

Review and Analysis

*Children and Young People
(Oversight and Advocacy Bodies) Act 2016 (SA)*

and

*Children and Young People
(Oversight and Advocacy Bodies) Regulations 2017 (SA)*

18 April 2018



Government of
South Australia



Child
Development
Council

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1. Introduction

The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (OAB Act) establishes two new oversight and advocacy bodies – a Commissioner for Children and Young People (Commissioner) and a Child Development Council (Council). It also continues two existing bodies – the Guardian for Children and Young People (Guardian) and the Child Death and Serious Injury Review Committee (Committee).

2. Purpose

This document presents the findings of a detailed review and analysis of the OAB Act and accompanying *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (OAB Regulations).

It aims to help newly appointed members of the Council become familiar with their statutory obligations by:

1. summarising the provisions contained in the OAB Act and OAB Regulations
2. explaining the scope of powers provided to the four oversight and advocacy bodies and detailing the individual statutory requirements for each body
3. identifying opportunities for collaboration
4. highlighting any anomalies or inconsistencies that may hinder the work of one or more of the oversight and advocacy bodies or contribute to a duplication of effort.

The document concludes with three recommendations.

3. Legislative Background

The process leading to the introduction of the OAB Act has been a long one, beginning in 2002 with a review into South Australia's child protection system by the Hon Justice Robyn Layton QC.

Figure 1: A long road to the OAB Act 2016



Layton's report, *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* was handed down in 2003 and recommended, amongst other things, that South Australia introduce a Commissioner for Children and Young Persons.¹

A host of other reviews into the State's child protection system occurred over the next decade, including an inquiry into children in state care in 2008, conducted by the Hon Ted Mullighan QC;² the appointment of a Select Committee on Families SA in 2007;³ the Independent Education Inquiry conducted by the Hon Bruce DeBelle AO QC in 2013;⁴ and the 2014 Legislative Council Select Committee into Statutory Child Protection and Care in South Australia.⁵

In 2014, the Government introduced the Child Development and Wellbeing (CD&W) Bill 2014, which sought to appoint a Commissioner. The Bill was passed by the House of Assembly (without amendment) but did not progress through the Legislative Council in early 2015, partly because the Government wanted to first consider any recommendations to emerge from the Child Protection Systems Royal Commission.

In 2016, the Hon Justice Margaret Nyland submitted the *Child Protection Systems Royal Commission report: The Life They Deserve* (Royal Commission Report), which again called for the introduction of a Commissioner (Recommendation 245).

In response, the Government introduced the Children and Young People (Oversight and Advocacy Bodies) Bill 2016, which passed through both Houses of Parliament in late 2016.

The OAB Act came into effect on 10 November 2016,⁶ paving the way for the appointment of South Australia's first Commissioner. However, operation of the provisions relating to the Commissioner's functions and powers (pt 2 div 2) and reporting obligations (pt 2 div 3) was suspended until 18 December 2017.

¹ South Australia, Child Protection Review, *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* (2003) 1.3.

² <https://www.childprotection.sa.gov.au/sites/g/files/net691/f/cisc-complete.pdf>

³ <https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=3&CId=149&PIId=51>

⁴ <http://www.saasso.asn.au/wp-content/uploads/2013/11/DeBelleInquiry.pdf>

⁵ <https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=3&CId=307>

⁶ South Australia, *South Australian Government Gazette*, No 72, 10 November 2016, 4391.

Commencement of the transitional provisions and related amendments detailed in Schedule 1 was also deferred until 18 December 2017, at which time the Act was fully proclaimed.

It was on this date that the provisions enabling the establishment of the Council (pt 6); the continuation of the Guardian (pt 3) and Committee (pt 4); and the requirement for State authorities to give effect to relevant human rights instruments (s 5) therefore commences.

Likewise, the provisions defining the meaning of 'rights', 'development' and 'wellbeing', as well as those allowing for the referral of matters affecting children and young people (pt 5); those relating to obstruction (s 64); false or misleading statements (s 65); victimisation (s 67); service (s 69) and review of the Act (s 70) also came into effect.

The OAB Regulations commenced on 5 December 2017.

4. Discussion

a. Summary of statutory provisions

The OAB Act is divided into eight main parts.

Part 1 contains preliminary provisions about commencement (s 2) and interpretation (s 3). Importantly, it also defines the meaning of rights, development and wellbeing (s 4); three concepts that are critical to the underlying sentiment of the OAB Act. In addition, this part emphasises the expectation that, in carrying out their functions, prescribed people or bodies will seek to give effect to internationally recognised human rights instruments, such as the *United Nations Convention on the Rights of the Child* (s 5).

