

The Hon. John Rau MP
The Hon. Susan Close MP
Sent via email: agd@agd.sa.gov.au,
minister.close@sa.gov.au

Marjorie Black House
47 King William Road
Unley SA 5061

P. 08 8305 4222
F. 08 8272 9500
E. sacoss@sacoss.org.au
www.sacoss.org.au

ABN 93 197 662 296

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Dear Attorney General and Minister Close,

We understand the *Children and Young People (Oversight and Advocacy Bodies) Bill 2016* is currently before the Upper House and we are writing to you to seek changes that we believe will strengthen the rights and wellbeing of South Australian children and young people. We believe the opposition are open to amendments that can be made efficiently and it is our intention that we will share our concerns with other members of the upper house.

The following comments have been agreed jointly by the South Australian Council of Social Service, the Youth Affairs Council of SA, the Council for the Care of Children, the Child and Family Welfare Association of SA, the Aboriginal Legal Rights Movement and the SA Guardian for Children and Young People.

We are concerned that the Children and Young People (Oversight and Advocacy Bodies) Bill 2016 in its current form contains ambiguities and confusion about the roles of different bodies, how they relate to one another and how they will be resourced. There are also significant gaps relating to the definition of the rights of children and young people and in addressing the specific rights, wellbeing and outcomes of Aboriginal children and young people. We are calling for the following changes to the legislation.

1. The referencing of the UN Convention on the Rights of the Child and the UN Convention on the Rights of Indigenous Peoples

We are seeking changes to the Children and Young People (Oversight and Advocacy Bodies) Bill 2016 (the Bill) to explicitly link the operation of the Commissioner for Children and Young People (and all other bodies/individuals who act under the legislation) to the United Nations Convention on the Rights of the Child (UNCRC). We also, believe it is important to

specifically reference the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

We would like to see the Bill state that children and young people (children) are valued citizens with statutory and common law rights and rights set out in the UNCRC and any other relevant international human rights instruments, such as the UNDRIP.

Currently, the Bill only mentions the 'rights' of children and young people in clauses (11), (12) and (16). In clause 11, sub-clause (1)(e) we note a less than explicit reference to 'international obligations' than in previous versions of the draft legislation to establish SA's first Children's Commissioner however, the UNCRC is not specifically referred to, nor are the rights of children defined or specified in the Bill.

The inclusion of a strong Declaration, Objects, Principles and Definition (of rights, development and wellbeing) like those in the Government's Child Development and Wellbeing Bill 2014 (Gov't Bill) and the Opposition's Commissioner for Children and Young People Bill 2014 (Opp Bill) are crucial in setting the tone of the Bill as rights-based and with an empowerment focus. The impact of omitting these sections has significantly changed the focus and 'flavour' of the legislation.

2. The involvement of Children and Young People in the Recruitment of the Commissioner and in Reporting.

A Commissioner for Children and Young People in SA will have a significant role for, and an impact on, children and young people in this State. In accordance with Article 3, UNCRC, it is in their best interests to be involved in any recruitment, selection and establishment of an inaugural Commissioner for Children and Young People, including to form a positive connection with a Commissioner for Children and Young People and to inform the subsequent operation and work of the Office of a Commissioner for Children and Young People.

Children have a right to participate in recruitment and selection in a manner that is cognisant of their statutory and common law rights, including those under the UNCRC and other relevant international human rights instruments. They should participate in ways that are consistent with their age and abilities e.g. in assessing how well candidates communicate with children. Their involvement should be transparent and respectful of them as individuals.

An adult-centric recruitment and selection process risks being a flawed process, even if those involved are wholly persuaded that they are well-meaning advocates who always, and only, act with children's best interest at heart.

Children should participate in ways that are consistent with their age and abilities e.g. in assessing how well candidates communicate with children. Their involvement should be

transparent and respectful of them as individuals. To ensure children are involved, and to prevent tokenistic and/or last minute attempts to consult or include them, the Bill should explicitly require their participation, to the greatest extent possible.

3. Focussing the role of the Children's Development Council (CDC) on the Outcomes Framework for Children and Young People

The main benefit of a Child Development Council (CDC) would be its primary role in the development and promotion of an Outcomes Framework for Children and Young People (Outcomes Framework). We believe this should be the exclusive focus of a CDC. A CDC should be established only with the functions and powers in clause 49, subclauses (1)(a)-(b) and (e) as well as sub-clause (3) and (4). We believe clause 49, sub-clauses (2)(c)-(d) should be removed for the reasons set out below.

