



Government of South Australia

Office of the Guardian
for Children and Young People

**Response to Youth Justice Policy Unit,
Department for Communities and Social
Inclusion**

**Youth Justice Administration Bill:
Discussion Paper**

September 2013

To: Principal Policy Officer, Youth Justice Policy Unit

From: Guardian for Children and Young People

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1. Introduction

- 1.1 Among other statutory functions, the Guardian for Children and Young People acts as an advocate for the interests of children and young people under the guardianship, or in the custody, of the Minister for Education and Child Development. The Guardian also advocates for young people in youth training centres. It is in this capacity that the following submission is made.
- 1.2 This submission is prepared on the basis of the Office's experience in advocating for children and young people, monitoring the provision of services, talking with young people about their experiences and with other experts in the provision of care and services.
- 1.3 The Office of the Guardian (GCYP) welcomes the proposal to prepare legal provisions for the administration of youth justice that will reinforce the need for high quality care and rehabilitation services. Thank you for the opportunity to comment on the development of the legislation.
- 1.4 This response will provide general comments about the proposed legislation followed by comments specific to the key elements of the proposed legislation.

2. General

- 2.1 The aim of gaining consistency in objects and principles between the criminal youth justice legislation and the administration of services is important, but only where the objects and principles of both are contemporary, sound and have been thoroughly considered in the parliamentary process. The *Young Offenders Act 1993* is 20 years old and a review of this Act is overdue. Provisions for administration of services could be incorporated within a single Act or within regulations to the Act, thereby protecting against inconsistencies between principles in separate Acts and simplifying the legislative framework.
- 2.2 However, the argument for separate Acts rests on there being divided executive responsibility for the administration of criminal justice and rehabilitation services. The Attorney General is primarily responsible for the *Young Offenders Act 1993* and the Minister for Communities and Social Inclusion for the administration of services to young offenders.
- 2.3 There are some important emphases in both the *Young Offenders Act 1993* and the *Family and Community Services Act 1972* that appear over-shadowed in the summary of principles that are proposed for the Administration Act. Notably these are the 'care...necessary for [a young person's] development' and the 'proper realisation of their potential' (Object (1) in the *Young Offenders Act 1993*). This is no minor point

when the state takes custody of children, temporarily or ongoing. For a short time at least the state accepts some parental responsibility for children and young people, in addition to protecting the community.

- 2.4 The proposed intention of enshrining in law the rights and responsibilities of children and young people, ensuring procedural fairness, emphasising rehabilitation and strengthening the continuity of services and supervision from custody to community, are all welcome. This is an opportunity too to refer to the foundation of youth justice administration being in respect for human rights principles, thereby explicitly linking custodial facilities and provision of service to international agreements.
- 2.5 The specific reference to the importance of recognising and respecting cultural elements in the design and administration of services and achieving a reduction in the proportion of Aboriginal children and young people in the criminal justice system are also most welcome.
- 2.6 At the least, the proposed Act should aim to improve conditions for incarcerated young people by: increasing the level of accountability and transparency; increasing the care, protection and rehabilitation of young people who are incarcerated or who have been; and comply with human rights principles, including that of participation of children and young people in decisions that affect them.

3. Replacing the *Family and Community Services Act 1972*

- 3.1 The delinking of youth justice administration from the *Family and Community Services Act 1972* (F&CS Act) inadvertently leaves the responsibility for ensuring the provision of community-based accommodation with no-one. At present, the intention, if not the reality, is that community accommodation including foster care, can be extended to all children and young people in need of such accommodation such as young people who are in secure custody for want of an alternative safe place to reside. It would be preferable for a Minister responsible for youth justice administration to be explicitly responsible for ensuring suitable community based accommodation for those young people eligible for bail.
- 3.2 There is a requirement in the *Family and Community Services Act* for the Chief Executive of the Department to investigate complaints. A similar provision should be included in the Youth Justice Administration Act. Furthermore there should be provision for oversight by an independent monitor of complaints handling and resolution.
- 3.3 There are provisions for interstate transfer of court orders in the F&CS Act which may also be required in a replacement Act.

