

The Council for the Care of Children

Submission

Children and Young People (Oversight and Advocacy Bodies) Bill 2016

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The Council for the
Care of Children



 Government of
South Australia

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Submission from the Council for the Care of Children

These comments from the Council for the Care of Children (Council) are intended to complement those provided recently on an extract of the Protection and Wellbeing of Children and Young People (Oversight and Advocacy Bodies) Bill 2016. Please consider this submission in addition to and alongside the Council's earlier submission (attached).

1 Title

Thank you for amending the title of the draft legislation. The shorter title Children and Young People (Oversight and Advocacy Bodies) Bill 2016 (the new Bill) is an improvement and better reflects its broad remit for all young South Australians.

For consideration – title

Please consider changing the title to: '*Children and Young People (Advocacy and Oversight Bodies) Bill 2016*'. Thank you.

2 Preliminary, Declaration, Objects and Principles

The Preliminary provisions of the Child Development and Wellbeing Bill 2014 (as restored to the Notice Paper in the Legislative Counsel on 11 February 2015) (the Government Bill) clearly articulated the importance of the development, wellbeing and rights (including international, statutory and common law rights) of children and young people.

The Objects and Principles of the Government Bill also clearly articulated its broad remit for all children and young people in SA, not only for children and young people who come into contact with the child protection system.

In an intentional effort to complement, rather than duplicate, the provisions of the *Children's Protection Act 1993* (the CPA), the Government Bill:

- outlined a strong foundation to improve the outcomes of our youngest South Australians
- extended to 'empowerment', 'voice' and 'social inclusion' as well as the recognition of children and young people as valued and contributing citizens from birth
- set a sound foundation and springboard for all children and young people to have fair chances, supports and services to enable all of them to achieve their full potential at every stage of life (leading to future economic benefits consequential to early investment).

For consideration – preliminaries, declarations, objects and principles:

The new Bill should have similar preliminaries, declarations, objects and principles to the Government Bill to ensure a balance of ‘advocacy’ and ‘oversight’ in the draft legislation. The involvement of children and young people should be clearly provided for. A clear focus on ‘advocacy’ would encourage a rights-informed, empowerment lens to prevent a skewed focus on ‘oversight’. An emphasis on ‘oversight’ would come at the expense of ‘advocacy’ and potentially lead to unintended consequences, including a narrowly-focused paternalism lens being applied to or by those with functions under the legislation.

3 Term of Appointment of a Children’s Commissioner

The Government Bill provided for a term of appointment ‘not exceeding 5 years’ whereas the new Bill provides for a term of appointment ‘not exceeding 7 years’.

On what basis or evidence has the term been determined and extended?

An Independent Review of the Role and Functions of the Children’s Commissioner for Wales’ in mid-December 2014 stated:

*‘In Wales, the Children’s Commissioner has a fixed term of 7 years but I could find no rational reason why this figure was chosen, other than that it is less than 10 (too long) and more than 5 (too short and too aligned to political terms of office). I would recommend that it should continue to be a fixed term but of 6 years to cover two 3 year Work Plans and fit in with budgetary cycles in the NAFW. **It also fits with the opinion of some of the young people in the workshops: “Six years is long enough to get stuff done...new Commissioners bring new ideas and they could get stuck in old ways should they be reappointed.”** Even with this one-year reduction, that is a long and potentially exhausting commitment.’ (emphasis added)*

<http://wales.gov.uk/topics/people-and-communities/people/children-and-young-people/rights/commissioner/review-of-childrens-commissioner/?lang=en>.

For consideration – term of appointment and the involvement of children and young people

A Children’s Commissioner will have a significant impact on, and hopefully a positive impact on behalf of, all children and young people in SA. He or she will be their primary advocate and champion. Please carefully consider the benefits and/or disadvantages of a potentially lengthy term of appointment.

Article 12 of the *United Nations Convention on the Rights of the Child* (UNCRC) articulates the right of children and young people (birth to 18 years) to express their opinions and views about matters that affect them and to have their views taken seriously.¹

¹ **Article 12, UNCRC:**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

In accordance with Article 3, UNCRC, it is in the best interest of children and young people in SA to be involved in this decision.² Therefore, please respectfully and genuinely seek the views of young South Australians about the Children's Commissioner, including the very important matter of the term of appointment and give their views due consideration.

Please also carefully consider the Council's earlier submission including to specifically provide – as in Western Australia – for the involvement of children and young people in the recruitment and selection of the Children's Commissioner in the new Bill.