The notion of a CDC was conceived of in 2012-13, when there was no intention to establish a Commissioner for Children and Young People and:

- at that time, it was envisaged that in addition to an Outcomes Framework (to include a Charter for Children and Young People) the CDC would have a broad role and mandate in SA, similar to that of the existing Council for the Care of Children (Council) pursuant to Part 7B of the *Children's Protection Act 1993* (the CPA)
- the first exposure draft of the Gov't Bill did not contain any provisions for a Children's Commissioner. A Children's Commissioner was included only in response to overwhelming community feedback calling for one
- the first exposure draft of the Gov't Bill also included provisions for regional trusts and a Foundation (for Children and Young People)
- the provisions for regional trusts and a Foundation were removed from the Gov't Bill following the inclusion of provisions for a Children's Commissioner and the provisions for a CDC were tweaked in an attempt to better tailor its role and function to the Outcomes Framework and to prevent any potential overlap with the Children's Commissioner's role and functions by removing functions that had been included from Part 7B of the CPA.

During consultation for the Gov't Bill many key stakeholders including the Child Death and Serious Injury Review Committee (CDSIRC), Save the Children, the Youth Affairs Council of SA, the Child and Family Welfare Association (CAFWA), the SA Council for Social Service, the Health and Community Services Complaints Commissioner and the Ombudsman of SA questioned the proposal to establish a CDC in addition to a Commissioner for Children and Young People and highlighted the potential confusion/duplication of the roles.

With reference to the above sentiments and in the context of the Government of SA's rationalisation of boards and committees as well as the enhancement of the Commissioner

for Children and Young People functions (including with Royal Commission powers and close integration and/or interaction with the GCYP and the CDSIRC) it would be prudent to carefully review and clarify a policy position regarding the functions of a CDC to avoid:

- needlessly establishing a new body with functions that could be fulfilled in an alternative way (refer rationale for review of Gov't Boards and Committees)
- building in unintentional confusion or overlap in the provisions for a CDC and the Commissioner for Children and Young People
- tasking a CDC with an odd array of functions for which there is no clearly articulated purpose or evidence-base
- potentially setting up a CDC to fail
- overwhelming a CDC beyond its anticipated limited capacity (given that its members will be required to meet only six times per annum and will most likely have a very limited human resource supports similar to the existing Council secretariat consisting of only 1.8 FTE
- inappropriately collocating a CDC with three independent advocacy and oversight bodies. (A CDC will report to the Minister, be subject to the Minister's direction and work 'collaboratively' with state authorities etc).

Further, the Commissioner for Children and Young People would have the power to review any legislation and there's no need to specifically provide for the Children's Commissioner or any other official to keep under review the operation of particular Acts of Parliament (if clause 49, sub-clauses (2)(c) and (d) are removed from the Bill). The provisions in sub-clause (2)(d) are rightly the domain of the Children's Commissioner and/or the GCYP and no doubt the Minister or the Parliament or the GCYP or other stakeholders would be able to request or suggest (but not demand or dictate) that the Children's Commissioner (or another official) should carry out a review of a particular Act in terms of its impact on children.

The Nyland Report recommendations are being responded to in a context with many competing priorities, demands and resource constraints. Therefore, in the absence of completely removing provisions for a CDC from the new Bill, it would be strategic and appropriate for the CDC's legislative functions to be tailored to focus on an Outcomes Framework (including to promote its implementation and reporting on its effectiveness in improving the outcomes of children in SA). Any other functions similar to proposed functions in clause 49, sub-clauses (2)(c)-(d) – from the CPA - should be avoided and removed.

4. Retaining the independence and capacity of the Guardian for Children and Young People ('GCYP' or 'Guardian')

The Guardian's capacity to operate as an independent officer accountable to Parliament relies on two things – statutorily enshrined independence, and the guaranteed provision of, and capacity to direct, adequate staffing and other resources to meet the identified responsibilities. The draft Bill raises questions about both.