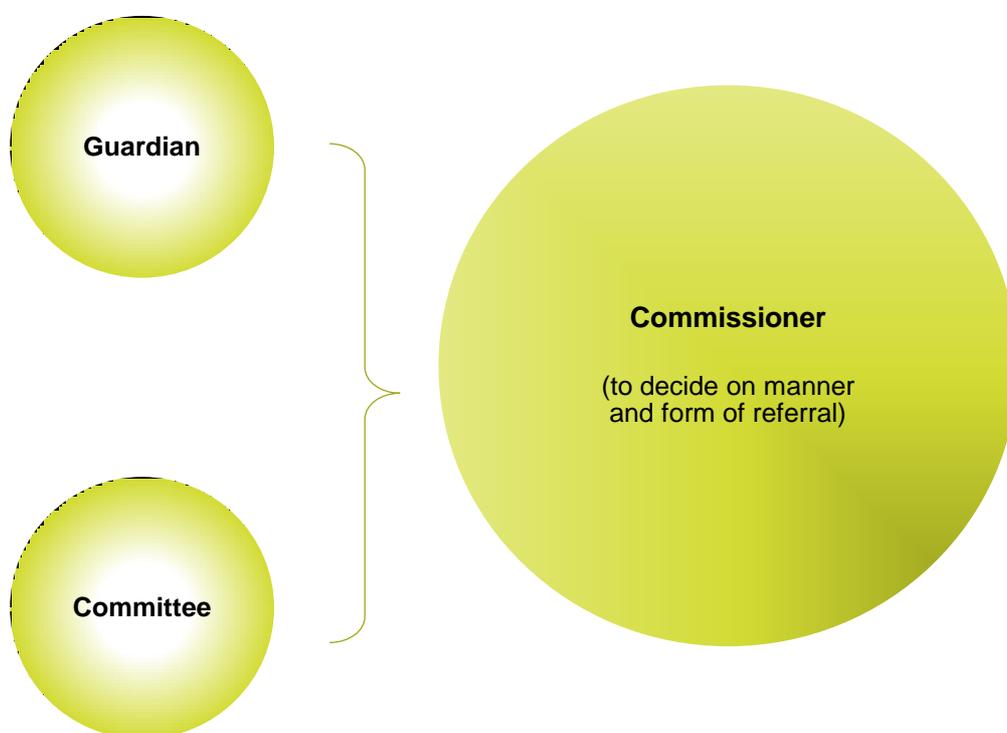
Part 2 provides the legislative basis for the establishment of the Commissioner, while **Parts 3** and **4** continue the existence of the Guardian and Committee, respectively.

Part 5 sets out the available processes for escalating or referring matters affecting children and young people to the Commissioner (s 40); inquiry

agencies (s 45)⁷ or other appropriate bodies (s 41); the Ombudsman (s 42); the Health and Community Services Complaints Commissioner (s 43); or even Parliament (s 44). This part aims to enhance the prospect of recommendations being implemented, as intended, by the relevant agencies,⁸ arguably strengthening⁹ the abilities of the Guardian and Committee to perform their existing duties.

Figure 2: Ability to escalate or refer matters

Figure 2A: Referrals to Commissioner



⁷ Inquiry bodies are defined in the legislation to include the South Australia Police; the Ombudsman; the State Coroner; the Independent Commissioner Against Corruption; the Commissioner for Public Sector Employment; the Health and Community Services Complaints Commissioner; and the Guardian.

⁸ South Australia, Child Protection Systems Royal Commission, *The life they deserve* (2016) 600.

⁹ South Australia, *Parliamentary Debates*, Legislative Council, 20 September 2016 (The Hon. P. Malinauskas, Minister for Police, Minister for Correctional Services, Minister for Emergency Services, Minister for Road Safety).

Figure 2B: Referrals to appropriate bodies

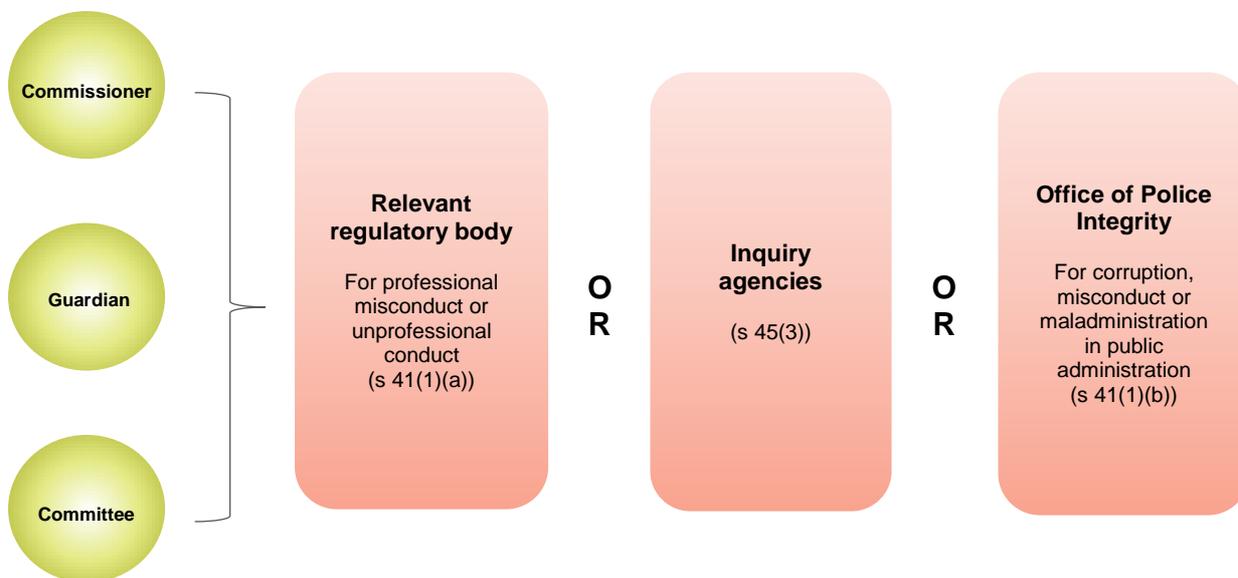
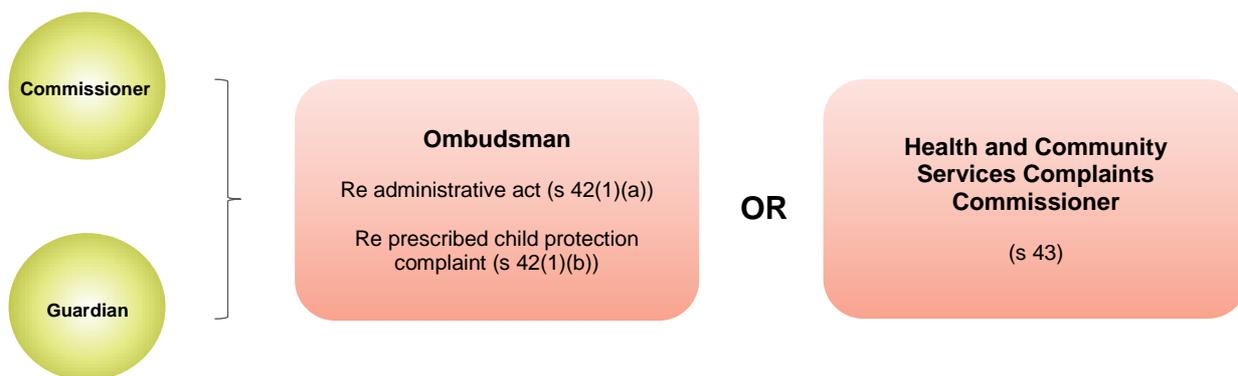
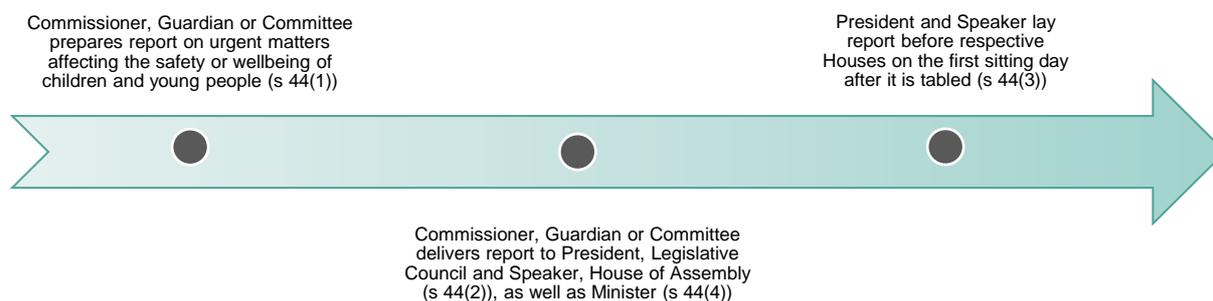


