

# National Children's Commissioner's call for submissions for an independent report to the UN Committee on the Rights of the Child about Australia's implementation of the CRC, OPSC and OPAC

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Government of  
South Australia



Child  
Development  
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Cluster of rights	Particular right	What the previous UN Consideration report said or focused on (if relevant)
General Principles	Non-discrimination (Art. 2)	'...serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children...significant overrepresentation in the criminal justice system...'

**The response below highlights:**

- an incremental replacement of 'best interest' with 'safety' in legislation in South Australia (SA)
- indirect discrimination against Aboriginal children and young people due to over-representation in the youth justice system (and the child protection and mental health systems)
- a lack of therapeutic treatment and rehabilitation options in SA (eg step-up/step-down facilities).

The *Statutes Amendment (Youth Sentenced as Adults) Act 2017* (SA) (SA Act) received assent on 12 December 2017, thereby amending the *Young Offenders Act 1993* (SA) (YO Act); the *Criminal Law (Sentencing) Act 1988* (SA); and the *Sentencing Act 2017* (SA). The amendments will disproportionately affect Aboriginal children and young people who remain significantly over-represented in the youth justice system.

The Guardian for Children and Young People's *Snapshot of South Australian Aboriginal and Torres Strait Islander Children and Young People in Care and/or Detention* from the Report on Government Services 2018 (April 2018) highlighted:

*'The most recent South Australian data records that in June 2017 Aboriginal children and young people comprised 48.5% of all those detained in secure care, <sup>1</sup> compared with 47.9% at the same time in 2016. This continues a substantial over-representation given that Aboriginal children and young people comprise only about 4.5 per cent of the State's child population.'*<sup>2</sup>

*'...the average rate per 100,000 young people of 10 to 17 year olds in detention in 2015/16 was 459.5 for Aboriginal compared with 15.2 for non-Aboriginal children and young people. This rate differential is a factor of just over 30 whereas the equivalent all-Australia differential is a factor of 25.'*<sup>3</sup>

Prior to the amendments, sanctions on a child or young person had to be balanced with their need for rehabilitation in the YO Act:

*'...to secure for youths who offend against the criminal law the care, correction and guidance necessary for their development into responsible and useful members of the community and the proper realisation of their potential.'*<sup>4</sup>

The SA Act amendments have made community safety the prime consideration thus:

- destroying a fine and sensible balance between the protection of the community and the needs of a child or young person who offend, in contravention of well-founded national and international legal principles and human rights instruments. For example, the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) state the wellbeing of a 'juvenile' should be the guiding factor in consideration of his or her case (Rule 17.1(d)).

<sup>1</sup> Guardian for Children and Young People (2017) (data supplied by the Department of Human Services)

<sup>2</sup> Child Protection Systems Royal Commission (2016) (page 450), cited by the Guardian for Children and Young People (2017)

<sup>3</sup> ROGS (2018), Table 17A.7, cited by the Guardian for Children and Young People (2017)

<sup>4</sup> *Young Offenders Act 1993* (SA)

- dispensing with the requirement that ‘regard should be had to the deterrent effect any proposed sanction may have on the youth’ if ‘a court is imposing sanctions on a youth who is being dealt with as an adult, whether because the youth’s conduct is part of a pattern of repeated illegal conduct or for some other reason, including, for example, the gravity of the illegal conduct (and the laws applying in relation to the sentencing of an adult apply to such a youth).’

The concept of proportionality as a criterion of fairness and justice in criminal law is about achieving the right balance between a sanction and the severity of an offence; the punishment of an offender should fit the crime.<sup>5</sup> The amendments place SA at odds with moves in other Australian jurisdictions eg on 10 May 2018, the Northern Territory Government passed the Creating Generational Change: *Youth Justice Amendment Bill 2018* (NT), and the Minister for Territory Families Dale Wakefield said:

*‘Evidence shows that a punitive approach does not work. Relying on punishment as the only tool for addressing youth crime is wrong. We are changing that because we know that an effective youth justice system is one that recognises that children are different to adults and are much more likely to respond to therapeutic interventions, education and re-engagement in the community. The smart and right thing to do is reform kids, not break them.’<sup>6</sup>*

Children and young people do not enjoy the same rights or privileges as adults. They should not have the same responsibilities or be subject to the same sanctions. In recognition of their developmental stages, they should benefit from safeguards and protections in law. They have yet to develop the ‘requisite moral reason (prudence, empathy, self-regulation), or cognitive brain development of the frontal lobe (where higher mental processing is carried out, such as problem-solving, judgement, impulse control, planning) rendering them incapable of making “adult decisions”.<sup>7</sup>

Offending by children and young people occurs in complex circumstances of entrenched socio-economic disadvantage, family breakdown, poor or absent role models, lack of supervision, overcrowding, housing instability, homelessness, intergenerational violence, mental or physical illness, caring responsibilities, unemployment, illiteracy and/or poor school achievement.