- 3.4 The F&CS Act has a clause that limits the engagement of for-profit service providers in the long-term care of children. In the context of the care and custody of young people in detention, a similar provision would ensure that monetary profit was not the principal motivation for providers of care, education or health services. The clause in the F&CS Act is:

The Minister should avoid, so far as practicable, entering into agreements providing for long-term care of persons in need of such care unless satisfied that the other parties to the agreement do not enter into those agreements with the object of making a profit. (S24 (3))

4. Rehabilitation

- 4.1 The requirement for rehabilitation should be developed in the Act from a general object to specific conditions, such as sound assessment and case management, provision of effective rehabilitation and therapeutic programs and oversight by an advisory body.
- 4.2 It could also be beneficial to consider where the use of restorative models of justice should apply in the response to poor behaviour or minor offences committed while in custody.
- 4.3 The proposed Act should refer to rehabilitation *and* therapeutic interventions to assist with desistance from unlawful behaviour. Behaviour usually has an underlying emotional purpose and offending behaviour is often a coping mechanism in response to earlier abuse or neglect.

5. Principles

- 5.1 The discussion paper refers to 'general deterrence' as being a principle of the *Young Offenders Act*. Our understanding of the Act is that this is only applied when the young person is being dealt with as an adult. Otherwise only individual deterrence can be considered when imposing sanctions. This is an important principle that should apply in the use of sanctions in and outside of court.
- 5.2 Other principles which should be included, in addition to the ones in the discussion paper, are the significance of family relationships and limiting the interruption to education or employment.
- 5.3 The discussion paper refers to information to be provided to children and young people about their rights and responsibilities 'within the justice system'. This is much broader than the provision of information to young people who spend time in the training centre. Both are important but residents of the training centre have need for information specific to their circumstances of detention.

- 5.4 The partnership arrangements for delivery of services should emphasise the need for continuity of learning and the benefit to the young person on release, which will require individualised approaches to education and consideration of accredited vocational training.
- 5.5 It is welcome news that the proposed Act would enshrine in law the requirement to have mechanisms for independent monitoring of conditions and care of young people in the training centre. The discussion paper draws attention to the Australian Government's commitment to meet the conditions for monitoring places of detention required in the Optional Protocol to the *UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

The functions of an independent monitor/s should include:

- Conduct announced and unannounced inspections of the facilities and provide public reports on conditions and treatment of detainees.
- Conduct regular audits of performance in key operational areas and report on performance.
- Audit the handling of detainee complaints and review complaints that are unresolved or indicate systemic issues.
- Advocate for the interests of children and young people who are detained or who have recently been.
- Monitor the circumstances of children and young people who are detained or have recently been.
- Provide advice to the Minister on the quality of treatment and care of children and young people who are detained and on systemic reform necessary to improve the quality.
- Inquire into systemic reform necessary to improve conditions of detention and circumstances of those who are detained or have recently been.
- Investigate matters that indicate systemic issues or are referred by the Minister.

The powers of the monitor must be necessary or expedient for, or incidental to, the performance of the functions. Furthermore the powers must include requirements for the provision of information and penalties for non-compliance or obstruction.

There should be clear provision for public reporting on all matters that are of public interest but protection for information about individual cases from disclosure under the *Freedom of Information Act 1991*.

The Guardian for Children and Young People provides most of these functions through an agreement between Ministers and the State Ombudsman can investigate complaints and initiate inquiries. It is preferable that the independent monitor be named in the Act but regardless there should be a requirement that the monitor have specialist expertise in child development and children's rights, and principles specific to the detention of juveniles.

If the Office can be of further assistance in either clarifying or expanding on the comments above please contact Pam Simmons, Guardian. It is the Office's practice to make its submissions available to the public. Please let the Guardian know if you have any concerns about this.