Figure 2C: Complaints to Ombudsman or Health and Community Services Complaints Commissioner¹⁰



¹⁰ Complaints can be made on behalf of a child or young person or on behalf of a class of children and young people.

Figure 2D: Immediate reports to Parliament



Part 6 establishes the Council and offers some guidance about the preparation of the Outcomes Framework for Children and Young People (Outcomes Framework). Additional guidance about the development, maintenance and promotion of the Outcomes Framework are contained in the OAB Regulations (reg 12).

Part 7 prescribes the requirements around information sharing. Enabling the sharing of de-identified data amongst the oversight and advocacy bodies was one of the recommendations made in the Royal Commission Report (Recommendation 250) and subsequently accepted by Government, thus making it an important part of the legislative framework.

Part 8 contains standard provisions relating to confidentiality (s 66); victimisation (s 67); and the making of accompanying regulations (s 71). It also prescribes the penalties associated with obstructing (s 64) the functions of the oversight and advocacy bodies or providing false or misleading information (s 65).

Schedule 1 contains the transitional provisions and related amendments to support the commencement of the Act.

The OAB Regulations provide additional detail about the operation of the OAB Act, including details about the recruitment scheme for the Commissioner (reg 6); the database maintained by the Committee (reg 10); the consultation requirements imposed on the Council in relation to the Outcomes Framework (reg 12(1)); and the requirements relating to the provision and sharing of information (reg 14).

b. Scope of powers

Overarching scope

Although the primary purpose of the OAB Act is to establish the two new oversight and advocacy bodies and to continue the functions of the existing bodies, its broader objective appears to be about creating a 'legislative framework [that focuses] on the rights, development and wellbeing of children and young people'.¹¹

As a signatory to the *United Nations Convention on the Rights of the Child*, Australia has agreed to be bound by the 54 articles that set out the civil, political, economic, social and cultural rights of children and young people. This means that Australia has an obligation to meet the basic needs of children and young people and to support them to grow and develop in a way that allows them to reach their full potential.

In 2016, it was acknowledged in the Legislative Council that a specific focus on the rights, development and wellbeing of children and young people had historically been absent in South Australia, noting that previous legislation was geared more towards regulating and directing 'service provision for children and young people in specific settings and circumstances, such as in relation to education, care, health and child safety'.¹²

The introduction of the OAB Act requires all State authorities, as defined in section 3(1), to proactively consider the rights of children and young people and to carry out their functions in a way that will support the development and wellbeing of this cohort.