4 Functions of the Children's Commissioner

The Council strongly supports the provisions at clause 11(1)(c) for a Children's Commissioner 'to advise, and make recommendations to...other bodies (**including non-Government bodies**) on matters related to the rights, development and wellbeing of children and young people at a systemic level;' (**emphasis added**).

This provision would potentially extend the Children's Commissioner's powers of systemic inquiry to:

- commercial bodies (eg employers of children and young people)
- non-government organisations (NGOs) especially those not linked to state authorities via service level and/or or funding agreements (eg independent schools)
- national legislation and policy initiatives (eg the National Disability Insurance Scheme).

Further, the Children's Commissioner should be able to refer matters to SA's new Mental Health Commissioner (that was established under the *Public Sector Management Act 2009* (SA) until mid-2018).

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

² **Article 3, UNCRC:**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

For consideration – application of the legislation to non-government/commercial bodies and the Mental Health Commissioner

- Please consider how the explicit reference to NGOs in clause 11 could be extended to other provisions of the new Bill to capture commercial bodies and NGOs for access to information held about children and young people for the purposes of systemic advocacy and inquiry.
- If the Mental Health Commissioner is not captured as a ‘State authority’ under clause 3(1) please consider whether or not the Mental Health Commissioner should be declared a State authority in the Regulations.

5 Resources

With reference to the Guardian for Children and Young People (GCYP), the Council and the Child Death and Serious Injury Review Committee (CDSIRC), the *Children’s Protection Act 1993* (CPA) explicitly provides that the Minister must provide these bodies with staff and resources to carry out their functions.

Part 7A, s 52B of the CPA provides: ‘The Minister must provide the Guardian with the staff and other resources that the Guardian reasonably needs for carrying out the Guardian’s functions.’ There are similar provisions for the Council at s 52I and for the CDSIRC at s 52Q.

For consideration – explicit provision for staffing and resources

The new Bill must explicitly provide for the Children’s Commissioner, the GCYP, the CDSIRC and the Child Development Council (CDC) to be provided with adequate resources to fulfil their legislative mandates.

6 Youth Advisory Committee (GCYP)

The provision for a static advisory group is an outdated concept, inconsistent with contemporary and more dynamic communication and information exchange and the evolution in technological means of doing so. It is also out of step with the Premier’s vision for a SA with leading edge community engagement models including ‘Better Together’, Together SA, Citizen’s Juries etc.

The former GCYP was in favour of changing the provisions for one Youth Advisory Group to allow for more dynamic interaction with more children and young people to inform the GCYP’s work. The current GCYP is also in favour of this.

For consideration – dynamic, flexible provisions for children and young people in the work of the GCYP

The Council supports an explicit requirement for the GCYP to receive advice and input from children and young people in care or from those who have left care. However, in liaison with the current GCYP, please consider changing the provisions to allow the GCYP to establish groups as required for specific

purposes and then to report annually on how children and young people have been involved in every aspect of the GCYP's work.

7 Fees and expenses

The new Bill, unlike the Government Bill, does not appear to provide for fees and expenses to be paid to members of the CDSIRC or a CDC.

For consideration – provision for sitting fees

Community members who serve on committees like the CDSIRC are volunteers who qualify for only a small sitting fee for formal meetings. They do not receive remuneration or fees for their additional work out of session. The community members do this gladly with enormous goodwill and a commitment to improving the outcomes of children and young people in SA.

In the first instance, please consider explicit provision for fees and expenses to be paid to members of the CDSIRC and a CDC.

Secondly, please consider whether or not there should be specific provisions for fees and expenses to be paid to community members, including children and young people, who participate from time to time in time-limited committees set up by the Children's Commissioner or the GCYP for specific purposes.

8 Child Development Council

With reference to the Government of SA's final report on 31 October 2014 of a review of boards and committees in SA, please carefully consider whether or not a CDC should still be established.

In the rationale for the review, the Premier stated that 'every government board and committee would be abolished, ***unless it could be demonstrated that they had an essential purpose that could not be fulfilled in an alternative way.***' (*emphasis added*).

