



Government of South Australia

Office of the Guardian
for Children and Young People

Responding to the draft *Children and Young People (Oversight and Advocacy Bodies) Bill, 2016*

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Reading this submission

This submission refers to the subjects of the Bill as the *four entities* (the Commissioner for Children and Young People; Guardian for Children and Young People; Child Death and Serious Injury Review Committee and the Child Development Council).

The existing statute empowering the Guardian's role is the *Children's Protection Act 1993*, referred to in this submission as the *CPA*.

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1. Basis for this submission

1.1 Introduction

Comment has been invited on the draft *Children and Young People (Oversight and Advocacy Bodies)* Bill 2016 (the Bill).

This submission examines the degree to which the Bill achieves its stated purpose, part of which is to “continue the Guardian for Children and Young People”. The test for this is whether the Bill responds to some ‘Guiding Principles’ that will allow the continuation of the Guardian’s role in the context of a consolidated Act.

The Guardian supports the creation or continuation of three of the four entities accommodated by the Bill in the context of comments made in this submission, noting that the purpose, role and reporting relationships of the Child Development Council (CDC) need further thought.

1.2 Guiding principles

Consideration must be given to the way in which the Bill provides for the independent operation of the four entities while optimising the capacity for mutually supportive and collaborative relationships, particularly in the context of possible co-location and potential sharing of some administrative resources.

In addressing these matters, the following guiding principles are proposed –

GUIDING PRINCIPLES

Effective continuation of the Guardian’s role will rely upon adherence to several guiding principles that will give effect to Parliament’s enactment of this independent statutory function. These should be apparent in and enabled by the *Children and Young People (Oversight and Advocacy Bodies)* Bill 2016 -

- A clear commitment to children under guardianship or in the custody of the Minister underpins the efficacy of the Guardian’s role.¹

¹ A factor acknowledged by Commissioner Nyland in her recent report, which also noted that “GCYP’s operations are driven by two imperatives: achieving transparency about the circumstances of children in care, and strengthening the voice of those children”

http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/CPRC/CPSRC_VOLUME%201_Part_6%20system%20wide%20changes%20to%20improve%20safety.pdf (at page 583)

- The Guardian must be independent, subject solely to accountability for fulfilling the role determined by Parliament and identified sanctions for failure or inability to meet those requirements.
- Independence requires autonomy in relation to giving effect to statutorily determined powers and functions.
- Autonomy requires the guaranteed provision of staff and other resources necessary to achieve the Guardian’s purposes.
- Autonomy requires that the Guardian engages, manages and directs a separate budget and dedicated staff.
- The Bill’s guarantee of the centrality of the ‘voices’ of children and young people (as suggested as a core Object in Part 1.3 below) is supported.

Assessment and comments in this submission effectively ask whether the provisions of the draft Bill support these guiding principles.

1.3 An Objects Clause

It will be helpful for the Bill to have an Objects statement to contextualise provisions that might otherwise seem disconnected or lacking integration. A suitable clause will make clear that two of the entities are continuing to operate (the Guardian and CDSIRC) while two are formative (Commissioner for Children and Young People and the CDC).

An Objects clause should allow us to ask whether the Bill as it stands adequately will –

- emphasise the right of children and young people to be heard and responded to in relevant areas of work?
- enable the continuing independent operation of the Guardian (and others)?
- provide arrangements to support effective relationships between the four entities (and some others e.g. the Ombudsman and the Health and Community Services Complaints Commissioner)?

The clause could be something like –

X. Objects

The objects of this Act are to -

- x.i ensure the active participation of children and young people in the work of the oversight and advocacy bodies;*

- x.ii *if decisions are to be made under this Act in relation to a child, the decision maker must have regard to the views of the child (if the child is willing and able to express such views;²*
- x.iii *provide for the establishment and operation of the Commissioner for Children and Young People;*
- x.iv *provide for the continuance and operation of the Guardian for Children and Young People;*
- x.v *provide for the continuance and operation of the Child Death and Serious Injury Review Committee;*
- x.vi *provide for the establishment and operation of the Child Development Council³;*
- x.vii *enable the ongoing independent operation of the oversight and advocacy bodies;
and*
- x.viii *identify arrangements for the relationships between these oversight and advocacy bodies and some others.*

1.4 Removal from Children’s Protection Act 1993 (CPA) context

Removing the Guardian from the CPA means that some of the strategic imperatives underpinning that Act may be lost or seen to have less relevance. This covers some fundamental matters, including –

- the statement of the core principle of keeping children and young people safe from harm - CPA Section 3 (1)
- an emphasis upon the needs of Aboriginal and Torres Strait Islander children and young people⁴ – CPA Section 5
- systemic arrangements and priorities for child protection.⁵

² The text of x.ii is taken directly from the Objects section of the CPA - Section 4 (3)

³ Or, an alternative stakeholder body should that be preferred. GCYP is not convinced that the CDC is necessary.