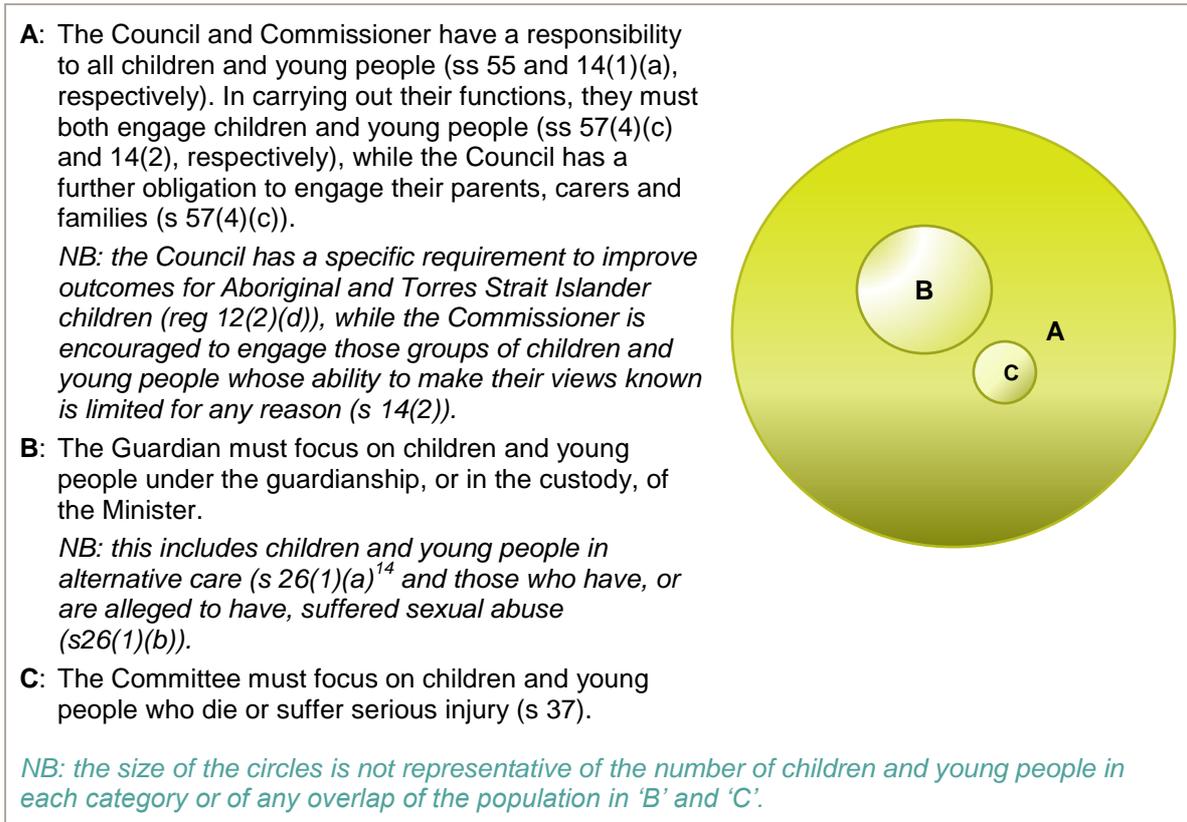
As depicted in Figure 3, all four oversight and advocacy bodies have a unique, yet critical, role to play in helping to achieve this broader objective and, arguably, to accomplish 'a more complete, cohesive and accessible network for review and oversight',¹³ as envisaged by Commissioner Nyland.

¹¹ South Australia, *Parliamentary Debates*, Legislative Council, 20 September 2016 (The Hon. P. Malinauskas, Minister for Police, Minister for Correctional Services, Minister for Emergency Services, Minister for Road Safety)

¹² South Australia, *Parliamentary Debates*, Legislative Council, 20 September 2016 (The Hon. P. Malinauskas, Minister for Police, Minister for Correctional Services, Minister for Emergency Services, Minister for Road Safety)

¹³ South Australia, Child Protection Systems Royal Commission, *The Life They Deserve* (2016) 582.

Figure 3: The unique, yet critical, roles of the oversight and advocacy bodies



Individual statutory requirements

Child Development Council

The Council will be instrumental in guiding ‘the Government’s work for children and young people’¹⁵ across South Australia.

Primary function

As depicted in Figure 4, the Council’s primary function is to ‘prepare and maintain the Outcomes Framework for children and young people’ (s 55(1)).

In doing so, the Council has a statutory obligation to act in accordance with the Minister’s instructions (s 57(4)(a)); consult with prescribed or other

¹⁴ Alternative care is defined in s 26(4) as being ‘care provided for a child on a residential basis (a) by, or through, a government agency; or (b) in a foster home (including a foster home provided by a member of the child’s family); and includes care provided in a detention facility for a child who is held there in lawful detention and care provided under independent living arrangements made for a child under the Minister’s guardianship’.

¹⁵ South Australia, *Parliamentary Debates*, Legislative Council, 20 September 2016 (The Hon. P. Malinauskas, Minister for Police, Minister for Correctional Services, Minister for Emergency Services, Minister for Road Safety).

appropriate bodies and people (s 57(4)(b); engage with children and young people (s 57(4)(c)); and ensure the needs of priority population groups receive an appropriate level of focus (s 57(4)(d)).

The Council is also required to develop performance indicators that will allow the development and wellbeing of children and young people across South Australia to be tracked over time (s 57(4)(e)).

While the OAB Act explicitly requires the Council to include a 'Charter for Children and Young People' (s 57(2)) in the Outcomes Framework, it falls short of dictating what else must be included.

The OAB Regulations are more prescriptive.

They require the Council to develop an Outcomes Framework that provides a cooperative (reg 12(2)(c)), whole of government approach by (State and Local Government) to the setting of objectives or to the development and implementation of policies relating to, or affecting, children and young people (reg 12(2)(a)) in the areas of health; safety; wellbeing; education; and preparedness for adulthood (reg 12(2)(b)).

