that are analogous to those provided for people who are subject to orders under the *Mental Health Act 2009*.²²

The state must meet specific obligations

The state must exercise due diligence in developing the initial case for, or renewal of, a secure therapeutic care order.

The state must support the operation of this set of framing principles.

The State must identify accountability measures for the operation of an order and the achievement of measures contained in an individual child or young person's case plan.

The state is responsible for the wellbeing and development²³ of a child or young person subject to an order.

The order shall be specific to that individual, and have a detailed and adequately resourced case plan with review mechanisms and applicable indicators in place.

The state must ensure access to the targeted, professional support necessary to meet the needs of a child or young person subject to an order in relation to day to day living support and professional assistance as well as access to relevant external expertise.

The state must actively address systemic issues or problems that have contributed to the need to apply for a therapeutic care order, including in relation to any undiagnosed disability and health issues and associated support and treatment options.

²¹ Note the guiding principle commentary for **Beijing Rules 1985** rule 17.1 (b) in relation to youth justice whereby "just desert and retributive sanctions ... should always be outweighed by the interest of safeguarding the wellbeing and the future of the young person". This 'safeguarding' obligation should extend to any secure care situation.

²² As provided, for example, in Parts 5, 6 and 8 of that Act.

²³ Which s4 of the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* takes "to include a reference to the physical, social, emotional and intellectual growth of each individual from birth through to adulthood".

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INTERNATIONAL INSTRUMENTS

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<http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

ICCPR, International Covenant on Civil and Political Rights

<http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>

UNCROC, United Nations Convention on the Rights of the Child

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

UNCRPD, United Nations Convention on the Rights of Persons with Disabilities

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