Government of South Australia

Office of the Guardian
for Children and Young People

Guardian's response to the draft Children and Young People (Safety) Bill, 2016

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The Voice of children and young people in care in this submission

"I need you to understand where I have come from and how I am dealing with this situation so that you can understand me when I have a say."

Quotations from children and young people in care are included throughout this submission. They come from consultation sessions conducted by the Guardian's Office, including the most recent in early January 2017.

References at the end of this submission provide links to GCYP documents that record engagement undertaken in the past few years seeking children and young people's opinions about various issues. These have informed GCYP submissions to the Nyland Royal Commission and other inquiries and reports.

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1 Introduction

"don't just look after us, take care of our families"

1.1 Context

The Government is seeking feedback about the draft *Children and Young People (Safety) Bill 2016* that eventually will be enacted as part of a suite of laws underpinning a renewed child protection system in South Australia[1].

Elements of an effective child protection system were described in *A Fresh Start*, the Government's recent response to the Nyland Royal Commission –

> *"Prevention will always be the best solution, and families must be supported as soon as possible with evidence-based services and programs that are targeted to their needs. These services and programs extend beyond the statutory child protection system into our mainstream health, education and other wellbeing services".*[2]

Noting this strategic context, the draft Bill appears to do three things: it updates the *Children's Protection Act 1993*, adds some elements from the *Family and Community Services Act 1972*, and enables a number of new initiatives that respond to Nyland Royal Commission recommendations.[3] As such, while not a thorough revisioning of child protection, it should underpin incremental improvements to the existing system.

[1] Of some importance in this context was the carryover of the Guardian's position from the *Children's Protection Act 1993* to the *Children and Young People (Oversight and Advocacy Bodies) Act 2016*. Section 5 of the draft Bill names the relevant Acts.

[2] **Government of South Australia 2016**, page 2. A guide to how to perceive child protection for programmatic purposes is available in the methodology of the *Report on Government Services*, which describes 'child protection services' within four domains: family support services, intensive family support services; child protection services; and out-of-home care services. The draft Bill primarily addresses the last two of these domains and some elements of the first and second (**Steering Committee for the Review of Government Service Provision 2017**)

[3] **Child Protection Systems Royal Commission 2016**

The benchmark for policy in this area was restated recently by the relevant United Nations Committee, which noted that –

> *"All measures of implementation of the Convention* [on the Rights of the Child]*, including legislation, policies, economic and social planning, decision-making and budgetary decisions, should follow procedures that ensure that the best interests of the child, including adolescents, are taken as a primary consideration in all actions concerning them."*[4]

Ensuring the best interests of the child in relevant domains therefore should be the core objective of this Bill and related legislation.

This draws attention to an aspect of the title of the draft Bill that describes part of its purpose as an intention "to protect children and young people from harm". The question is: does the draft Bill really address this ambitious overall agenda? Perhaps it more accurately can be seen to attempt to minimise harm to and address risks confronting an already at risk population of children and young people.

"I do need to talk with you. I need to let you know what is important to me, to get what I want and need, and to be kept safe"

1.2 Scope and limitations of this submission

This submission does not discuss all clauses in the draft Bill, others are not addressed in as much detail as warranted. Factors that have limited the Guardian's capacity to respond fully include that -

- there is no explanatory documentation for the proposed clauses and the policy decisions that support them (with the same applying to matters that have not been carried over to the draft)

[4] **Committee on the Rights of the Child 2016** (from paragraph 22)

- it is not clear what will happen to all existing legislation (and regulations). For example, while the *Children's Protection Act 1993* will be repealed, it is not clear what will happen to all elements of the *Family and Community Services Act 1972*
- no framework is available outlining what is likely to be incorporated in regulations or perhaps appear as policy and thereby impact upon the exercise of delegations.

A table included in the Attachments to this submission summarises some possible amendments to specific sections of the draft Bill. This only captures matters that are conducive to textual change.

Operational resourcing and capacity sufficient to achieve the purpose of the proposed clauses, while important, are not addressed in this response.

Related issues and concerns were canvassed in the Guardian's submission lodged last September in response to the draft *Children and Young People (Oversight and Advocacy Bodies) Bill 2016*.[5]

"I have ways of sending messages to you that you may not understand …"

[5] **GCYP September 2016**

2. Strategic concerns

The concerns raised in this part highlight the inadvisability of commenting about some important matters definitively at this stage of consultation. This primarily is because it is not clear why the draft Bill presents a particular position or that this position necessarily is the best approach.

2.1 Practical implications of some proposals

The draft Bill will create substantial new work and resource demands. A simple example is the generation of new activity by the s145 creation of a review role for the South Australian Civil and Administrative Tribunal (SACAT), a proposition the Guardian supports.

Preliminary thinking suggests that review applications to SACAT will *include* matters such as Departmental decisions about approval or deregistration of carers, placement of children and young people in care, and licencing of foster care agencies and children's residential facilities. Demands for the Guardian's already overstretched advocacy service therefore will increase (an example being a request for assistance with the SACAT process by a child or young person who wants to challenge a placement decision).

