Guardian for Children and Young People

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Hon Rachel Sanderson MP
Minister for Child Protection
GPO Box 1838
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Friday, 23 October 2020

By email only: Minister.Sanderson@sa.gov.au

Attachment 1: Submission for the review of the Children and Young People (Safety) Act 2017 (20 December 2019)

Dear Minister Sanderson

Guardian's feedback on draft *Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020*

Thank you for providing me with a copy of the draft *Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020*. I am very pleased that proposed changes incorporate a requirement to consider the best interests of the child, and elements and objectives of the Aboriginal and Torres Strait Islander Child Placement Principle have been described. I believe that these simple changes will make a significant difference in the lives of children and young people in care.

My feedback addresses the following -

- Amendment of section 8—Insertion of requirement to act in the best interests of the child
- Amendment of section 12 - Aboriginal and Torres Strait Islander Child Placement Principle
- Amendment of section 35 - Chief Executive may direct that child or young person be examined and assessed
- Amendment of section 157—Internal review

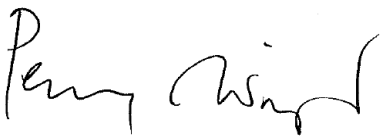
I have sought some further clarification about the effect of these proposed amendments in my feedback below.

If you require any further information about this feedback, your staff may contact my Senior Policy Officer, Ms Jessica Flynn, or me. Ms Flynn may be contacted on 8226 8570 or at jessica.flynn@gcyp.sa.gov.au.

I note that this draft Bill has been provided on a confidential basis. As is commonly my practice, I may elect to publish an edited version of this submission on my office's website. However, I will only do so once this Bill has been introduced into Parliament, and thus is on the public record.

Thank you for the opportunity to provide feedback on these critical reforms.

Yours sincerely,



Penny Wright | Guardian, Child and Young Person's Visitor, and Training Centre Visitor
Office of the Guardian for Children and Young People

Feedback to the Minister for Child Protection | Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020

From Penny Wright, Guardian for Children and Young People, Child and Young Person's Visitor, and Training Centre Visitor

October 2020

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1. **Comments relating to amendment of section 8—insertion of requirement to act in the best interests of the child**

I warmly welcome the proposed insertion of a subsection requiring that persons or bodies must act in the best interests of the child. I anticipate this requirement will lead to improved outcomes for children and young people in care and better enable them to access their rights and have a voice in decisions that are made about them.

2. **Comments relating to amendment of section 12 - Aboriginal and Torres Strait Islander Child Placement Principle**

The proposed amendments seek to provide more detail as to the objects and elements of the Aboriginal and Torres Strait Islander Child Placement Principle. I support this in principle, and note that –

a. The proposed amendment has added subsections mentioning self-determination and notes the long-term effect of decisions for children and young people in relation to identity and connection with family and community.

b. OGCYP Aboriginal Advocates feel that this is an important step in the right direction and look forward to seeing how self-determination works in practice.

c. This proposed amendment does not address the cultural change needed within the Department regarding application of the ATSICPP but strengthens the requirements of criteria which must be met in applying it.

d. OGCYP Aboriginal Advocates suggest that reflective cultural supervision would be helpful for non-Aboriginal DCP staff in how to engage with and promote participation from Aboriginal families as required by the ATSICPP.

3. **Comments and clarification required regarding amendment of section 35 - Chief Executive may direct that child or young person be examined and assessed**

I hold concerns about amendments proposed for section 35, specifically that the changes will enable the Chief Executive to direct that a child or young person in their care undergo an examination or assessment, and that a failure to comply with this direction may result in imprisonment for 6 months. As currently drafted in the Bill, section 35(7) states (amongst other things) that -

> '*A person must not, without reasonable excuse, refuse or fail to comply with a direction under this section.*
>
> *Maximum penalty: Imprisonment for 6 months*.'

The word “person” is not defined in the Safety Act, and I understand that the ordinary or dictionary definition may then be applied. It would appear that “a person” includes children and young people. This may be a drafting error, and children and young people in care are not the intended cohort for the penalty provision.

I am concerned that, if left unchanged, this amendment -

a. discriminates against children and young people in care.

   i. I am not aware of any other scheme which enables a guardian to seek imprisonment if a child or young person in their care refuses or fails to comply with their directions.

   ii. The draft amendment does not provide any protections for children and young people who are provided a written notice of the direction who may have low or no literacy or other learning difficulties.

   iii. Any written notice must include information about mechanisms to appeal the decision.

b. is contrary to common law principles, the *Consent to Medical Treatment and Palliative Care Act 1995* and the *Mental Health Act 2009.*

   i. Generally, administrative powers should be transparent and accountable. It is unclear if any checks and balances exist regarding this proposed amendment. Decisions should be reviewable, and public reporting should be required to allow for necessary scrutiny and accountability.