⁴ e.g. specific reference to the Aboriginal and Torres Strait Islander Child Placement Principle and respect for culture (with detail in the *Children’s Protection Regulations 2010*)

⁵ An example is the CPA Section 52 (1) requirement to review annually the circumstances of a child under long term guardianship of the Minister

2. Recommendations

These tables summarise the Guardian’s feedback about the draft *Children and Young People (Oversight and Advocacy Bodies) Bill 2016* as it relates to the continuation of the Guardian.

Not canvassed here are the resource, capacity and process implications that necessarily will be instrumental to the success or otherwise of the work of the four entities in the context of this statutory consolidation.

The Guardian has not been party to any discussion about these matters in the drafting process for the Bill. It is not clear whether and how this opportunity will arise in relation to associated formal arrangements or understanding that subsequently will need to be formalised by Regulation or through some other instrument(s).

2.1 Add to the draft Bill

Subject	Issue	Where discussed in submission
Objects clause	Add an Objects Clause – especially in relation to addressing matters canvassed in this submission e.g in relation to the commitment to the ‘voice’ of children and young people and the need to clarify relationships between the four entities.	Part 1.3 Part 1.4
Staff and resources	Carry over the existing 52B (Staff and resources) from the CPA: <i>“The Minister must provide the Guardian with the staff and other resources that the Guardian reasonably needs for carrying out the Guardian’s functions”.</i>	Part 3.3
	There is a major lacuna in the Bill given the lack of a direct power for the Guardian to engage staff (similar to that provided in Section 9 for the Commissioner for Children and Young People)	Part 3.3
	GCYP staff status as Public Servants is not clarified in the Bill (the Commissioner’s staff will not have this status)	Part 3.3

Functions and Powers	Add equivalent of Section 11(e) to Guardian’s role (e.g. with respect to international covenants)	Part 3.1
	Add a new sub-section to Section 22 (2) to ensure linkage with strategic imperatives in the CPA	Part 1.4 Part 3.1
Charter of Rights for Children and Young People in Care	A statutorily based <i>Charter for Children and Young People in Care</i> is critical for the achievement of the Guardian’s role.	Part 3.5

2.2 Delete, amend or reconsider draft Bill proposals

Subject	Issue	Where discussed in submission
Independence of the Guardian	Proposed Section 18 (2) does not carry over the detail provided by Section 52AB of the CPA.	Part 3.2
	The implications of Section 52 of the Bill with respect to the Guardian’s independence need to be reconsidered.	Part 3.2
	Section 18 (2) ensures that the Guardian “is independent of direction or control by the Crown or any Minister of the Crown”, yet, as a State authority, Sections 12 (5) and (6) would make the Guardian subject to the Commissioner’s direction. This should be reconsidered.	Part 3.4
	Proposed Section 12 (3)(4) should be reconsidered. Giving the Commissioner the power to inquire into the Guardian seriously undermines the Guardian’s independence and establishes a de facto hierarchy (and noting the Ombudsman’s existing power)	Part 3.2 Part 3.4
Youth Advisory Committee	Section 23 carries the YAC over from the CPA. More flexible engagement options than a rigid committee	Part 3.16