Other jurisdictions have the organisational capacity to undertake this specific advisory and advocacy function. The Public Guardian in Queensland, for example, has a mandate for and dedicated resources to undertake this work, with legal advocates available to take matters to Queensland Civil and Administrative Tribunal (QCAT) on behalf of children and young people.[6] The Office of the Guardian for Children and Young People is the equivalent advocacy body in South Australia.

2.2 Accountability, adequate review and sanctions

The Nyland Report reinforces learning from similar reviews in South Australia and elsewhere that the child protection system repeatedly has failed to give effect to fundamental entitlements or service elements required by statute or regulation. Effective reform therefore should ensure that poor practices and organisational culture do not carry over to the

[6] http://www.publicguardian.qld.gov.au/child-advocate/opg-child-advocacy

renewed system and thereby undermine the capacity of affected children and young people to protect and assert their rights and access critical elements of the statutorily defined system.

Unfortunately, breakdowns in critical areas of the child protection system have been tolerated, which raises the question: how do we know they will not reoccur? Does the Bill provide aggrieved children and young people with adequate recourse to grievance procedures should this happen? Does it avail potential sanctions to help reinforce the accountability of those responsible for resourcing and managing the system?

An example where this would be warranted, and where the Bill does not appear to provide an enforceable assurance, is access to the core entitlement to a competent annual review of a child or young person's care plan (including with opportunities for informed participation). The draft Bill therefore does not address adequately the current failure to implement the equivalent section in the *Children's Protection Act 1993* (s52). Non-compliance with core entitlements is, it seems, tolerated. This tendency to systemic failure could be addressed by amending the proposed Internal Review provisions in s145 of the draft Bill to –

- make explicit that Internal Review extends to failure of the Chief Executive or child protection officer to give effect to the entitlements of children and young people under this Act

- provide an appeal mechanism should an applicant wish to challenge the outcome of an Internal Review, and

- guarantee access by affected children and young people to independent advocacy services for these processes.

Section 25(2) and s101(3) similarly deny a child or young person the opportunity to seek redress for failures by the child protection system by making commitments in a child or young person's case plan or transition plan unenforceable.[7] There should be a capacity to hold the system accountable if commitments are made and not delivered.

[7] Section 25(2) – "However, a case plan does not create legally enforceable rights or obligations on the part of the Chief Executive, the Crown, a child or young person or any other person"

2.3 The centrality of 'Voice'

"show us respect by informing us about what is going on and seek our input to decision making that affects our lives"

It is heartening that the Bill responds in various ways to Nyland recommendations that support the active voice of children and young people in decision-making. Examples are –

- a child or young person's lawyer being directed to represent the child's views to the Court (s55)

- that "a child or young person to whom the proceedings relate must be given a reasonable opportunity to personally present to the Court their views related to their ongoing care and protection" (s54(1)), and

- that the Department must ask children and young people for their opinions when decisions are being made about their lives. A good example is s75(3) which provides that to the extent that they are willing and able to do so "a child or young person who is affected by a decision of the Chief Executive … should be involved in the decision-making process". In particular, "their views should be given due weight in making the decision, in accordance with their developmental capacity and the circumstances of the case".

It also is heartening that hearing and considering the views of children and young people are priorities for the "administration, operation and enforcement of the Act" (s7). However, s7(1)(a) could be taken from that sub-clause location and given equivalent emphasis to that granted to s6 (*Safety of children and young people paramount*). Commissioner Nyland made clear the link between being both informed and listened to -

> *"The guiding aim of any reform of the child protections system must be keeping children safe and improving the quality of their lives. Thus children's experiences must be understood, and children must be heard. The evidence in the McCoole case study highlights the dangers of a system that fails to listen to what children say, either directly or through their behaviour."*[8]

[8] **Child Protection Systems Royal Commission 2016**, page 6

"talk to us in a way we understand"

Section 3.9 of the then Guardian's submission to the Nyland Royal Commission suggested a succinct clause to help give effect to Article 12 in the *UN Convention on the Rights of the Child* -

> "*In all decisions that affect the child, the child will be included in the decision making to the extent that they are capable and willing. The views of the child will be given due weight in accordance with the age and maturity of the child"* [9]

2.4 Aboriginal and Torres Strait Islander Children and Young People

"acknowledge our cultures"

A major ongoing concern is whether the child protection system adequately supports Aboriginal and Torres Strait Islander children and young people in care. The context for this is the reality noted by Commissioner Nyland; that these children and young people are "vastly over-represented in all parts of the South Australian child protection system"[10].

Anticipated comments from Aboriginal and Torres Strait Islander community organisations will assist us all to reflect upon the implications of proposed changes to treatment of the Aboriginal and Torres Strait Islander Child Placement Principal in s10 of the Bill when compared with s5 of the *Children's Protection Act 1993*. This extends to matters that may be contained within regulations pursuant to s10(6) of the Bill but which currently are not available.

Other welcome provisions relevant to the interests of Aboriginal and Torres Strait Islander children and young people can be noted –

- s75 (2)(a) – which requires the Chief Executive to have regard to the Aboriginal and Torres Strait Islander Child Placement Principle

[9] **GCYP January 2015**, page 12

[10] **Child Protection Systems Royal Commission 2016**, page 450. This also is referred to in **Government of South Australia 2016a** at page 9.