The Final Report: Boards and Committees referred to the following criteria having been used in the review ie:

'(i)n reviewing all government boards and committees, we were guided by the need to:

- *allow more direct and open access to government*
- *reduce red tape*
- *enhance productivity*
- *improve accountability and governance.'*

In giving careful consideration as to whether or not a CDC is still required, please also consider the following:

- when the CDC was conceived of in 2012-13, there was no intention to establish a Children's Commissioner. At that time, it was envisaged that in addition to an Outcomes Framework (with a Charter) the CDC would have a broad role and mandate in SA, similar to that of the existing Council in Part 7B of the CPA (ie the Council for the Care of Children)
- the first exposure draft of a *Child Development Bill* **did not** contain any provisions for a Children's Commissioner. A Children's Commissioner was provided for only in response to overwhelming feedback calling for one
- instead of a Children's Commissioner, the first exposure draft of a *Child Development Bill* included provisions for a *CDC* as well as *regional trusts* and a *Foundation*
- the provisions for regional trusts and a Foundation were removed from the *Child Development Bill* following the inclusion of a Children's Commissioner. The provisions for a CDC were tweaked in an attempt to better tailor the CDC's role and function to the Outcomes Framework and to prevent any potential overlap with the Children's Commissioner's role and functions and to remove functions that had been included from Part 7B of the CPA.

During consultation for the Government Bill many key stakeholders including the 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 Children's Commissioner and highlighted the potential confusion/duplication of the roles.

For example:

- the CAFWA stated there was '*considerable overlap between some of the functions of the Commissioner and the Council, leading to possible duplication in a resource depleted environment...CAFWA...queries whether we are creating another costly council in an already fragmented system.*'
- the Ombudsman indicated that there would be '*confusion and duplication of effort...there is an opportunity...to streamline and focus the effort and resources available to address the rights, development and wellbeing of children and young people...fully consistent with the Layton Report recommendation which proposed the creation of a statutory Office of Commissioner for Children and Young People.*'

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 Children's Commissioner 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 a CDC.

This should be done to avoid:

- needlessly establishing a new body with functions that could be fulfilled in an alternative way

- building in unintentional confusion or overlap in the provisions for a CDC and the Children's Commissioner
- 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 and be subject to the Minister's direction. A CDC will also work 'collaboratively' with state authorities etc).

The Nyland Report recommendations are being responded to in a context with many competing priorities, demands and resource constraints. In this context, the Council urges reconsideration of the proposal to establish a CDC. However, if a conclusion is reached after due consideration that there would be a clear and significant benefit in having a CDC, then its legislative functions should be tailored to reflect a focus on an Outcomes Framework only. Any other functions similar to proposed functions in clause 49, sub-clauses (2)(c)-(d) should be avoided and removed.

If this were to occur the Council would support, in principle, the establishment of a CDC with functions and powers similar to those in clause 49, sub-clauses (1); (2)(a)-(b) and (e) as well as sub-clauses (3) and (4). Such functions ie to prepare and maintain an Outcomes Framework as well as to promote its implementation and to report on its effectiveness in improving the outcomes of children and young people in SA, would be entirely appropriate.

The Council would not support any proposed functions and powers for a CDC similar to those in clause 49, sub-clauses (2)(c)-(d) for the reasons already stated.

Other reasons for the Council's position include:

- the Council was set up in 2006 *in lieu of* a Children's Commissioner for SA and it was appropriate for it to have a broad and systemic legislative role and mandate for all children and young people from birth to 18 years in SA
- the Council is fully supportive of SA's efforts to establish a Children's Commissioner with a broad systemic mandate for all children and young people providing that a Children's Commissioner is appropriately resourced to fulfil his/her legislative mandate
- as drafted in the new Bill, SA's first Children's Commissioner will have a similar yet far more extensive systemic role and mandate for our youngest South Australians than the Council role and functions in Part 7B of the CPA

- a CDC's role and function must not be obscured or confused by including any of the functions in Part 7B of the CPA or similar functions.

If a CDC is established, then the Council supports:

- the notion of a CDC having a close relationship and direct reporting line to a Minister and/or a government department (as indicated in Figure 22.1: Proposed oversight agencies and their reporting relationships in Part VI on page 601 of the Nyland Report)
- the CDC having clear and specific functions primarily focused on the Outcomes Framework.

For consideration – should a CDC should still be established?

Please carefully review and clearly articulate a policy position regarding a CDC and then shape the provisions of the new Bill accordingly.

9 Outcomes Framework

The Council strongly supports the production of an Outcomes Framework.

The Council's monitoring framework: *A Snapshot of Young South Australians June 2015* (Snapshot) reports on how children and young people in SA are faring by examining and measuring their wellbeing across five dimensions of their lives: (i) *health*; (ii) *safety*; (iii) *achievement and enjoyment of life*; (iv) *relationships with family, peers, community, culture and society*; and (v) *preparedness for adulthood*.