	<p>structure should be enabled.</p> <p>An alternative draft clause is provided in this submission.</p>	
Remove Part 7A of the CPA	<p>This will be achieved within Schedule 1 of the Bill.</p> <p>Whether this is desirable or not depends on whether concerns such as the maintenance of the <i>Charter</i> are resolved.</p>	Part 3.7
Confidentiality	<p>Broad support is extended for the proposed Section 60. It may be useful to retain an explicit reference to the Freedom of Information Act (e.g. Section 52E of the CPA)</p>	Part 3.8
Child Development Council	<p>Further consideration of intended relationships (and relative responsibilities) between the four entities subject to the Bill is needed. There is potential for duplication or confusion of roles.</p> <p>The concept of an advisory or reference group is supported, but further consideration needs to be given to its relationship to the Commissioner.</p>	Part 3.15
Reporting obligations (Section 25)	<p>It is not clear why requirements for distributing reports when Parliament is not in session have been removed</p>	Part 3.10
	<p>It is not clear why the status of such a report as “a report of Parliament” has been omitted</p>	Part 3.10
	<p>There does not appear to be an explicit reciprocal capacity for the Guardian to advise and make recommendations to the Commissioner for Children and Young People</p>	Part 3.4
Require information (Section 55 (5))	<p>The Minister’s capacity under the proposed Section 55 (5) to “exempt a specified person or body, or persons or bodies of a specified class, from the operation of this section” is unlimited.</p> <p>It may be prudent to consider this further if the Guardian’s Independent capacity is to be ensured.</p>	Part 3.11

Referral of matters to inquiry agencies etc not affected	The general purpose of Section 40 is supported, but the Guardian also should be added as an “inquiry agency” in sub-section (3)	Part 3.14
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2.3 Broad support for proposals in the draft Bill

Subject	Issue	Where discussed in submission
Functions and Powers	‘Carry over’ is achieved in the Bill.	Part 3.1
	Add a sub-section to Section 22 (2) to link with the Objects and other appropriate provisions of the CPA	Part 3.1
	Note discussion of adding an equivalent of Section 11(e) of the Bill to Guardian’s role	Part 3.1
Delegation	The new provision is supported.	Part 3.6
Terms and conditions of appointment	Section 19 of the Bill is supported, noting the question about the removal of an “address from both Houses of Parliament”.	Part 3.9
Schedule 1 matters	All appear reasonable, noting discussion above of the implications of removing Part 7A of the CPA	Part 3.5
Reporting obligations (Section 24)	Effective carry over of current provisions from the CPA	Part 3.10
Immediate reports to Parliament	Allows direct reporting access to Parliament in urgent situations	Part 3.12
Require information	Proposed Section 55 provisions broadly are supported (noting need to clarify sub-section (5) as raised above)	Part 3.11
Share information	Proposed Section 56 is supported	Part 3.11

Child Death and Serious Injury Review Committee	The Section 32 (3)(d) review function in relation to children and young people under guardianship in custody is endorsed	Part 3.17
Referral of matters	Proposed sections 36, 37 and 38 are supported (re: professional regulatory bodies; the Office for Public Integrity; the Ombudsman; and the Health and Community Services Complaints Commission)	Part 3.12
Immediate report to Parliament	Proposed Section 39 is supported	Part 3.12

3. Does the Bill adequately enable the ongoing independent operation of the Guardian for Children and Young People?

The Guardian’s powers and functions are transferred from the *Children’s Protection Act 1993 (CPA)* to this draft consolidation Bill through the translation of the existing Section 52C of the *CPA* to the proposed Section 22.

Discussion in this part considers relationships between the four entities with a primary focus on implications for the independent operation of the Guardian and the achievement thereby of the ongoing, statutorily defined role.

An important added consideration in this context is that His Excellency the Governor has just appointed the Guardian as Training Centre Visitor under Section 11 of the *Youth Justice Administration Act 2016* as an independent monitor to conduct inspections of the training centre and promote the best interests of residents.⁶

3.1 Functions and Powers

Transferring the Guardian’s powers and functions from the *CPA* to a consolidated Act⁷ is supported if the transition occurs with due regard given to the full range of elements that are essential to maintain the autonomy of the role.

⁶ Correspondence from Hon Zoe Bettison MP, Minister for Communities and Social Inclusion, 8 September 2016.

⁷ Section 52C, *CPA* to proposed Section 22

While the Bill carries over the CPA definition of alternative care⁸, other dislocations occur. Part 1.4 above drew attention to the distancing of the Guardian from CPA strategic imperatives such as the primacy of child safety and the need to be sensitive to the needs of children and young people from Aboriginal and Torres Strait Islander backgrounds. The need to maintain connectivity with this guidance could be achieved by the adoption of a new sub-section within section 22 (2) such as –

(d) have regard to the Objects and other appropriate provisions of the Children’s Protection Act 1993, particularly in relation to those dealing with Aboriginal and Torres Strait Islander children and young people.