- s144(1)(a) – requiring the Chief Executive to submit an annual report about "the development of cultural maintenance plans with input from local Aboriginal and Torres Strait Islander communities and organisations", and enabling "access to a caseworker, community, relative or other person from the same Aboriginal or Torres Strait Islander community as the child or young person"

- s24(2) – with regard to cultural maintenance and reunification planning and related matters, and

- s19(1)(h) – which accommodates Aboriginality as one of the criteria in appropriate situations to be an entitled person with respect to family group conferences.

The final form of the Bill should support the effectiveness of Department for Child Protection (DCP) operational drivers such as the *Aboriginal Cultural Identity Support Tool* (ACIST) and more broadly the *Standards of Alternative Care in South Australia*.

"treat us fairly"

2.5 Changed roles and functions - Minister and Chief Executive

The Bill effectively proposes that the DCP Chief Executive assumes overarching accountability for achieving the objectives of the Bill/Act that currently resides with the Minister.

The lack of a developed rationale for this proposed change makes comment difficult, for example in relation to the array of ***Chief Executive functions*** listed s133. It is worth noting here that the two fact sheets developed respectively for children and young people and adults about the draft Bill provide different rationales for the proposed change of central accountability from the Minister to the Chief Executive[11].

The Guardian is unaware of evidence that substantiates an assertion that designating the Chief Executive as a child's legal guardian achieves better outcomes for children and young people in out of home care. This probably is the case with respect to a range of strategically important issues such as overrepresentation of Aboriginal and Torres Strait Islander children and

[11] **Government of South Australia 2016b**

young people in care, growth in numbers in care and a range of service quality and efficiency issues.

The removal of the ***Minister*** as the primary focus for responsibility and accountability leaves them with residual capacities and duties in the Bill. It is not clear why some of these warrant discreet treatment while other obligations will pass to the Chief Executive.

It also is unclear what will happen to a range of other responsibilities currently identified as general functions of the Minister (s8 *Children's Protection Act 1993*). For example, s8(ka) currently requires the Minister "to encourage the provision of child safe environments particularly by government and non-government organisations that provide services for, or have contact with, children". The removal of this role, combined with the omission of child safe environments in the draft as discussed in part 3.2 below, means that this component of a comprehensive child protection framework will disappear from the appropriate South Australian statute once the *Children's Protection Act 1993* is repealed.

At the heart of this question of overall accountability is an issue raised by the then Guardian in her submission to the Nyland Royal Commission regarding potential conflict of interest. This "fundamental problem" must be borne in mind whether a Minister or Chief Executive is the critical person acting as parent on behalf of the state, given potential conflict between "what is in the best interests of the child and what is in the best political interests of the government [in relation to] every major decision…"[12]

"make the system work for us"

2.6 Other matters needing clarification

Some changes included in, or absent from, the draft Bill will be included in regulations. Others may not be carried over from previous legislation for policy or other reasons. The absence of explanatory notes for the draft Bill means that the reasons are not transparent. The provision of properly informed feedback therefore is difficult in relation to some matters.

Meaning of harm / meaning of at risk

Meaning of harm (s13) and ***meaning of at risk*** (s14) are treated as separate clauses in the Bill. Both are described broadly and therefore will need

[12] **GCYP January 2015**, Section 3.7

further development in order to provide adequate guidance for systemic treatment/responses within the child protection system. Some aspects of these two sections need clarification –

- what will distinguishing "psychological harm" from "emotional reactions … that are a response to the ordinary vicissitudes of life" in s13(2) mean in practice?

- risk in relation to being of no fixed address in s14(1)(e) only applies to those under the age of 15 years?[13]

- what sort of circumstances will be considered as suitable for prescription by regulation as allowed for in s14(1)(f)?

As presented, the concepts of risk and harm are quite expansive, which may lead to threshold issues when considering application of various clauses in the draft Bill. It can be noted, for example, that s32(1)(a) situates the capacity of a child protection officer to remove a child or young person within the ambit of "serious harm" without this refinement of the concept of harm being explained.

The implications of not using (or defining) the terms *abuse* and *neglect* as currently contained in s6 of the *Children's Protection Act 1993* need further thought.

Relationship to the Consent to Medical Treatment and Palliative Care Act 1995

The potential impact of the proposed ***Child and Family Assessment and Referral Networks*** (CFARN) (s16) and their anticipated relationship to broader services and systems that bear upon the wellbeing of children and young people require discussion. This partly is because of uncertainty about how exactly they will work in practice, but it also is about specific provisions in the draft Bill.

Section 16 gives a potentially open-ended capacity to override core rights of children and young people (who do not have an impaired decision-making capacity) arising from the direction in s16(4) that -

[13] If this, at least in part, reflects relative State and Commonwealth youth homelessness responsibilities, then it should be distinguished to limit it to this programmatic context (assuming that other factors are not also involved). There also may be practical implications for children and young people, for example in relation to access to domestic violence services.