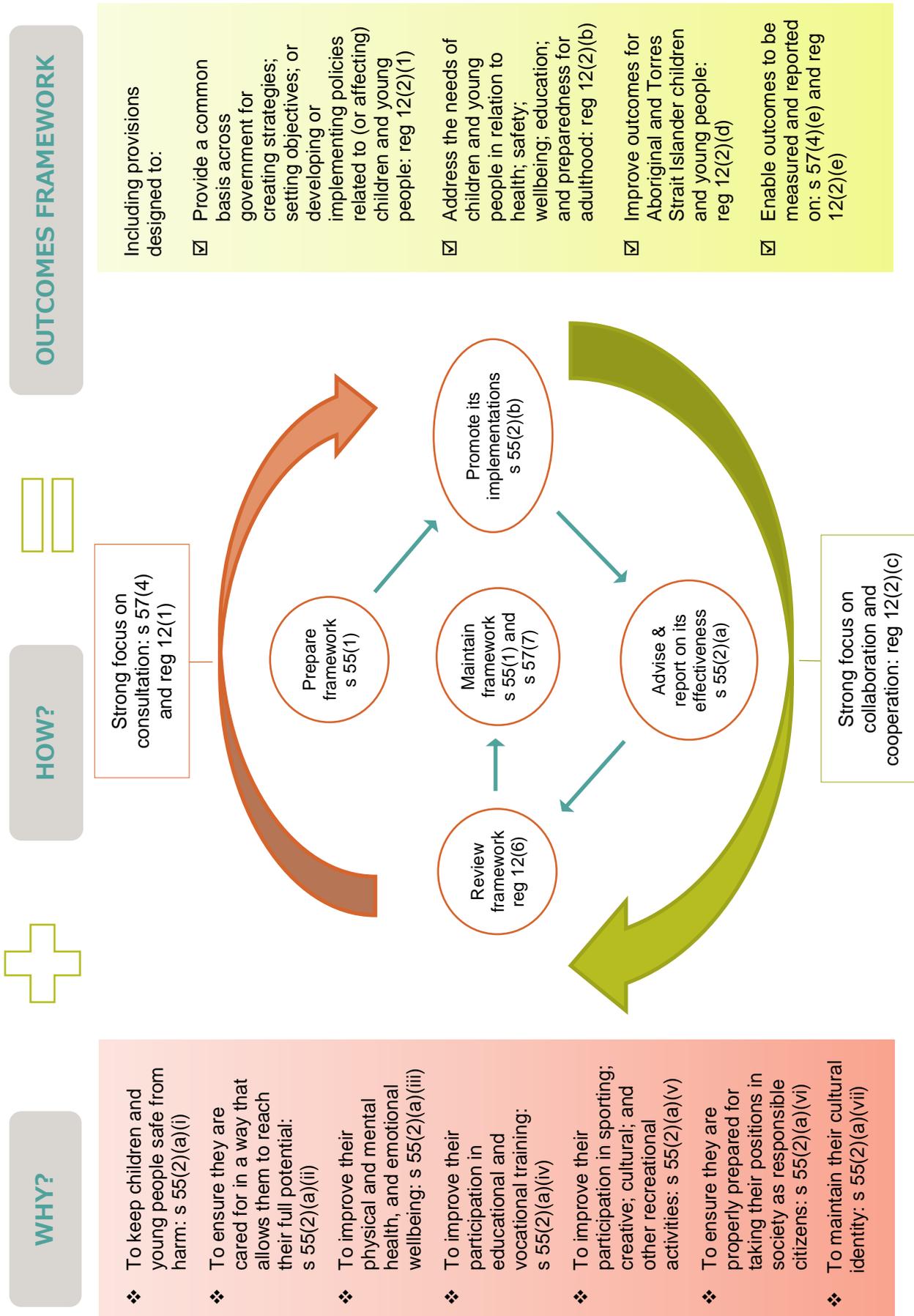
They further state that a special focus needs to apply in the case of Aboriginal and Torres Strait Islander children and young people (reg 12(2)(d)).

In addition, the OAB Regulations require the Council to proactively consult with prescribed persons and bodies (reg 12(1)), as well as persons or bodies specified (reg 12(3)(a)), or otherwise directed (reg 12(3)(b)), by the Minister when preparing and maintaining the Outcomes Framework.

Figure 4 maps the process to be followed by the Council in carrying out its functions.

Please note: in preparing the Outcomes Framework, the Council may consider using existing local, national or international frameworks to inform itself, including the Council for the Care of Children's *A Snapshot for Young South Australians*.

Figure 4: Preparing and maintaining the Outcomes Framework



Additional functions

The Council must also 'advise and report [...] on the effectiveness of the Outcomes Framework' (s 55(2)(a)); a view reiterated by regulation 12(2)(e), which requires the Outcomes Framework to incorporate provisions that allow for specified data to be collected so that it can inform how the development and wellbeing of children and young people is tracking over time (s 57(4)(e)).

Furthermore, it needs to promote the implementation of the Outcomes Framework across the state (s 55(2)(b)).

Possible functions

The Council may also be assigned other functions by the Minister or in accordance with the provisions of any relevant legislation (s 55(2)(c)).

Commissioner for Children and Young People

Similarly, the Commissioner has a crucial role to play in advocating for, and promoting the rights and interests of, all children and young people across South Australia.

The Commissioner's functions can be grouped into five main categories:

- promotion and advocacy (ss 14(1)(a) and (b))
- provision of advice and making of recommendations (ss 14(1)(c) and 17))
- inquiring into matters affecting children and young people at a systemic level (ss 14(1)(d) and 15)
- reporting (ss 14(1)(g), 18, 19 and 20)
- research (s 14(1)(f)).

In carrying out these functions, the OAB Act expressly requires the Commissioner to consult with and engage children and young people, particularly those whose ability to make their views known may be limited for any reason (s 14(2)).

Guardian for Children and Young People

Unlike both the Council and the Commissioner, the Guardian has a specific mandate to focus only on children and young people under the guardianship,

or in the custody, of the Minister, particularly those in alternative care or who have suffered (or allegedly suffered) sexual abuse.

The Guardian does this through five main functions, including promotion and advocacy (s 26(1)(a) and (b)); monitoring (s 26(1)(c)); provision of advice (s 26(1)(d)); inquiring into whether systemic reform is necessary to improve the quality of care provided to children in alternative care (s 26(1)(e)); and investigating and reporting (ss 26(1)(f), 28 and 29).

The OAB Act requires the Guardian to ensure children and young people participate in 'strategic, policy or systemic practice development or review processes' (s 27).

Child Death and Serious Injury Review Committee

The Committee also has a specific focus, having been tasked with reviewing child death or serious injury cases, with a view to preventing similar cases in the future (s 37(1)(a)).

Additionally, the Committee is responsible for making recommendations about ways to avoid preventable child deaths and serious injury (s 37(1)(b)), as well as maintaining a database of child deaths and serious injury that encapsulates the associated circumstances and causes (s 37(1)(c)).

The OAB Act is very explicit about when, and under what circumstances, the Committee can review a child death or serious injury (ss 37(2)-(7)).