Section 18 (2) of the Bill asserts that the Guardian "is independent of direction or control by the Crown or any Minister of the Crown" (a more succinct description of this status than that provided by Section 52AB of the CPA. However, this objective may be undermined by the operation of Section 12 of the Bill in relation to the Guardian, who, as a "State authority" comes within ambit. The following points identify areas of concern as the Bill currently stands –

- Section 12 (1) makes 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.
- Section 12 (3)(4) also give the Commissioner the power to inquire into the Guardian, thereby undermining the Guardian's independence and establishing a de facto hierarchy (noting that the Ombudsman has existing power in relation to relevant matters).
- Sections 12 (5) and (6) would make the Guardian subject to the Commissioner's direction (again, because the Guardian is a State authority).
- 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 could not apply to an investigation undertaken by the Guardian given the lack of recognition of the Guardian as one of the inquiry agencies in the Bill.
- Section 12 should be reviewed to remove provisions that expose the Guardian to potential intervention by another statutory officer (the Commissioner for Children and Young People) in relation to matters that are central to the independent accountability of the Guardian to Parliament.

It also 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" as currently provided for by Section 52DA (3) of the CPA 1993.

The Bill fails to carry over section 52B (Staff and resources) from the CPA 1993: “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 Bill should retain this section as it otherwise is silent about guaranteed resources to meet the Guardian's responsibilities. The absence of such a provision undermines a claim that the Bill adequately ‘continues’ the Guardian's statutory role as stated in its preamble.

Section 23 requires the Guardian adopt a formal advisory committee structure for the engagement and input of children and young people. We believe this is problematic and should be altered. Given the target group of vulnerable children and young people, mechanisms that are more dynamic and flexible have been more effective in eliciting input and engagement.

We suggest the replacement of section 23 with the following wording, “The Guardian must establish and maintain process to ensure the participation of children and young people in strategic, policy or systemic practice development or review processes.”

5. Recognising the special needs of Aboriginal Children and Young People by providing for the appointment of a Commissioner for Aboriginal Children and Young People

Given poorer outcomes of Aboriginal children and young people in the areas of education, health, justice and child protection, further consideration should be made to the establishment of an additional Commissioner who would focus on Aboriginal children and young people. The preferred model is that established in Victoria. The Victorian *Children and Young People Act 2012*, includes provisions for the establishment of additional Commissioners alongside the Principal Commissioner. We are asking that similar provisions are made within the Bill.

As noted earlier, the work of each of the oversight and advocacy bodies should also be guided by the UNDRIP. Aboriginal inclusion is needed across all roles and functions of the oversight and advocacy bodies included in the Bill. This means Aboriginal children, families and communities should be involved in all aspects of decision making, consultation, planning, strategy development, policy and program development and implementation, community engagement, monitoring, evaluation and reporting.

6. Reviewing the legislation after 2 years

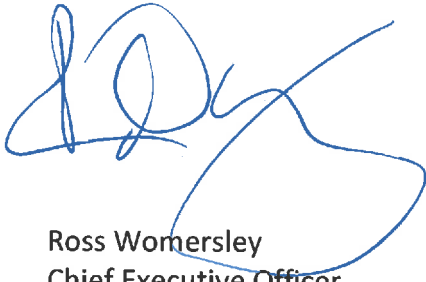
The Bill provides for the establishment of two new statutory bodies, that of the Children's Commissioner for Children and a CDC, and has implications for two other important bodies, the GCYP and the CDSIRC. The effective functioning of these key bodies is vital for the

wellbeing of all children in SA and so it is necessary for the legislation to be reviewed to ensure its adequacy.

A review should be added to the Bill and should occur after two years. The review should be not only of the legislative provisions but also of the statutory bodies with a view to strengthening their operation and resources.

Please do not hesitate to contact myself or other endorsing parties to speak further about the changes we have outlined.

Yours sincerely,



Ross Womersley
Chief Executive Officer
South Australian Council of Social Service

cc Anne Bainbridge
Executive Director
Youth Affairs Coalition of SA

Amanda Shaw
Guardian for Children and Young People
Office of the Guardian for Children and Young People

Cheryl Axleby
Chief Executive Officer
Aboriginal Legal Rights Movement

Rob Martin
Executive Director
Child and Family Welfare Association SA

Simon Schrapel
Chair
The Council for the Care of Children