> "*The members of a Child and Family Assessment and Referral Network may, despite any other Act or law -*
> *(a) exchange information and documents without restriction in the course of performing its functions; and*
> *(b) collaborate with each other without restriction in the course of performing its functions.*"

It is helpful in this sensitive context to draw attention to *Information Sharing: Guidelines for Promoting the Safety and Wellbeing of Children, Young People and their Families*. This gives guidance about how to approach privacy and confidentiality issues in an environment in which "overriding of a person's confidentiality wishes must occur only when the client or another person, including a child or young person, is considered to be 'at risk'".[14]

There should be no ambiguity about the rights of a young person. The absolute CFARN capacity to use information and documents governed by other Acts or laws "without restriction" is problematic. For example, the right to privacy of a young person aged 16 or over "to decide freely for themselves on an informed basis whether or not to undergo medical treatment"[15] should not be jeopardised. This rightly rests upon the *Consent to Medical Treatment and Palliative Care Act* 1995 application that, for the purposes of that Act, "child means a person under 16 years of age". The accompanying s6 then provides, appropriately, that "[a]person of or over 16 years of age may make decisions about his or her own medical treatment as validly and effectively as an adult". The essential confidentiality of the doctor/patient (and some other professional relationships) must be respected.

The intended operation of s30 of the Bill in the context of the *Consent to Medical Treatment and Palliative Care Act 1995* also needs further thought. The right of a young person in care aged 16 or above to ***consent*** themselves ***to medical treatment*** must be guaranteed and mirror the equivalent rights of any other young person of that age in our community. The draft Bill therefore could be amended to refer to the object set out in s3(a)(i) of the *Consent to Medical Treatment and Palliative Care Act 1995* "to allow persons of or over the age of 16 years to decide freely for themselves on an informed basis whether or not to undergo medical treatment".

[14] **Government of South Australia 2008** (page 14)

[15] s3(a)(i), *Consent to Medical Treatment and Palliative Care Act* 1995

Further matters requiring more consideration

The following matters can be noted at this stage of consultation -

- ***service of an application for a s44 order*** (43(1)(a)): will be allowed on parties that include "a child or young person who is the subject of the application [and] is of or above the age of 10 years" without canvassing the possibly intimidating impact of the service process. The same concern applies to s113 ***notification of the administrative transfer of a child protection order***.

  These are just two provisions that invite reflection about the wisdom of adding a clause to the Bill to shape standards for respectful dialogue with children and young people

  "don't overburden us, but when we can lead – let us"

- ***protection from liability for voluntary or mandatory notification:*** s12 *Children's Protection Act 1993* is absent from the draft Bill

- ***confidentiality in relation to notifications of abuse or neglect*** (s151): reference to treatment of a "notifier" (s13 of the *Children's Protection Act 1993*) is omitted

- ***return to home requirements*** (s33): this alters the *Children's Protection Act 1993* s16 standard of "the best interests of the child" to the Bill's standard that the child or young person be "at risk"

- ***custody of removed child or young person***, (s34): sets a new limit of 5 working days for the required return home without any reason for this number of days being nominated

- ***investigatory requirements*** s29(3): the detail in s19 of the *Children's Protection Act 1993* is not carried over to the draft Bill, which simply refers to the fact that regulations "may make further provisions in relation to an investigation under this section"

- ***compulsory investigation, examination or assessment measures***: the implications of the Bill's proposed arrangements are difficult to compare to their equivalents in the *Children's Protection Act 1993*

- ***person or class of persons who/that may be exempted by regulation "from the operation of a specified provision or provisions of this Act"*** (s157(2)(a)): insufficient detail is provided

- ***Court orders and related processes*** (ss 40–42, 44-49, 53, 57, 58, 60): these differ in a number of ways from comparable provisions in the *Children's Protection Act 1993* (notably ss 37–40, 45). Implications for legal procedures and the capacity of parties to ensure their rights cannot be properly assessed at this stage (e.g. what is the impact of removing the *Children's Protection Act 1993* s45(2) reference to proof on the basis of the balance of probabilities?).

  The terminology change from "may" (*Children's Protection Act 1993* s37(1)(b)) to "must" in s41(1) of the draft Bill is supported. So too is the s41(3) referral to being "at risk" or potentially subject to "harm" (although these are defined very broadly in s 13 and s14 of the Act and therefore may generate difficulties when determining requirements for services and programs)

- ***record keeping requirements*** (s98): the substance of these is referred to regulations, which means that even the minimal prescriptions in the analogous s53 of the *Family and Community Services Act 1972* are not identified or guaranteed[16]

- ***child protection officer inspectorial role*** (s99(2) and (4)): these clauses grant an officer a ***capacity to give directions*** to a licence holder or other person present at a facility. It will be helpful to understand the sort of circumstances that would give rise to the exercise of that power (which does not appear to have an analogue in the *Family and Community Services Act 1972*)

- ***Part 1 – Approved Carers (in Chapter 7 – Children and Young People in Care)***: these parts need detailed analysis based upon explanatory notes that work through the vision for how ***oversight of and arrangements for carers*** can best be provided

- ***Part 6 – Foster care agencies***: the same applies.

"provide us with someone we can trust"

[16] The broader issue of record keeping was something to which Commissioner Nyland gave considerable attention (see **Child Protection Systems Royal Commission 2016** at page 58, and noting the centrality of case workers emphasised in Recommendation 10). Should statutory direction be given about adequate record keeping within the Department for Child Protection.