Table 1: Opportunities for collaboration

	Council	Commissioner
Promote	<ul style="list-style-type: none"> The implementation of the Outcomes Framework: s 55(2)(b) 	<ul style="list-style-type: none"> The rights and interests of all children and young people in South Australia: s 14(1)(a)
		<ul style="list-style-type: none"> Participation by children and young people in the making of decisions that affect their lives: s 14(1)(b)
Advocate		<ul style="list-style-type: none"> For the rights and interests of all children and young people: s 14(1)(a)
Review		
Prepare and maintain	<ul style="list-style-type: none"> The Outcomes Framework: s 55(1). <i>NB: this must occur in accordance with any instructions of the Minister: s 57(4)(a)</i> 	
Advise	<ul style="list-style-type: none"> The Government on the effectiveness of the Outcomes Framework: s 55(2)(a) 	<ul style="list-style-type: none"> Ministers, State authorities and other bodies about matters relating to the rights, development and wellbeing of children and young people: s 14(1)(c)
Recommend		<ul style="list-style-type: none"> Ways for state authorities to achieve specified outcomes: s 17
Monitor		
Inquire		<ul style="list-style-type: none"> Into matters affecting the rights, development and wellbeing of children and young people at a systemic level: s 14(1)(d) and s 15. <i>NB: inquiries conducted under s 15 are at the Commissioner's absolute discretion and cannot be directed or controlled by the Crown or any Minister or officer of the Crown, as per s 7(2)</i>
Investigate		
Report	<ul style="list-style-type: none"> To the Minister on the performance of its functions during the preceding financial year: s 56(2) 	<ul style="list-style-type: none"> To the Minister on the performance of its functions during the preceding financial year: s 13A
	<ul style="list-style-type: none"> On the performance of its functions or on any other matter specified by the Minister: s 56(1) 	<ul style="list-style-type: none"> On Commissioner's views about the failure or refusal of a State authority to implement a recommendation: s 17(4). <i>NB: submitting such a report is optional.</i>
		<ul style="list-style-type: none"> On any 'own motion' inquiry conducted pursuant to s 15: s 18
		<ul style="list-style-type: none"> On other matters relating to the rights, development and wellbeing of children and young people at a systemic level: s 14(1)(g) and s 19. <i>NB: submitting these reports is optional.</i>
		<ul style="list-style-type: none"> On any matter related to the Commissioner's function that raises issues of such importance to the safety or wellbeing of children and young people that the Parliament should be made aware of the matter as a matter of urgency: s 44(1)
Research		<ul style="list-style-type: none"> Commission research on topics related to children and young people: s 14(1)(f)
Support		<ul style="list-style-type: none"> South Australia's achievement of international obligations relating to children and young people: s 14(1)(e)
Other	<ul style="list-style-type: none"> As may be assigned to the Council by this or any other Act: s 55(2)(c) 	<ul style="list-style-type: none"> As may be conferred on the Commissioner by this or any other Act: s 14(1)(h)

Table 1: Opportunities for collaboration

Guardian	Committee
<ul style="list-style-type: none"> The best interests of children under guardianship or in custody of the Minister, especially those in alternative care: s 26(1)(a) 	
<ul style="list-style-type: none"> For the interests of children under guardianship or in custody of the Minister, especially those who have suffered or allegedly suffered sexual abuse: s 26(1)(b) 	
	<ul style="list-style-type: none"> Cases in which children die or suffer serious injury: s 37(1)(a)
	<ul style="list-style-type: none"> A database of child deaths and serious injuries, along with associated circumstances and causes: s 37(1)(c)
<ul style="list-style-type: none"> The Minister on the quality of care for children under guardianship or in custody of the Minister, especially as to whether their needs are being met: s 26(1)(d) 	
<ul style="list-style-type: none"> The Minister on ways to improve the quality of care provided for children in alternative care at a systemic level: s 26(1)(e) 	
	<ul style="list-style-type: none"> Ways to avoid preventable child death or serious injury: s 37(1)(b)
<ul style="list-style-type: none"> The circumstances of children under guardianship or in custody of the Minister: s 26 (1)(c) 	<ul style="list-style-type: none"> Implementation of its own recommendations: s 37(1)(b)
<ul style="list-style-type: none"> Into whether systemic reform is necessary to improve the quality of care provided for children in alternative care: s 26(1)(e) 	
<ul style="list-style-type: none"> Matters referred to the Guardian by the Minister: s 26(1)(f) 	
<ul style="list-style-type: none"> To the Minister on the performance of its functions during the preceding financial year: s 28(2) 	<ul style="list-style-type: none"> To the Minister on the performance of its functions during the preceding financial year: s 39(2)
<ul style="list-style-type: none"> On the performance of its functions or on any other matter specified by the Minister: s 28(1) 	<ul style="list-style-type: none"> On the performance of its functions or on any other matter specified by the Minister: s 39(1)
<ul style="list-style-type: none"> On matters referred to the Guardian by the Minister: s 26(1)(f) 	
<ul style="list-style-type: none"> On any matter related to the Guardian's function(s) that raises issues of such importance to the safety or wellbeing of children and young people that the Parliament should be made aware of the matter as a matter of urgency: s 44(1) 	<ul style="list-style-type: none"> On any matter related to the Committee's function(s) that raises issues of such importance to the safety or wellbeing of children and young people that the Parliament should be made aware of the matter as a matter of urgency: s 44(1)
<ul style="list-style-type: none"> As may be conferred on the Guardian by this or any other Act: s 26(1)(g) 	

c. Opportunities for collaboration

The four oversight and advocacy bodies all have individual statutory obligations to fulfil, as summarised in Table 1.

While there are some synergies in the functions to be performed by each body, there are few obvious crossovers in the operationalisation of those functions. This is primarily because the Council and Commissioner have a broad responsibility to all children and young people in South Australia, while the Guardian and Committee have a narrower focus that enables them to delve more deeply into individual matters.

Nonetheless, there is both an explicit and implied expectation within the OAB Act and OAB Regulations that the four bodies lead State authorities in working collaboratively to improve outcomes for children and young people in South Australia.

