

*The Council for the Care of Children*

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## *Submission*

# Protection and Wellbeing of Children and Young People (Oversight and Advocacy Bodies) Bill 2016

26 August 2016

The Council for the  
**Care of Children**



 Government of  
South Australia

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## Protection and Wellbeing of Children and Young People (Oversight and Advocacy Bodies) Bill 2016

### SUBMISSION from THE COUNCIL FOR THE CARE OF CHILDREN

#### 1 Establishment of a Children's Commissioner

Overall, the *Protection and Wellbeing of Children and Young People (Oversight and Advocacy Bodies) Bill 2016* (Bill) has clear and concise provisions for the establishment of a Commissioner for Children and Young People (Children's Commissioner) with a systemic oversight and advocacy function in South Australia (SA).

The Bill appears to encapsulate and blend some of the best features of the:

- Child Development and Wellbeing Bill 2014 (as restored to the Notice Paper in the Legislative Counsel on 11 February 2015) (Gov't Bill)
  - Opposition's Commissioner for Children and Young People Bill 2014,
- as well as incorporating the recommendations of the Child Protection Systems Royal Commissioner (Royal Commission).

#### 2 Terms and conditions of appointment

The Council for the Care of Children (the Council) supports the inclusion of clarification that the Commissioner is not a Public Service employee.

The Council notes that the provisions in the Gov't Bill for a 'scheme determined by the Minister' to be published in the Gazette and on a website has not been included in the Bill.

In the interest of a transparent process and in genuine and respectful partnership with key stakeholders, including children and young people, this is of concern.

Please consider including a provision to ensure the process for the recruitment and selection of a Children's Commissioner is transparent and genuine.

#### 3 Functions of the Children's Commissioner

The Council strongly supports the Bill's provisions headed 'General functions of the Commissioner', in particular:

- a provision to advise and make recommendations to other bodies eg non-government bodies (not only State authorities), regarding 'matters related to the rights, development and wellbeing of...at a systemic level'
- the removal of the following functions that had been included in the Gov't Bill that would have required the Children's Commissioner to:
  - 'guide, cooperate with and monitor State authorities' regarding the rights, development and wellbeing of children and young people

- 'monitor the way in which State authorities investigate and otherwise deal with complaints...'
- 'monitor trends in complaints...'

#### 4 Staffing and resources

Clauses 11 (Employees) and 12 (Use of staff etc of Public Service) do not provide for adequate resources to be provided to the Children's Commissioner to enable him/her to carry out the prescribed tasks and role.

Part 7A, section 52B, of the *Children's Protection Act 1993* specifically provides for funding for the Guardian for Children and Young People as follows: '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 Council recommends the inclusion of a similar provision for the Children's Commissioner to ensure the Children's Commissioner is fully funded to fulfil his/her legislative mandate.

#### 5 Children's Commissioner's powers to inquire into matters and to make recommendations

The inclusion in clause 13 (General functions of Commissioner) of other bodies, including non-government bodies is strongly supported.

- In the interest of consistency and improving the outcomes of children and young people, the Council recommends that consideration be given to the inclusion of similar provisions in clauses 14 (Commissioner may inquire into matters affecting children and young people at systemic level) and 16 (Recommendations).
- This would extend the Children's Commissioner's remit to bodies funded to provide services to children and young people under the *Children's Protection Act 1993*, independent schools etc. The latter sector might not be receptive to such provisions however, it should be considered.

Clause 14, sub-clause (4) of the Bill provides that the 'Commissioner must not conduct an inquiry under this section if to do so would be likely to impede an investigation...by an inquiry agency.'

- Is 'inquiry agency' defined in the Bill? It should be and/or this provision should be clearly interpreted and carefully defined to ensure it does not unnecessarily limit the circumstances under which the Children's Commissioner can undertake an inquiry in parallel with other inquiries.
- With reference to the practice of adverse event inquiries/root cause analysis in health settings (to identify what went wrong and to promptly effect continuous improvement of systems and services), the Children's Commissioner should not have to await the outcome of, say, a coronial inquest (frequently two to three years) or the outcome of a police/court process before being able to inquire into matters.

## 6 Tabling of reports

The Council supports the changes that require a report to be tabled within six sitting days (as opposed to within 12 sitting days in the Gov't Bill).

The Council observes that the Minister is required to prepare a report for Parliament in response to a report from the Children's Commissioner however, no period of time in which the Minister must respond (with a report) has been provided for.

With reference to clauses 16 (Recommendations) and 17 (report of an inquiry under clause 14) of the Bill, please consider:

- specifying the period of time in which the Minister must prepare a report for tabling or
- providing for the Children's Commissioner to specify a time (determined with reference to the nature of the Children's Commissioner's report) that has to be responded to by the Minister with a report for tabling or
- providing for the Children's Commissioner and the Minister to agree on a timeline in which the Minister will/must prepare a report for tabling.

## 7 Appointment of acting Commissioner

The Council provides in principle support for this provision however, it should only be used when the successful applicant has been appointed to the position of Children's Commissioner. The provisions should *not* be enacted early and utilised to appoint an acting Children's Commissioner prior to a genuine and transparent recruitment and selection process.

A less than ideal interim appointment could have disastrous long term impacts on the position and on community confidence and goodwill. The Council reiterates in the strongest sense possible, concerns regarding due process for any appointment (including the genuine involvement of children and young people in a transparent recruitment and selection process).