   I would appreciate clarification as to whether a CE “direction” would constitute a “decision” and is therefore reviewable.

   ii. Section 35 of the *Safety Act* currently sets out that it is not intended to otherwise limit *the Consent to Medical Treatment and Palliative Care Act* but that a person ‘who is to examine, assess or treat a child or young person in accordance with this section may do so despite the absence or refusal of the consent of the child or young person's parents or guardians.’ Section 35 makes no similar statement in how the section operates in conjunction with medical consent for children and young people.

   iii. Section 6 of the *Safety Act* currently provides for interaction with other Acts - ‘This Act is to work in conjunction with all of the laws of the State…’ and ‘…is in addition to, and does not derogate from, any other Act or law.’

   iv. The age of medical consent is 16. The proposed amendment inserting section 35(2)(b) explicitly states the Chief Executive may direct a young person who is 16 years of age or older to undergo an examination or assessment. This therefore appears to act in contravention of both the *Consent to Medical Treatment and Palliative Care Act 1995* and the *Mental Health Act 2009*.

   v. The *Mental Health Act 2009* specifically recognises the right of those aged 16 years of age or older to consent to treatment while also requiring additional safeguards for all children and young people under 18 years in the form of shorter orders and more frequent review of orders. All treatment must be governed by a treatment and care plan which includes the child or young person’s views.

   vi. If a person aged 16 years or over lacks capacity, consent may be under an advance care directive by a substitute decision-maker or by SACAT on application (or ‘in any other case – by a medical agent or guardian of the patient or by the Tribunal on application…’).

vii. Section 56(1)(c) of the *Mental Health Act 2009* provides that if it appears to an authorised officer that a person has a mental illness and 'the person has caused or there is a significant risk of the person causing, harm to himself or herself or others or property or the person otherwise requires medical examination' they may take the person to be examined. This power includes the ability to restrain and transport, the person for the purposes of receiving assessment or treatment.

viii. It is my position that the proposed amendment and insertion of section 35(7) into the *Safety Act* may not be necessary as other statutory powers and interventions to compel assessment already exist.

c. Breaches the Convention on the Rights of the Child

i. This amendment appears to be in contravention of Article 37 of the Convention on the Rights of the Child which requires that imprisonment of a child must be as a last resort, and for the minimum period of time possible.

ii. I am also unaware of other schemes which seek to imprison children for a failure to follow directions of a guardian, or for other civil or administrative breaches.

d. Enables imprisonment of children and young people for a failure to comply

i. The minimum age of criminal responsibility is 10 years of age, so any child under that age could not be lawfully imprisoned.

ii. Children and young people in care are already overrepresented in our youth justice system. Almost 40 per cent of admissions to Kurlana Tapa Youth Justice Centre are for those in care, despite making up one per cent of the state's population of children and young people. This proposed amendment would likely make this worse.

iii. My concerns about the potential imprisonment of children in care for up to six months for a refusal or failure to undergo an examination or assessment echo those raised in my feedback provided to you about secure therapeutic care in May of this year. That is, this amendment in operation alongside the Youth Treatment Orders scheme may have the practical implication of a small and extremely vulnerable group cycling between detention imposed under Youth Treatment Orders and imprisonment under this provision.

I would be grateful to receive clarification about the intention of these changes, and what outcomes are anticipated for children and young people in care

4. Comments and clarification required relating to amendment of section 157—Internal review

I am concerned that the proposed amendment of section 157 will exclude decisions relating to carer payments or other assistance from the internal review process. I wish to reiterate my comments above relating to the importance of accountability and transparency in government decision making.

I am not aware of the rationale for this section and what internal and external review processes currently exist for carers and children and young people who wish to dispute a financial decision or other assistance made by the Chief Executive?

5. Comments relating to feedback from OGCYP in December 2019 on the operation of the *Children and Young People (Safety) Act 2017*

I refer to my feedback provided to you on 20 December 2019 (see attachment). There are a number of recommendations I made that are not addressed by this draft Bill, and it is my position that there is no reason to wait until the legislative review in late 2022 to make these simple changes. I believe these changes as proposed below would improve the safety of children and young people in care, and their ability to have their rights and voice upheld.

- Consider amending the Act to require the Chief Executive and Minister to receive, acknowledge and consider information, reports and materials from the Guardian.

- Consider amending the Act to require that whenever the Guardian makes a recommendation to the Chief Executive or the Minister in any report or other written communication, the Chief Executive or Minister must respond in writing to the Guardian within a given timeframe setting out whether or not the CE or Minister intends to adopt the recommendation and if not, why not.

- Consider amending the Act to impose a clearer responsibility on the Chief Executive and Department to ensure children and young people in care are familiar with the Charter and the role of the GCYP.

- Consider amending the Act to state that all care and support provided to those in care with a disability should comply with the Disability Inclusion Act.

- Consider amending the Act so that DCP must provide children and young people in their care with complaints information.

- Consider amending the Act to ensure those in care are advised by DCP of their right to seek a review of a decision.

- The Act must include an onus on DCP to ensure a child or young person seeking review has access to independent legal counsel, and that DCP must cover this cost.

- Consider amending the Act to embed requirements that the Department must in carrying out its functions or exercising its powers, protect, respect and seek to give effect to the rights in the United Nations Convention on the Rights of the Child and any other relevant international human rights instruments affecting children and young people.

- Consider amending the Act, and the *Family and Community Services Act 1972*, so that residential care facilities can house no more than four children and/or young people together, unless to preserve a sibling group.

- Consider amending the Act so that educational engagement is a priority.

- Consider amending the Act so that financial support is available to all young people leaving care until the age of 21 years.

- Consider amending section 28 of the Act, which provides for the preparation of case plans, to require that a case plan must identify if that child or young person may be eligible to seek restitution under the Victims of Crime or Royal Commission into Institutional Responses to Sexual Abuse or any other relevant scheme.

- Consider amending the Act to reflect the information sharing between the Department and the GCYP required by the R20 arrangement.