Some collaboration opportunities are mandated,¹⁶ but an array of other non-mandated opportunities also exist. For example, regular communication between the four bodies about priority focus areas or emerging topical issues could provide an opportunity to prepare and submit joint submissions or to share de-identified data that could aid, or complement, the Commissioner's research agenda.

Capitalising on these collaboration opportunities, and making them the norm, is likely to magnify the effect and reach that each individual oversight and advocacy body will have on improving outcomes for South Australian children and young people.

Developing a referral mechanism or protocol (such as a Memorandum of Understanding) that explores the potential benefits of collaboration; provides guidance and/or examples about the types of scenarios under which a collaborative approach could be triggered; and outlines an agreed process could be the first step in operationalising the notion of 'collaboration' and taking a joint approach to improving outcomes for children and young people.

¹⁶ For example, s 52 allows for the Commissioner, or a person authorised by the Commissioner, to attend Council meetings and/or have access to any meeting papers. Additionally, the Council must consult with the Commissioner when developing the Outcomes Framework (s 57(4)(b)(i)).

Once established, further opportunities at a more operational level may present themselves. For example, efficiencies may be able to be gained by sharing resources, skills and knowledge across the four bodies.

d. Anomalies and inconsistencies

A detailed review of the Act revealed some anomalies and inconsistencies that would benefit from further consideration and/or clarification.

Giving effect to the Outcomes Framework

The Council has been tasked with developing an Outcomes Framework that provides a whole of government approach to the setting of objectives or to the development and implementation of policies relating to, or affecting, children and young people (reg 12(2)(a)).

Furthermore, the Outcomes Framework must require State authorities and other relevant persons or bodies to cooperate and, where possible, collaborate when performing functions or duties that relate to, or affect, children and young people (reg 12(2)(c)).

While it is the individual responsibility of every State authority to have regard for, and seek to give effect to, the Outcomes Framework (s 58(1)), there is little incentive for them to do so.¹⁷ There are also no provisions for the Council to compel State authorities and other relevant persons or bodies to engage with the Outcomes Framework.

Building strong relationships and developing persuasive, consistent messaging that encourages State authorities to actively support the Outcomes Framework will be crucial for the Council's success. But without a 'compliance regime' in place, the Council may become somewhat of a 'toothless tiger' and have limited capacity to promote effective implementation (s 55(2)(b)) if State authorities do not become involved, of their own accord.

¹⁷ See, for example, s 58(3): a failure to comply will not automatically give rise to any civil liability against the Crown, the State authority or any other person.

Requiring information

Section 61 is entitled 'Commissioner, Guardian or *Council* may require information' [emphasis added]. However, the provisions under this section (especially ss 61(1), (2) and (4)) only allow the Commissioner and Guardian to require information or documentation that is reasonably required for the performance of their functions under the OAB Act. There is specific power for the Committee in s 38(1) to obtain information or documents for a review, however there is no similar, standalone power for the Council.

These provisions appear to be an oversight in drafting, particularly if the instructors to Parliamentary Counsel did not intend for the Council to be afforded this power.

Seeking clarification about this anomaly may be prudent, while a legislative amendment in relation to s 61 may help minimise any future confusion.

No obligation to maintain secrecy

Section 59 allows unrestricted disclosure of information between the Commissioner, Guardian and Committee, provided there is an obligation to keep the identity of an informant or notifier secret.

The Council has apparently been excluded from this provision.

Read in conjunction with Recommendation 250 from the Royal Commission Report,¹⁸ it may be argued that the omission was deliberate and that it is unnecessary for information to be shared with the Council.

However, the Council needs to develop the Outcomes Framework in a way that allows the development and wellbeing of children and young people to be tracked over time (s 57(4)(e)) and there is a risk that exclusion from this unrestricted disclosure provision may hamper the Council's work.¹⁹

¹⁸ 'Amend legislation to permit, but not require, [the Guardian], [Committee] and [the Commissioner] to share de-identified data.'

¹⁹ Section 55(4), which bestows upon the Council any powers 'necessary or expedient' to perform its functions, may come into play in this scenario.

Independence of direction and control by the Minister

The OAB Act specifically prevents the Crown or any Minister or officer of the Crown from directing or controlling both the Commissioner (s 7) and the Guardian (s 21(2)). This is to ensure the two bodies remain completely independent.

Similarly, the OAB Act prevents the Minister from directing the Committee to make specific findings or recommendations (s 30(3)), yet the Committee may still be subject to the direction of the Minister.

There is no similar provision for Council. Section 51(7) refers to 'any direction of the Minister' which indicates an intention for the Minister to direct the Council.

This raises a question about how appropriate it is for the Minister to have such a 'hands on' role with the Outcomes Framework, especially when the Council has been tasked with reporting to Government on the effectiveness of the Outcomes Framework. Providing frank and fearless advice may be difficult under these circumstances.

Consultation

There is a very clear requirement for the Council to consult when developing the Outcomes Framework (ss 57(4)(b) and 57(5)(e), as well as regs 12(1) and 12(3)).

Both the OAB Act and the OAB Regulations make it apparent that the Minister has the power to specify who should be consulted during the development of the Outcomes Framework, explicitly requiring the Council to consult with the Ministers responsible for the education, child protection and health portfolios, as well as their respective departments (reg 12(1)). The Commissioner and Guardian must also be consulted, as well as any other person or body the Minister sees fit.

Although s 57(4)(b) provides for the Council to consult with any other person or body it thinks appropriate, being subject to such stringent prescribed consultation requirements could hinder the Council's ability to consult effectively and with a targeted purpose.

The Outcomes Framework is yet to be developed. While the overall vision for the framework is apparent, the content and specific areas of focus are yet to be determined. In developing the framework, the Council may deem education, child protection and health to be priority focus areas. But, equally, it may find that there are other more pressing priorities in the current climate.