Given the significant lapse of time since the Layton recommendation for a Children's Commissioner, there is no justification to rush into an appointment.

## 8 Other matters

In the absence of being able to review and comment in a holistic manner on the provisions for a Children's Commissioner in the overall context of a complete draft bill, the Council proactively raises a number of other matters.

The Gov't Bill's Objects and Principles clarified that the Gov't Bill:

- imposed a duty on State authorities to cooperate...
- established the Children's Commissioner to provide an authoritative voice and to hold decision makers to account on a systemic level.

It is the Council's assumption that the Bill will have Objects and Principles to reflect that the Children's Commissioner having an expansive system-wide view and oversight functions (in addition to having the powers of a Royal Commission).

## 9 Declaration

The Gov't Bill<sup>1</sup> included a declaration; '*This Act recognises the competencies and rights of children and young people in our community.*'

Professor Carla Rinaldi recommended that a declaration of the child as 'the competent child and a possessor of rights' be made as a preamble to the (then) newly proposed legislation on child development and wellbeing. This was recommendation 1.1 of her report *Re-imagining Childhood: the inspiration of Reggio Emilia education principles in South Australia* (Re-imagining Childhood).

The Council recommends that a similar declaration be included in the Bill.

The societal responsibilities of children and young people are readily apparent in different settings eg rules at home, school and in the community whereas their rights are not and they lack the political power and opportunities to exercise their rights. Therefore, the draft legislation should feature a declaration about the competencies and rights of children and young people.

## 10 Recruitment and selection

The *Commissioner for Children and Young People Act 2006* (WA) provides for children and young people to be involved in the recruitment and selection process of the Child Commissioner (or equivalent). It is a simple provision, allowing the practicalities of doing so to be dealt with elsewhere.

The draft legislation should specify that children and young people must be comprehensively involved in the recruitment and selection of a Children's Commissioner.

## 11 Involving children and young people

A Children's Commissioner should routinely and regularly involve children and young people in his or her work, including in strategic and annual planning.

The United Kingdom's *Children and Families Act 2014* provides useful guidance and direction about reasonable steps to be taken to involve children and young people in the discharge of the primary function of the Children's Commissioner. In turn, that Office has proactively applied the provisions of this piece of legislation in such a way that it requires children and young people from specified programs to be included in all decisions relating to the recruitment of permanent staff within the Office of the Children's Commissioner.

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<sup>1</sup> Refer <https://www.legislation.sa.gov.au/listBills.aspx?key=C> Refer for Bills of the 2nd session of the 53<sup>rd</sup> Parliament of SA.

Section (s) 11 of the *Children's Commissioner Act 2003* (NZ) describes the matters to which that Commissioner must have regard in exercising functions or powers, including general principles around taking children and young people's wishes into consideration and consulting with them on the making of decisions that will affect them. Of note is that s 14 of that Act requires the Commissioner to develop ways to consult with children and young people and, where practicable, to do so before any significant decisions are made in relation to the exercise of the Commissioner's functions.

While these provisions vary regarding the involvement of children and young people in broader decision making processes that would be likely to affect them, the focus on listening to them and seriously considering their views is nicely set out in the Australian Capital Territory's legislation (*Human Rights Commission Act 2005*). That legislation directs the Commissioner to endeavour to consult with children and young people in ways that promote their involvement in decision making (s 3(a)); to listen to and seriously consider the views of young people (s 3(b)); and to ensure accessibility to children and young people (s 3(c)).

## **12 Reporting on how children and young people have been involved**

It is apparent from the Bill, though not explicit, that a Children's Commissioner would be required to table an annual report.

The provisions should require a Children's Commissioner in SA to report to Parliament annually on how the views of children and young people have been sought, and included, in accordance with his/her legislative functions.

## **13 Review of a Children's Commissioner**

In addition to providing for a review of the legislation, there should be a requirement for review of the Children's Commissioner, including reviews of the role, functions, operations and resources. It should be apparent that the purpose of such reviews should not be to do away with the Children's Commissioner, but to appropriately tailor and strengthen the role. Any review should involve children and young people.

## **14 Title of the Bill**

The *Children's Protection Act 1993* (SA) provides for the protection of children and young people. Therefore, it is of the utmost importance that the new legislation should not be burdened with a title that reflects paternalism and protectionism.

To the greatest extent possible, the new legislation should be complementary to existing South Australian legislation rather than duplicate or overlap existing legislation.

The inclusion of the declaration in the Gov't Bill was in response to a recommendation by Professor Carla Rinaldi, former Thinker-in-Residence, in

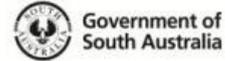
her 2013 Re-imagining Childhood report. The declaration was an appropriate inclusion as the draft legislation should:

- lead the way in creating a new narrative about children and young people in this State and its title should be reflective of a rights based and an empowerment approach
- articulate the citizenship of children and young people
- recognise children and young people as contributing members of the community in their own right in accordance with their ages and abilities.

In making children and young people more visible and socially included and in respecting their citizenship now, not at some point in the future, the legislation should be named to echo the statutory and common law rights of children and young people as well as their rights set out in international human rights instruments.

The Council urges, in the strongest sense possible, that the title of the new legislation be changed to remove any reference to 'protection' and 'oversight' and to instead strengthen the focus on advocacy and on the rights, development, wellbeing; empowerment and social inclusion of children and young people in SA.

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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