Further consideration is required about providing for the independent operation of the four entities while optimising the capacity for effective mutual work with and on behalf of children and young people.

An equivalent of the Commissioner’s power described in Section 11 (e) of the Bill “to assist in ensuring that the State, as part of the Commonwealth, satisfies its international obligations in respect of children and young people” should be provided. This will make clear what is inherent in the Guardian’s role, and reinforce a fundamental aspect of our ongoing theory and practice.⁹

3.2 Independence

In addition to stating that there will be a Guardian for Children and Young People, proposed Section 18 (2) in the Bill stipulates that the Guardian “is independent of direction or control by the Crown or any Minister or officer of the Crown”.

This prescription contrasts with the more detailed existing CPA clause which appears to express the necessary nature of the independent statutory role more carefully -

52AB—Independence

(1) In performing and exercising his or her functions and powers under this Act, the Guardian must act independently, impartially and in the public interest.

(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.

Note— *This provision does not derogate from any express power of the Minister under this Act.*

⁸ From Section 6, CPA, to proposed Section 22 (4)

⁹ See, for example, the detailed discussion in *Attachment 1* to the GCYP submission to the Legislative Council [Inquiry into Access to the Education System for Students with Disabilities](http://www.gcyp.sa.gov.au/2015/10/access-to-the-education-system-for-students-with-disabilities/) (September 2015) that discusses implications of the *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities* in this sphere. <http://www.gcyp.sa.gov.au/2015/10/access-to-the-education-system-for-students-with-disabilities/>

Independence also needs to be considered in relation to the proposed requirement that the Guardian, as a “State authority”, must “have regard to, and seek to give effect to the Outcomes Framework”¹⁰ that will be generated by the proposed Child Development Council (CDC). While subsection 52 (2) then has a proviso that a State authority “will not be taken to be in breach” of this obligation if it acts “in accordance with a requirement under this or any other Act”, there remains a potential tension between the Guardian’s independent role and the Section 52 obligation. This is exacerbated by the fact that, while the CDC is responsible for developing the Outcomes Framework, it does so under a requirement that it “act in accordance with any instructions of the Minister”¹¹, who also retains a capacity to vary what is being proposed prior to gazetta¹².

Another example is discussed in Part 3.4 below in relation to the implications of whether or not the Guardian is to be shielded by the operation of Section 12 (3)(4) of the Bill. Simply put, giving the Commissioner the (Royal Commission equivalent) power to inquire into the Guardian seriously undermines the independence of the Guardian and establishes an unacceptable de facto hierarchy.¹³ This especially is so, given the Ombudsman’s existing power in relation to relevant matters.

3.3 Staff and Resources

The Guardian’s capacity to carry out the functions assigned by Parliament currently is guaranteed by Section 52B of the CPA -

52B—Staff and resources

The Minister must provide the Guardian with the staff and other resources that the Guardian reasonably needs for carrying out the Guardian's functions.

The new Bill contains no equivalent provision.

The absence of such a provision undermines a claim that the Bill adequately ‘continues’ the Guardian’s statutory role as stated in its preamble. Removing the Minister’s obligation to provide necessary staff and other resources makes the independence of the role moot, and diffuses provisioning transparency and accountability through to Parliament. Section 52B therefore should be carried over to the *Children and Young People (Oversight and Advocacy Bodies) Bill 2016*.

¹⁰ The Outcomes Framework is described in Section 51 of the Bill, with the quoted obligation included in Section 52 (1).

¹¹ Bill, Section 51 (4)(a)

¹² Bill, Section 51 (7)

¹³ All hinging on whether or not the Guardian is included as a Section 40 “inquiry agency” (see discussion in Part 3.11 of this submission)

The Bill empowers the Commissioner for Children and Young People to “engage employees on terms and conditions determined by the Commissioner”, and asserts that such employees “are not Public Service employees but will, for the purposes of the *Public Sector (Honesty and Accountability) Act 1995*, be taken to be public sector employees employed by the Commissioner”.¹⁴

CDSIRC also has an engagement power identified in Section 31 (2).