3 Proposals not supported by the Guardian

3.1 Aspects of referral of notifications to a State Authority

Whilst acknowledging the constructive intent of s28, the proposed s28(7) capacity for the Chief Executive to "give directions or guidance in relation to a matter to a State authority to which the matter is referred" is not supported as currently constructed. It is not appropriate for the Chief Executive to give direction to an independent statutory officer such as the Guardian (who is nominated as a State authority in the draft Bill) as this conflicts with the Guardian's independent statutory role.

The Minister currently does not have an equivalent power, with the *Children's Protection Act 1993* stating that -

> s52AB(2) *The Minister cannot control how the Guardian is to exercise the Guardian's statutory functions and powers and cannot give any direction with respect to the content of any report prepared by the Guardian.*

Incompatibility of the proposed s28(7) with existing legislation is reinforced by s21(2) of the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* which guarantees that –

> *"The Guardian is independent of direction or control by the Crown or any Minister or officer of the Crown".*

The relevant clause in the draft Bill therefore should *exclude* the capacity of the Chief Executive to direct an independent statutory officer. The capacity should be to request such assistance.

An analogous argument can be made with respect to s139 of the draft Bill which would empower the Chief Executive to "require a State authority to prepare and provide a report … in relation to the matters, and in accordance with any requirements, specified in the notice".

"I want to be treated like other children who do not live in care"

3.2 Removal of child safe environment provisions

A version of the child safe environment provisions currently enacted in s8B of the *Children's Protection Act 1993* should be retained. This could be in abbreviated form, with detail then outlined in regulations. Statutory guidance in this matter will help embed this policy and practice in the fabric of South Australia's child protection system. The Government recognised the importance of child safe environment standards by making the Chief Executive (of the then Department for Families and Communities) "responsible for monitoring progress towards child safe environments in the government and non-government sectors and reporting regularly to the Minister on that subject".[17]

South Australia is committed to implementing the *National Framework for Protecting Australia's Children,* which was refined in the *Third Three-Year Action Plan 2015–2018*. This includes a strategy to promote better responses to keeping children and young people safe by building on the *National Framework: Creating Safe Environments for Children* (2005) to assist organisations to incorporate child safety into the way they operate. It is worth quoting the rationale for this in full, especially in relation to learning from the Commonwealth Royal Commission -

> *The significance of child safety in organisations has been highlighted through the Royal Commission into Institutional Responses to Child Sexual Abuse. This strategy will drive implementation of a child safe culture across all sectors. This will be informed by engagement with children and young people. Cultural awareness will be an important component of all child safe organisation approaches under the Third Action Plan to ensure activities respect diversity in cultures and child rearing practices and help to foster cultural competency within the organisations. It will reduce the risk of a child being harmed and foster environments that empower children and young people to speak up, and recognise and appropriately respond to threats to children. This strategy will also consider the recommendations of the Royal Commission and actions to support these findings.* [18]

[17] **Government of South Australia 2008a** (page11)

[18] **Commonwealth of Australia 2015** (page 12)

Statutory sanctioning of child safe environment approaches bolsters an understanding that government and non-government organisations hold a relevant duty of care. They should be accountable for such provision.[19]

Child safe environment mechanisms are essential preventative measures.

3.3 Removal of female genital mutilation as a child abuse issue

Sections 26A and 26B of the *Children's Protection Act 1993* do not carry over to the draft Bill, which removes ***female genital mutilation*** (FGM) as a matter warranting explicit attention as a form of child abuse.

The Guardian urges that the FGM provisions be retained to maintain a focus on this unacceptable practice within the child protection sector in accordance with relevant international and national standards, not least of which is the International Convention on the Rights of the Child[20].

This should happen irrespective of the proscription of FGM in other legislation[21]. Mirrored coverage applies to other matters in the draft Bill, an example being cross coverage of s79 *unlawful taking of a child or young person* with parallel provisions in the *Criminal Law Consolidation Act 1935*[22].

"if adults see that something bad is happening, they should do something!"

[19] Discussion of aspects of this responsibility can be found in Part D **(***Prevention—Duty Of Care To Create Child-Safe Organisations*) of **Family and Community Development Committee 2013**

[20] **World Health Organisation 2010** presents an holistic view of the role of legislation and urges that "existing laws should be enforced in the absence of specific legislation on FGM, such as child-protection laws and criminal laws on physical harm" (p14). **Triggs 2016** is a succinct contextual discussion.

[21] Notably Sections 33, 33A and 33B of the *Criminal Law Consolidation Act* 1935, which is just one of the topics in that Act that parallel provisions in the current *Children's Protection Act*.

[22] See s40, unlawful removal of a child from jurisdiction, *Criminal Law Consolidation Act* 1935

4 Proposals broadly supported by the Guardian

This section identifies provisions that broadly are supported by the Guardian. They are additional to those noted in part 2 above such as retention of an appropriate statutory enactment of the Aboriginal and Torres Strait Islander Child Placement Principal.

"I am not the same as every other young person in care"

4.1 Parliamentary Declaration and matters of principle

The Guardian strongly supports the expanded contextual statements and commitments in introductory provisions such as the ***Parliamentary declaration*** (s3), the universal ***duty to safeguard and promote the welfare of children and young people*** (s4), and that the ***safety of children and young people is paramount*** (s6).