The Council only has limited resources. Using those resources to consult with persons or bodies (who may even be disinterested in, or unqualified to, provide feedback because, for example, the content is not applicable to them), would be an inefficient use of resources, particularly if it was at the expense of identifying, and then consulting with, other persons or bodies with a legitimate interest in, and ability to, provide valuable and substantial input.

Therefore, developing a consultation agenda that predominantly seeks to adhere to the legislative requirements is likely to be ineffectual for everyone concerned. It could skew the information able to be extracted by the Council throughout the consultation process and may, in turn, reduce the effectiveness of both the Outcomes Framework and its subsequent uptake by State authorities.

In contrast, having a more flexible consultation regime should support the Council to be more dynamic and responsive in its approach to consultation, thus allowing new or emerging areas of need to be identified, investigated and addressed quickly. The more responsive the consultation process can be, the greater the likelihood that the Outcomes Framework will be relevant to the contemporary needs of children and young people and supported by State authorities.

Governance

Despite the Council and Committee having been established under similar 'committee structure' arrangements, there are some obvious differences in how the governance arrangements for the two bodies have been drafted.

For example, the Council is required to meet a minimum of six times per calendar year (s 51(2)), while the Committee has a requirement to meet at least five times per calendar year (s 33(2)).

Furthermore, section 32 requires the Minister to appoint a member of the Committee as the presiding member. In contrast, section 48 requires the Minister to appoint one member of the Council as the presiding member and an additional member as the deputy presiding member.

Interestingly, the OAB Act allows for the Minister to appoint deputy members to the Council (s 46(4)), yet the same provision does not apply to the Committee.

By way of further example, Committee members and Council members present at a meeting are all entitled to one vote per question arising (ss 33(5) and 51(5), respectively). However, the Committee's presiding member is to have the casting vote in situations where votes are tied but the Council's presiding member has explicitly been denied a casting vote (s 51(5)).

Finally, section 50 is very prescriptive about the way in which the Council can establish and use sub-committees, while no requirements have been prescribed for how the Committee's sub-committees should function.

While these anomalies are unlikely to present any procedural issues for either body, or limit their work in any way, it does raise the question as to why the sections were drafted differently.

Delegation and use of staff

The delegation provisions differ for all four oversight and advocacy bodies, as demonstrated in Table 2.

Table 2: Delegation provisions

Council	Commissioner	Guardian	Committee
<p>The Council may delegate a function or power under this Act (other than a prescribed body or power):</p> <p>(a) To a member of the Council; or</p> <p>(b) To a committee established by the Council; or</p> <p>(c) To a specified body or person (including a person for the time being holding or acting in a specified office or position): s 49</p>	<p>Subject to this section, the Commissioner may delegate a function or power under this Act (other than a prescribed function or power) to any person or body that is, in the Commissioner's opinion, competent to perform or exercise the relevant function or power: s 10(1)</p>	<p>The Guardian may delegate a function or power under this Act (other than a prescribed function or power) to a specified body or person (including a person for the time being holding or acting in a specified office or position): s 23(1)</p>	<p>The Committee may delegate to a member, or a sub-committee of its members, any of its powers or functions under this Act: s 34(1)</p>

The Committee's delegation provision is the most restrictive of the four, as it prevents any power or function from being delegated beyond the Committee structure.

Although it can be argued that any disadvantage arising from section 34(1) is countered by the Committee's ability to engage an expert to assist in a case review or in carrying out any other aspect of its function (s 36(2)),²⁰ more consistent wording of the 'Delegation' and 'Use of staff' provisions across the four bodies may reduce confusion.

Employees

A further notable anomaly is that section 12 allows the Commissioner to engage employees on terms and conditions determined by the Commissioner, yet there is no comparable provision for the Guardian.

Again, it is unlikely to affect the ability of any oversight and advocacy body to undertake its prescribed function, but the drafting differences are curious.

Terminology

One final inconsistency is that Part 3 – Guardian for Children and Young People and Part 4 – Child Death and Serious Injury Review Committee describe the cohort in question as 'child/ren'. The remainder of the legislation refers to 'children and young people'; a term that is defined in section 3 to mean 'persons who are under 18 years of age'.

One reason for the anomaly might be that the provisions for the continuing entities (the Guardian and the Committee) were removed from the *Children's Protection Act 1993* and inserted into the OAB Act. Although the provisions for the Guardian and the Committee were enhanced in the OAB Act, it would appear that a review for consistency in the use of terminology did not occur.

While it is unlikely to affect the functions of any of the oversight and advocacy bodies, more consistent wording may be appropriate.

²⁰ The OAB Act does not specifically provide for the use of experts in relation to the Council, Commissioner or Guardian.

5. Summary

The legislative framework surrounding the four oversight and advocacy bodies relevant to children and young people, has commenced.

A review of the OAB Act and OAB Regulations noted that the four bodies (the Council, the Commissioner, the Guardian and the Committee) all have very individualised statutory obligations to fulfil, which results partially from their differing mandates.

Nonetheless, the OAB Act lays the foundations for the four bodies to work together and maximise their abilities to improve outcomes for children and young people in South Australia.

It may therefore be prudent to establish a referral mechanism or protocol (such as a Memorandum of Understanding) between the four oversight and advocacy bodies. Additional operational efficiencies may be able to be realised over time, particularly in relation to resourcing, skills and knowledge.

However, there are some provisions in the OAB Act that may hinder progress in this regard, so it is recommended that clarification be sought about the anomalies and inconsistencies identified in this document.

6. Recommendations

Recommendation 1: Seek clarification about anomalies and inconsistencies identified in this document.

Recommendation 2: Develop a referral mechanism or protocol (such as a Memorandum of Understanding) that explores the potential benefits of collaboration; provides guidance and/or examples about the types of scenarios under which a collaborative approach could be triggered; and outlines an agreed process that formalises the way in which the bodies will work together to improve outcomes for children and young people.

Recommendation 3: Over time, consider whether any operational synergies can be identified and implemented across the four bodies to magnify the benefits for children and young people.