There is no equivalent provision for the Guardian to engage employees, which raises two critical matters that should be resolved as soon as possible -

- the Guardian must be empowered to employ and manage GCYP staff as a matter central to meeting the Guiding Principles raised in this submission; and
- urgent discussion is required about any intention that existing or future staff will not continue to be engaged as Public Service employees directly responsible to the Guardian. There has been no discussion about this critical matter with the Guardian, let alone potentially affected staff.

The proposed Section 21 (Use of staff etc of Public Service) can only meaningfully be considered once these core status matters are clarified.

Evolving and growing demands

Caution also is needed given the growth in responsibilities that may or will be vested in the Guardian. Already noted is the appointment this month of the Guardian as Training Centre Visitor. Consideration also is being given to new or more intensive functions arising from the recommendations of the Nyland Royal Commission.¹⁵

3.4 Commissioner for Children and Young People

Division 2 of the Bill (Functions and Powers of Commissioner) has a number of notable implications for the Guardian, some of which need to be considered further.

Section 11 (Commissioner's general functions)

Section 11 has several sub-sections that create common areas of scrutiny/concern with those of the Guardian¹⁶, a factor also relevant to the operation of Section 16 (1).

¹⁴ Quotes respectively from the Bill, Sections 9 (1) and 9 (2)

¹⁵ For example, [Recommendation 136](#) to develop an education program for children in facilities run by the Agency or non-government organisations. Other staffing/resourcing issues will arise should [Recommendation 137](#) be adopted (the development of a community visitors' scheme for children in residential and emergency care facilities). Child Protection Systems Royal Commission, [The life they deserve: Child Protection Systems Royal Commission Report, Volume 1: Summary and Report](#), Government of South Australia, 2016 (at page xli)

¹⁶ An example is sub-section 11 (c) - “to advise, and make recommendations to, Ministers, State authorities and other bodies (including non-Government bodies) on matters related to the rights, development and wellbeing of children and young people at a systemic level”.

Section 11 (c) will allow the Commissioner for Children and Young People to advise and make recommendations to the Guardian. There does not appear to be a reciprocal capacity identified for the Guardian. This provision could be accommodated as a third sub-section within Section 25 (Guardian may provide other reports).

Section 12 (Commissioner's power to conduct systemic inquiries)

Section 12 (1) will make it possible for the Commissioner for Children and Young People, at their absolute discretion, to conduct an inquiry into “the policies, practices and procedures of a State authority or authorities as they relate to the rights, development and wellbeing of children and young people generally, or a particular group of children and young people”. This scope includes the Guardian.

It is not clear whether Section 12 (3) (4) will apply to work of the Guardian that could constitute “an inquiry under this section” given that Section 40 does not include the Guardian as an “inquiry agency” (see related discussion in Parts 3.2 and 3.14).

A State authority must assist the Commissioner in the conduct of an inquiry as prescribed in Sections 12 (5) and (6) if requested by the Commissioner. This potentially infringes on the Guardian's independent capacity to determine their work priorities. It also jeopardises the nature of the independence provided for in Section 18 (2) of the Bill, which ensures that the Guardian “is independent of direction or control by the Crown or any Minister of the Crown”.

Section 12 (4) notes that the Commissioner must not conduct an inquiry “if to do so would be likely to impede an investigation or proposed investigation relating to a matter that is being, or is to be conducted by an inquiry agency”. This would not apply to an investigation undertaken by the Guardian given the lack of recognition of the Guardian as an inquiry agency in the Bill.

3.5 The Charter of Rights for Children and Young People in Care

Division 3 of the *CPA* provides detailed requirements for the *Charter of Rights for Children and Young People in Care*. This Charter disappears in the Bill, although a new and generic Charter for Children and Young People is included in Section 52.

The existing *Charter* expresses the rights of a disadvantaged group of children and young people that are core entitlements prescribed in international covenants and domestic law and policy. It is not appropriate to think that a generic Charter for all children and young people can replace or incorporate these matters.

The *Charter of Rights for Children and Young People in Care* was created in 2006, in consultation with children and young people in care, their carers and workers. The adoption of the measure as part of the passage of the *Children's Protection Amendment Bill, 2009*, was particularly important. Young people in care, participating in Youth Parliament, successfully advocated to the Minister and other

members of Parliament. It would be sad if the Bill ignored this serious and tangible result of the work of advocates of this highly disadvantaged group of children and young people.

As required by the CPA the Charter was reviewed by children and young people in care in 2015, accepted by the Minister and tabled in Parliament earlier this year.