The Guardian similarly supports separate statements about ***other needs of children and young people*** (s7) -

> *(a) the need to be heard and have their views considered;*
> *(b) the need for love and attachment;*
> *(c) the need for self-esteem;*
> *(d) the need to achieve their full potential.*

However, the importance of s7(1)(a) suggests that it should be treated as a stand-alone section as proposed in Part 2.3 above.

4.2 Charter of Rights for Children and Young People in Care

The Guardian acknowledges the inclusion of the ***Charter of Rights for Children and Young People in Care*** in the draft Bill (s11), seeing it as a fundamental Parliamentary commitment as the new suite of Acts comes into place.

The Charter's text was developed by children and young people in care and expresses their core entitlements as prescribed in international covenants and domestic law and policy. In practice, the Charter helps guide government and non-government organisations in their dealings with

children and young people.[23] Possibly more importantly, it is a tool for engaging with individual children and young people about their rights when they come into and live within the care system. The Charter is an indispensable mechanism for ongoing work with government and non-government agencies that sign on as *Charter Champions* as a basis for working appropriately with children in care.[24]

"I can have a say most easily with people I know and trust and with whom I have a relationship"

4.3 Child and Young Person's Visitor Scheme

The Guardian strongly supports the establishment of a ***Child and Young Person's Visitor Scheme*** (ss 104 - 107). It is not clear why s105(1) makes this a discretionary rather than mandatory direction to the Minister.

The long-term implications of what, additional to residential care facilities, may be deemed by regulation to be a "prescribed facility" pursuant to s104 are difficult to contemplate. Could private foster care homes be included? If so, functions and powers identified in s106 may need further consideration.

In performing their functions, a visitor will be required to take notice of factors set out in s106(2). These are excellent, but would be strengthened by the addition of a s106(2)(b)(iii) - "*cultural, locational or other characteristics as prescribed by regulation*". While the draft Bill is responsive to the needs of Aboriginal and Torres Strait Islander children and young people, it gives less guidance about meeting the needs of those from other cultural backgrounds or those with a range of special needs.

Accountability through the operation of s107 is supported.

4.4 Right to be heard in proceedings and elsewhere

The Guardian strongly supports the ***strengthening of the Child and Young Person's right to be heard in proceedings*** (ss 54, 55, 56), seeing this as indicative of a commitment to ensuring that their 'voice' will be sought and heard.

[23] For example, all agencies delivering alternative care are required contractually to endorse the Charter and promote it to the children and young people with whom they work.

[24] **GCYP 2017**

The same spirit is seen in proposed arrangements for ***family group conferences*** (ss 17-21), although the basis for all changes or omissions from the analogous clauses in the *Children's Protection Act 1993* (ss 27-33) is not evident due to the lack of explanatory notes. Some specific matters can be noted here –

- the implications of the promotion of "consensus" in s20(4)(a) are not clear, in particular in relation to those situations where achieving this is not a possibility
- sections 19(3) and 19(4) are positive additions that require the co-ordinator to ***consult with the child or young person*** about who should or should not attend conferences and to make appropriate advocacy arrangements.

Is there a reason children and young people themselves cannot request a review of arrangements as provided for other parties in s21?

"some ways of communicating with me don't work"

4.5 Other clauses broadly supported (from the Children's Protection Act 1993)

Recognising the limitations outlined in part 1.2 above, the Guardian notes broad support for the following elements of the draft Bill that primarily are derived from provisions in the *Children's Protection Act 1993* (with cautions in some *places*) -

- ***case planning*** (ss 24, 25, but noting comments about Chief Executive powers discussed earlier): references to cultural maintenance, reunification planning and other matters in s24(2) are welcome. However –
    - the list provided in s24(2) will benefit from an added sub-clause that guarantees access to core entitlements such as adequate education, holistic developmental support, and appropriate health or therapeutic services
    - reference should be made to the centrality of the case plan to the ***annual review*** process

- ***annual review*** (s76): noting, however –
    - the argument advanced in part 2.2 above about the lack of capacity to enforce such requirements
    - creating better linkage with case planning as described above (e.g. by adding a sub-clause to s76(2)(c) to note explicitly the need for a review panel to have regard to and make recommendations about the case plan)
- ***Chief Executive capacity to refer notifications to a State Authority*** (s28): broadly supported with the significant exception of s28(7) as discussed in part 3.1 above
- ***removal of a child or young person*** (s32): although the s32(2) reference to material that will be covered in the regulations means that it is not clear what, specifically, might constitute appropriate "characteristics" sufficient to justify removal
- ***temporary instruments of guardianship*** (s36) and ***restraining notices*** (s37)
- ***powers vested in the Chief Executive in relation to children and young people*** (ss 75, 144): further consideration is required in accordance with issues noted in part 2.5 above. However, the s75 (2)(a) requirement that the Chief Executive have regard to the Aboriginal and Torres Strait Islander Child Placement Principle and that guardianship or custody "is the least preferred option" (s75 (2)(b)) are both welcome statements
- ***transition to long term guardianship*** (ss 80, 81, 82): it is not clear why s80 requires an application to be made to initiate Departmental consideration and trigger relevant processes rather than have this undertaken as a matter of Departmental obligation. The young person and/or carer then would have an 'opt-out' capacity
- ***carer access to information and involvement in decision-making*** (ss 69-74): the Guardian is interested in considering carer feedback about these matters, noting a concern to ensure that the right to confidentiality and privacy of a child should be carefully protected within this engagement process