The Snapshot should be used to inform the development of the first Outcomes Framework. However, an Outcomes Framework should be expanded to include qualitative data eg for self-reporting by children and young people in connection with measures of health, wellbeing, optimism about the future etc.

Should a CDC not be established, the responsibility for the establishment of an Outcomes Framework should preferably rest with the Minister or alternatively with the Children's Commissioner. In considering this, one should consider that although a Children's Commissioner should be able to influence the measures included in an Outcomes Framework and utilise the data, he/she should **not** be responsible for the actual production or maintenance of an Outcomes Framework.

This caution arises from the Council's experiences in producing three editions of the Snapshot in 2009, 2013 and 2015. The production of a monitoring (or Outcomes) framework is a resource-intensive, administrative function which calls for specialists skills eg specific and dedicated research and data analysis skills and expertise, especially if it is to be created and maintained as a 'living' and dynamic document on a website that can be updated with newly published data.

The production and management of an Outcomes Framework would be a largely operational function that could readily be undertaken within a substantial government agency such as the Department for Education and Child Development (DECD). DECD already has significant resources and expertise in qualitative and quantitative data collection, management and reporting. For example, DECD has set up the Fraser Mustard Centre, and the agency has robust mechanisms and dedicated human resources devoted to data collection for the Australian Early Development Census (AEDC) and to produce the Middle Years Development Index (MDI).

For information, a hard copy of the Snapshot is enclosed and it is available on the Council's website <http://www.childrensa.sa.gov.au/wellbeing/outcomes-framework.html>.

For consideration – responsibility for and production of an Outcomes Framework

Please carefully review and clearly articulate a policy position regarding the Outcomes Framework and then shape the provisions of the new Bill accordingly.

10 Charter for Children and Young People

Please carefully review and clearly articulate a policy position regarding a Charter for Children and Young People (Charter). In view of the significantly enhanced role, functions and powers of a Children's Commission in the new Bill, active consideration should be given to the Children's Commissioner having responsibility for a Charter.

For consideration – Charter for Children and Young People

Please carefully review and clearly articulate a policy position regarding the Charter and then shape the provisions of the new Bill accordingly.

11 Charter of Rights for Children and Young People in Care

The GCYP's Charter of Rights for Children and Young People in Care (Charter of Care) which is provided for in Part A of the CPA was developed by children and young people and is a catalyst in guiding the work of the GCYP and in engaging government and NGO stakeholders as Charter Champions.

Children and young people in care face additional vulnerability. Recently a separate charter has been created for children and young people in youth detention facilities. Although consideration should be given to the interaction and scope of different charters, it would be appropriate to include provision in the new Bill for a separate Charter of Care.

For consideration – Charter of Care

Please consider including provisions in the new Bill for a GCYP's Charter of Care. Thank you.

The Council for the
Care of Children



About the Council for the Care of Children

The Government of South Australia established the Council for the Care of Children in 2006 under the *Children's Protection Act 1993* and the Council's functions and responsibilities extend to all children and young people in SA from birth up to 18 years of age.

In looking out for children and young people across all communities and sectors in South Australia ('SA'), the Council advises government and others, and works collaboratively with state and national stakeholders, with the aim of ensuring children and young people in SA are cherished, nurtured and respected.

Broadly speaking, the Council's role in SA can be summarised as:

- advocating for and supporting the active participation of children and young people as valued citizens
- improving outcomes for children and young people by providing expert advice to government on their rights, needs and interests and the implications for policy, practice, and research
- raising awareness of issues impacting on children and young people
- monitoring the wellbeing of children and young people from birth to 18 years of age
- promoting the wellbeing, safe care and development of vulnerable children and young people (especially those with disability and/or under the guardianship of the Minister and/or who are Aboriginal or Torres Strait Islander).

One of the South Australian Government's seven key priorities is priority no 4, *Every chance for every child* which refers to all children and young people in SA up to 18 years of age. *Every chance for every child* aims to provide children and young people with the best possible start in life and to assist families to provide the best possible support for their children.

The Council supports *Every chance for every child*. This strategic direction is well-aligned with the Council's legislative mandate in SA and with the principles of the international human rights instruments which Australia upholds including the:

- United Nations Convention on the Rights of the Child
- United Nations Convention on the Rights of Persons with Disability
- United Nations Declaration on the Rights of Indigenous Peoples.

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