In practice, the Charter has been of considerable assistance as a means of guiding government and non-government organisations in their dealings with children and young people in care.¹⁷ Possibly more importantly, it also serves as a focus for engaging with individual children and young people as they come into and live through the care system about their rights and how they can expect to be treated. The Charter is an indispensable focus for work with government and non-government agencies that are invited to sign on as Charter Champions as a basis for working appropriately with children in care.¹⁸

Section 52EE of the CPA (Approval of Charter) also has a useful sub-section that guarantees the involvement of Parliament in any evolution of the Charter: “(2) The Minister must then cause a copy of the Charter or variation (as the case may be) to be laid before both Houses of Parliament”.

The Charter of Rights for Children and Young People in Care should maintain its status as a legislatively required instrument, just as the Charter of Rights for Youths Detained in Training Centres¹⁹ recently received statutory recognition.

3.6 Delegation

Proposed Section 20 Delegation is supported and assumed to state explicitly what was inherent in the existing Section 52C (3) of the CPA. The Guardian has the powers necessary or expedient for, or incidental to, the performance of the Guardian's functions.

3.7 Removal of the Guardian from the CPA

Schedule 1 of the Bill will repeal Part 7A of the CPA, thereby removing existing provisions that empower and regulate the Guardian. This is reasonable given the coterminous recreation of most existing GCYP provisions in the new Bill.

¹⁷ 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.

¹⁸ <http://www.gcyp.sa.gov.au/charter-of-rights-2/>

¹⁹ *Youth Justice Administration Act, 2016 (SA)*, Section 22—Charter of Rights for Youths Detained in Training Centres, which states: “(1) There will be a Charter of Rights for Youths Detained in Training Centres” and that “(3) A person exercising functions or powers under a relevant law must, in any dealings with, or in relation to, a youth who is in detention, have regard to, and seek to implement to the fullest extent possible, the terms of the Charter”.
https://www.legislation.sa.gov.au/LZ/V/A/2016/YOUTH%20JUSTICE%20ADMINISTRATION%20ACT%202016_6/2016.6.UN.PDF

It is not advisable with respect to at least one important matter; that is, the disappearance of the *Charter of Rights for Children and Young People in Care* as currently required by Division 3 of the CPA. This Charter should be retained and is not replaceable by the generic Charter as proposed in the Bill.

3.8 Confidentiality

The simple existing section 52E in the CPA is replaced by a more substantial clause.²⁰ While the proposed Section 60 provides helpful and detailed guidance, it is not clear why the reference to the *Freedom of Information Act 1991* in Section 52E of the CPA has been removed given that it provides helpful advice²¹.

It is recommended that the text of s52E be retained – “*Information about individual cases disclosed to the Guardian or a member of the Guardian's staff is to be kept confidential and is not liable to disclosure under the Freedom of Information Act 1991*”.

3.9 Terms and conditions of appointment (Guardian)

Section 19 of the Bill broadly is supported. It is not clear, however, why the current capacity²² to remove the Guardian “on the presentation of an address from both Houses of Parliament seeking the Guardian's removal” has been omitted as has the option of suspension.

3.10 Reporting obligations

Section 24 in the Bill restates the requirements of Section 52B of the CPA. Section 25 then does three things that warrant comment:

- It enables reporting to a Minister other than the sole Minister currently provided for in the CPA. This is a good suggestion although it may have resource implications in terms of enabling reporting in relation to specific topics. Currently, for example, it is appropriate for a report to be provided to the Minister for Communities and Social Inclusion in relation to youth justice matters, a factor that has increased relevance now that the Guardian has been appointed as Training Centre Visitor.
- It is not clear why the detailed requirements for distribution of reports when Parliament is not in session have been removed²³.

²⁰ 52E, CPA replaced by proposed Section 60

²¹ Notwithstanding the sensible amendment to the *Freedom of Information Act 1991* proposed in Schedule 1 of the Bill that would add the Guardian to the list of Exempt agencies under that Act.

²² Section 52A (5) of the CPA - with suspension in s52A (5)

²³ See CPA section 52DA (2)

- Similarly, it is not clear why the Bill removes the status of such a report as “a report of Parliament published under the authority of the Legislative Council and the House of Assembly”²⁴.