"if my family could care for me safely, then help them do this"

- ***the right of a young person over 16 years of age to terminate a voluntary custody agreement*** (s87): is endorsed strongly. It will be important that the Chief Executive's implementation of the s87(8) obligation to ensure that "proper arrangements exist for the care of the child or young person" provides access to all necessary support and/or services

- ***provision of assistance to care leavers*** (ss 101, 102): rather than placing the onus on a young person to "request" such a plan, the responsibility to offer such a planning process should rest with the Department

- ***Child Protection Officer*** (ss 135-138) and associated matters (s99)

- ***information gathering and sharing*** provisions (ss 139-143)

- ***reporting of suspicion that a child or young person may be at risk*** (ss 26, 27)

- ***transfer of certain orders and proceedings between South Australia and other jurisdictions*** (draft Bill Chapter 9).

"they need to protect children…it is called child protection and they need to live up to their name"

4.6 Other clauses broadly supported (from the Family and Community Services Act 1972)

Recognising the limitations outlined in part 1.2 above, the Guardian's broad support can be noted (with cautions in some places) for the following elements of the draft Bill that draw from the *Family and Community Services Act 1972* -

- ***unlawful taking of a child or young person*** (s79)

- ***funeral arrangements for children and young people in care*** (s103)

- ***fit and proper person test for a licence to operate a children's residential facility*** (s96)

- ***complaint to the Chief Executive about the care received in residential care*** (s100): the proposed capacity for a resident to make a complaint is supported strongly. The development of a detailed regulation will be a critical part of the safety net available to children and young people in this part of the out of home care system. The Guardian has long advocated for formal complaints processes to be established, maintained and promoted within residential care facilities. Some still lack them.

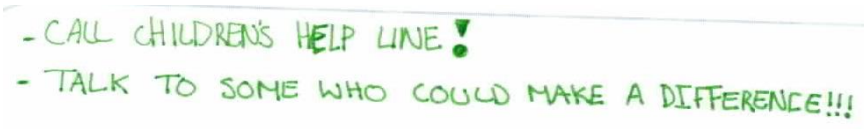
  It is not so clear that the change from the analogous requirement in s56(2) of the *Family and Community Services Act 1972* to investigate "any complaint made under this section" to the formulation in the new draft is helpful. Section s100(4) of the draft Bill will allow the Chief Executive to not investigate a complaint that, in their opinion, is "frivolous or vexatious or not made in good faith". Is this expression of a capacity not to investigate too sweeping?

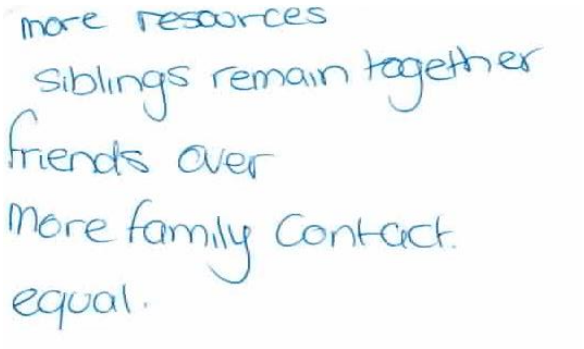
"the child needs to be shown that they are loved and that they can be ok"

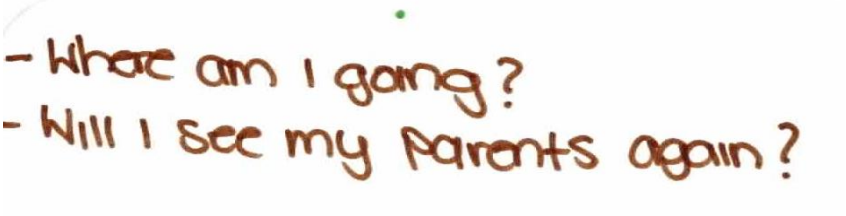
APPENDICES

A REFERENCES

B TABLE – GCYP suggested specific clause amendments - draft *Children and Young People (Safety) Bill 2016*







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South Australian Legislation

Children's Protection Act 1993

Children and Young People (Oversight and Advocacy Bodies) Act 2016.

Consent to Medical Treatment and Palliative Care Act 1995

Criminal Law Consolidation Act 193

Family and Community Services Act 1972

Public Sector (Data Sharing) Act 2016

B TABLE – GCYP suggested specific clause amendments - draft *Children and Young People (Safety) Bill 2016*

This table lists matters/questions raised in the Guardian's submission that are amenable to being addressed by amending the text of specific sections of the draft *Children and Young People (Safety) Bill 2016*.

It does not incorporate all recommendations made in the submission. Two notable examples of this sort are the need to retain some existing provisions from the *Children's Protection Act 1993* that have not carried over to the Bill: s26A and s 26B (female genital mutilation) and s8B (child safe environments).

Section of draft Bill	Subject and GCYP proposal	Where in GCYP Submission
Preamble	Part of the Bill's purpose is "to protect children and young people from harm". Does it do this?	1.1
	Does the draft address this ambitious overall agenda? Perhaps it more accurately can be seen to attempt to minimise harm to and address risks confronting an already at risk population of children and young people	
s145 ***Internal Review***	How adequate are provisions to seek redress for non-compliance with core statutory entitlements?	2.2
	Amend s145 of the draft to – • make explicit that Internal Review extends to failure of the Chief Executive or a child protection officer to give effect to the entitlements of children and young people under this Act • provide an appeal mechanism should an applicant wish to challenge an internal review outcome, and • guarantee access by affected children and young people to independent advocacy services for these processes.	
s25(2) ***enforceable Rights***	Denies children and young people access to enforceable rights or obligations in relation to a case plan	2.2
	Provide a child or young person with enforceable rights	

S101(1) ***transition plan***	Places the onus on a young person to "request" the development of a transition plan	4.5
	Amend this section to place the onus on the Department to offer the development of a transition plan	
s7(1)(a) ***right to be heard***	This is the current location of the statement about "the need [of children and young people] to be heard and have their views considered"	2.3
	Lift text of s7(1)(a) from "Other needs of children and young people" to give it equivalent separate emphasis as that granted currently to s6, "Safety of children and young people paramount" In the re-emphasis, use language that gives effect to Article 12 of the UN Convention on the Rights of the Child - "*In all decisions that affect the child, the child will be included in the decision making to the extent that they are capable and willing. The views of the child will be given due weight in accordance with the age and maturity of the child"*	
s10 ***ATSI Placement Principal***	Aboriginal and Torres Strait Islander Child Placement Principal	2.4
	No specific suggestion at this stage, but note potential Aboriginal Community interest in this matter that may lead to drafting changes	
S16 ***CFARN powers***	s16(4) will allow members of a Child and Family Assessment and Referral Network, "despite any other Act or law", to "(a) exchange information and documents without restriction in the course of performing its functions"	2.6
	This open-ended capacity potentially to override rights in relation to information and documents governed by other Acts or laws should be amended to protect essential rights. For example: to protect the right to privacy of a young person aged 16 or over "to decide freely for themselves on an informed basis whether or not to undergo medical treatment" – as per s3(a)(i) of the *Consent to Medical Treatment and Palliative Care Act 1995*.	

s 24(2) ***case plan***	This section describes some matters that may be included in a case plan, without limiting what else can be included	4.5
	Add a sub-clause to guarantee access to various core entitlements e.g. adequate education; holistic developmental support; appropriate health and/or therapeutic services.	
S76(2)(c) ***annual review***	This sub-section gives direction to the conduct of panels that undertake annual reviews	4.5
	Add a sub-clause to s76(2)(c) to note explicitly that a review panel should have regard to and make recommendations about the case plan	
s30 **direction for examination or assessment**	Among other things, s30 has implications for the capacity to exercise rights under the *Consent to Medical Treatment and Palliative Care Act 1995*	2.6
	The Bill should guarantee the right of a young person in care aged 16 or above to ***consent*** themselves ***to medical treatment***. This could be done by referral to the object in s3(a)(i) of the *Consent to Medical Treatment and Palliative Care Act 1995 i.e.* "to allow persons of or over the age of 16 years to decide freely for themselves on an informed basis whether or not to undergo medical treatment".	
s43(1)(a) ***application for a s44 order***	An application for a s44 order can be served on parties including "a child or young person who is the subject of the application [and] is of or above the age of 10 years".	2.6
	Supplement this provision with requirements for sensitive 'service' processes for children and young people	
s113 ***notification of the transfer of a child protection order***	The same capacity as that noted immediately above also applies to s113 (notification of the administrative transfer of a child protection order)	2.6
	Supplement this provision with requirements for sensitive processes for children and young people	

s28(7) ***direction to a State Authority***	s28(7) would allow the Chief Executive to "give directions or guidance in relation to a matter to a State authority to which the matter is referred" (the Guardian is a State authority)	3.1
	Amend this clause to <u>exclude</u> the capacity of the Chief Executive to direct an independent statutory officer such as the Guardian because this undermines the necessarily independent functioning of this office and conflicts with other legislation.	
s105(1) ***Visitors Scheme***	s105(1) leaves establishment of the scheme as a discretionary matter for the Minister	
	Embed this as a statutory requirement by replacing the word "may" with "must" in s105(1)	4.3
s106(2) ***Visitor functions***	s106(2) instructs a visitor about how they will perform in several important areas when exercising functions under *the Child and Young Person's Visitor scheme*.	4.3
	Add a sub-clause to the factors with which a visitor must comply under s106(2) i.e. add a s106(2)(b)(iii) - "*cultural, locational or other characteristics as prescribed by regulation*".	
s 80 ***transition to long term guardianship***	s80 requires an application to be made to trigger Departmental consideration of the development of a transition plan	4.5
	Amended this to make it a Departmental responsibility to offer the planning process to relevant children and young people (who then would be given an 'opt-out' capacity)	
s100(4) ***complaints about residential care***	This sub-section would allow the Chief Executive to *not investigate* a complaint that, in their opinion, is "frivolous or vexatious or not made in good faith".	4.6
	A capacity to not investigate should be subject to standards that better reflect the intention that underpins the comparable s56(2) of the *Family and Community Services Act 1972* (which requires investigation of "any complaint made under this section")	