3.11 Information

Section 55 of the Bill appears to allow the Guardian to require information from any party subject to the conditions outlined in the clause. The conditions identified are more fulsome than those in Section 52CA of the CPA and broadly are reasonable.

However, an open-ended capacity is provided in the Bill for the Minister as follows –

55 (5) The Minister may, by notice in writing, exempt a specified person or body, or persons or bodies of a specified class, from the operation of this section.

It is unclear why this caveat is required and under what circumstances it might be invoked. There appears to be nothing, for example, that would stop a Minister from applying it to a unit of the proposed new Department for Child Protection, which potentially would make the Guardian’s role extremely difficult to achieve. Perhaps a more nuanced clause is required.

The capacity outlined in Section 56 to enable sharing of information between certain persons and bodies is supported.

3.12 Immediate reports to Parliament

The Section 39 proposal to allow the Guardian (and Commissioner) to report to Parliament on any matter related to their functions if the matter raises urgent issues of such importance to the safety or wellbeing of children and young people that Parliament should be made aware of the matter²⁵ is supported.

3.13 Referral of matters – overview

Part 5 of the Bill (Referral of matters) is critical to the achievement of the Objects of the Bill (as captured by this submission’s proposal that these Objects should be articulated separately²⁶). The broad objective of rebuilding the South Australian child protection system on the basis of an appropriate and practical capacity to refer certain matters to capable investigatory agencies is supported. The specific capacities provided for the Guardian (and others) to make relevant referrals in accordance with the following sections therefore are endorsed: Section 36 - to professional

²⁴ CPA Section 52DA (3)

²⁵ Bill, Section 39 (1)

²⁶ See discussion in Part 1.3 above (and the inclusion of the proposed sub-section x.viii)

regulatory bodies or the Office for Public Integrity; Section 37 – to the Ombudsman; Section 38 – to the HCSCC.

Some matters included in Part 5 warrant further consideration in relation to prospective operational and/or resource implications for the work of the GCYP. An example is the provision that the Guardian may form an opinion that a matter should be referred to the Commissioner for Children and Young People, which then must be referred “in a manner or form determined by the Commissioner. A thorough examination of current GCYP advocacy, monitoring and investigation processes and working relationships also will be needed should Division 5 be enacted.

The critical nature of the referral relationships for the success or otherwise of the current reforms suggests that the mechanisms that will give effect to the various processes need to be considered in some detail with respect to the operations and capacities of all participating agencies.

3.14 Referral of matters to inquiry agencies

Section 40 (1) ensures that nothing in the Bill “prevents a matter from being referred to an inquiry agency or any other appropriate person or body at any time”. Sub-section 40 (2) then ensures that a referral “does not prevent the Commissioner, the Guardian or the Committee from performing functions or exercise powers in respect of the matter ...”

It is not clear why the Guardian is then not included in the list of inquiry agencies in sub-section 40 (3).²⁷ GCYP should be included, especially to avoid duplication or confusion where inquiries initiated by the Commissioner may be wholly or substantially about children and young people under guardianship or in the custody of the Minister.

3.15 Child Development Council (CDC) and relationships between the four entities

There is a potential confusion, or at least ambiguity, about the roles of the four entities.

Relationship between the CDC and the Guardian

An instance of this potential confusion was introduced in 3.2 above in relation to the proposed requirement that the Guardian will be required to “have regard to, and seek to give effect to the Outcomes Framework” (notwithstanding the accompanying provisos). Another example is the proposed CDC task of advising the Minister about “raising community awareness of the relationship between the needs of children for care and protection and their developmental needs”²⁸ with no reference to doing so on the basis of liaison with the Guardian. The Guardian, of course, separately has a responsibility to do just this task²⁹.

²⁷ Noting that “inquiry agency” itself is not described in Section 3 of the Bill (Interpretation)

²⁸ See proposed Section 49 (2) (d)(ii)

²⁹ Pursuant to Section 22 (d) of the proposed Bill (which mirrors Section 52C (d) of the CPA).

The Minister may, therefore, receive different, potentially conflicting, advice from two of the entities that could be operating from a co-located office.

Relationship between the CDC and the Commissioner

It may be helpful to explore further the relationship between the CDC and the Commissioner in order to minimise the likelihood of creating separate poles of policy advice. This also should avoid unnecessary management and administrative confusion or unnecessary duplication of effort.

Previous GCYP input about the CDC

GCYP provided feedback to Government in 2012 about the CDC proposed in draft legislation at that time. Specific matters raised in that submission that may be worth noting in the current context are

–

- the need to carry over to a CDC the capacity currently held by the Council for the Care of Children to provide advice to the Minister about particular groups of vulnerable children and on the operation of the *Children’s Protection Act* and the *Family and Community Services Act*. The Council has also been able to initiate its own work at the Council members’ request, which resulted, for example, in the preliminary work on Child Friendly Cities;
- the need to ensure that some CDC activity is devoted to groups of vulnerable children and young people which means that standing committees will be appropriate for Aboriginal children, those with disabilities and children in care/child protection (while the proposed outcomes framework also should include specific targets for these groups);
- that a proposed standing committee for children and young people should be supplemented by a consultation and communication strategy that reaches many more young people. Any legislated obligation should be about participation rather than the form of participation (see discussion about the Youth Advisory Committee in 3.16 below); and
- it also is important that the CDC is transparent about its plans and actions. Two way communication with interested observers and contributors should be considered from the very beginning.

3.16 Participation of children and young people

The proposed Youth Advisory Committee in Section 23 of the Bill seeks to transfer the mechanism identified in the *CPA*³⁰. In doing so, it correctly is unequivocal about a requirement to engage with

³⁰ *Children’s Protection Act 1993*, Section 52EA—Youth Advisory Committee

children and young people in care and custody (a feature that can be enhanced by adopting the proposed Objects sub clause described in Part 1.3 above).

Requiring a formal advisory committee structure is problematic however. Our experience is that this mechanism does not respond to the need for flexible options for engaging with vulnerable children and young people. Hence, while committees can be parts of an array of options, they are not sufficient or necessarily effective, particularly in relation to such a highly transitory and internally diverse group.³¹

After testing various options, successful consultation processes implemented by the GCYP over the past few years have been based on dynamic, less formalistic processes that do not demand an ongoing commitment to a committee process.³² Highly structured mechanisms simply are not responsive to the realities of these young people's lives. GCYP experience has been that the diversity of children and young people is best addressed through careful design of specific and targeted participation opportunities, for example with those from Aboriginal and Torres Strait Islander backgrounds or those who are in younger age groups.

The proposed Section 23 therefore should be replaced with a clause that –

- requires the Guardian to engage with and consult children and young people in relation to performance of the Guardian's functions, and
- ensures that the Guardian undertakes a program of engagement with children and young people in care to ensure that their experiences and advice informs work in relevant areas.

The following is proposed as a possible approach to such a clause (drawing as much as possible on the structure and terminology in the current draft) -

23—Input by children and young people

(1) The Guardian must establish and maintain processes to ensure the participation of children and young people in strategic, policy or systemic practice development or review processes.

³¹ GCYP explored effective engagement models for children and young people in care, leading to preparation of an *Options Paper: GCYP Youth Participation* (August 2013) and the subsequent adoption of a Youth Participation Strategy in October 2013.

³² The GCYP approach can be seen at <http://www.gcyp.sa.gov.au/about-2/youth-participation-policy/> A good practical example is the process convened for the Nyland Royal Commission in conjunction with CREATE Foundation - report available at <http://www.gcyp.sa.gov.au/2015/03/the-guardians-submission-to-the-sa-royal-commission-on-child-protection-systems/>

(2) The Guardian must seek to involve children and young people from across the diverse groups present within the overall population of children and young people who are, or have been, under the guardianship, or in the custody, of the Minister.

(3) The Guardian must ensure that avenues are available for the involvement of the affected children and young people in care or custody where that group is the focus for strategic, policy or systemic practice scrutiny.

(4) Participatory processes generated under this section are –

*(a) to assist the Guardian in the performance of the Guardian's functions by ensuring that the Guardian is aware of the experiences of, and receives advice from, children who are, or have been, under the guardianship, or in the custody, of the Minister;
and*

(b) such other functions as are assigned by the Guardian.

(5) The Guardian must include an account of activities undertaken in accordance with this section in the Annual Report required by Section 24.

3.17 CDSIRC

Continuation of the Child Death and Serious Injury Review Committee is supported. So too is the review function identified in Section 32 (3) (d) in relation to children and young people “under the guardianship, or in the custody, of the Minister or ... in custody or detention or in the care of a government agency” which specifically links with the work of the Guardian.