Children and young people with poor oral language competence are disadvantaged in interviews and/or interactions with police officers, lawyers, judges and clinicians. In some cases, authority figures have drawn conclusions that a child or young person has been uncooperative, aggressive or antisocial because of how they tell their story.<sup>8</sup>

A child or young person sentenced to detention will eventually be released. Ultimately the best protection for the community would be afforded by their rehabilitation **while in** detention. Rehabilitation would be more likely in a youth training centre or a step-up/step-down facility (of which SA has none) than in an adult prison. Prisons compound disadvantage, encourage negative social learning, build unhelpful relationships, exacerbate poor outcomes and negate independence following release in terms of accommodation, learning or earning.<sup>9</sup>

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<sup>5</sup> The Supreme Court of South Australia (SA) Court of Criminal Appeal cases that demonstrate how the higher courts had traditionally dealt with children and young people prior to the SA Act, include; R v C – BC9806282; R v N; R v P – BC9800382; R v QTV – BC200308141; R v W, TB – BC2006011082 and R v A, D [2011] SASFC 5

<sup>6</sup> <http://aadant.org.au/youth-justice-legislation-amendment-bill-2018-passed-in-parliament/>

<sup>7</sup> The Law Society of South Australia (2017), Written submission on the Statutes Amendment (Youth Sentenced as Adults) Bill 2017 (10 Aug 2017)

<sup>8</sup> Australian Government (2012), Australian Institute of Criminology, *Youth (in)justice: Oral language competence in early life and risk for engagement in antisocial behaviour in adolescence*, Canberra <http://www.aic.gov.au/publications/current%20series/tandi/421-440/tandi435.html>

<sup>9</sup> Commonwealth of Australia (2011), *Breaking Cycles of Disadvantage*, Australian Social Inclusion Board, available at: <http://trove.nla.gov.au/work/81064809?selectedversion=NBD46895887>

Cluster of rights	Particular right	What the previous UN Consideration report said or focused on (if relevant)
General Principles	Best interest of the child (Art. 3)	Highlighted the lack of knowledge about the 'best interest of the child' principle.

**The response below highlights:**

- an incremental replacement of 'best interest' with 'safety' in legislation in South Australia (SA)
- a lack of legislative imperatives for, and investment in, prevention and early intervention services and supports to assist families to care for their children at home.

The paramount consideration for intervention in a child or young person's life in SA's new *Children and Young People (Safety) Act 2017* (SA) (Safety Act) is 'safety', not 'best interest' (of which safety is arguably a key component).

A focus exclusively on safety reflects a reactive, welfare-based lens rather than a proactive, rights-based approach. The former perpetuates the concept of a child or young person as a passive recipient of welfare; the latter recognises the child or young person as a contributing citizen with human rights under civil or administrative law and international human rights instruments.

There is no mention, or a definition, of the 'best interests' of the child or a reference to the United Nations Convention on the Rights of the Child in SA's new Safety Act. This is consistent with what appears to be an intentional, incremental removal of the *best interest* principle from legislation in SA.

Without explicit provision for prevention and early intervention services to address the major drivers such as socioeconomic disadvantage that fuel abuse and neglect, SA's new Safety Act represents a missed opportunity for systems reform to address the major drivers that fuel abuse and neglect.

Hence, it is anticipated that the upward trajectory of expenditure on child protection services, especially out-of-home-care (OOHC), will not be arrested but, instead, continue to escalate beyond current levels.

Information regarding the current levels of expenditure can be found in a report by the Guardian for Children and Young People (Guardian) in March 2018 *South Australian child protection expenditure from the Report on Government Services 2018*. The report states the following in terms of 2016/17 expenditure in SA on:

- 'protective intervention services' was \$90 per child in SA (41% of the national average) and
- seventy eight per cent (78%) of the child protection budget was spent on OOHC ie foster, kinship and residential care (\$1,092 per child; 91% **more** than the national average).<sup>10</sup>

<sup>10</sup> Guardian for Children and Young People (2018), *South Australian child protection expenditure from the Report on Government Services 2018* (March 2018), accessed on 14 May 2018

Cluster of rights	Particular right	What the previous UN Consideration report said or focused on (if relevant)
General Principles	Respect for the views of the child (Art. 12)	Mentioned there are very few places where children and young people can voice their views directly to the government.'

**The response below highlights:**

- that the views of children and young people enhance 'adult' consultation processes and can assist in governments and others getting things 'right' more often.
- under-appreciation of the benefits of incorporating the views of children and young people and/or a lack of knowledge of how, or preparedness, to involve them
- a general, ongoing lack of opportunities for children and young people to be involved.

From July to October 2013, an inaugural Citizen's Jury in SA comprised of 43 randomly selected adults over 18 years considered the question:

*'How can we ensure we have a vibrant and safe Adelaide nightlife?'*

The eligibility requirements and recruitment process for the Citizen's Jury excluded children and young people under 18 years. Having unsuccessfully advocated for the inclusion of children and young people, the (then) Council for the Care of Children partnered with the Youth Affairs Council of SA (YACSA) for an online Young Citizen's Jury (Young CJ). The rationale was that children and young people had a right to use the city and to have their voices heard in a discussion about how we could ensure a more vibrant and safe capital city.

The Young CJ survey consisted of 10 questions and was distributed via websites, social media and email networks. The survey was open to children and young people of primary and high school age. The questions were designed to find out what respondents felt would lead to a safer and more vibrant Adelaide nightlife. The survey primarily attracted responses from high school students, particularly in the 17 year age bracket (n=44).

In October 2013 both juries presented their recommendations to the Premier of SA. The Adult CJ had concluded that Adelaide already had a vibrant and safe nightlife and had focused on liquor licencing laws, education programs in schools and community groups to promote safety, establishing an 'injury and outcome reporting system' and an independent strategic planning and infrastructure advisory body to ensure vibrancy and safety.

Respondents to the Young CJ had cited a lack of age appropriate entertainment options and venues, no 'safe' spaces to access and feeling unsafe in areas characterised by the sale and consumption of alcohol. Their suggestions had focused on environmental design, better street lighting, greater police presence, safer and more frequent public transport and venues that were safe/free/inexpensive and not centred on the sale and consumption of alcohol.

The findings of the Young CJ were presented to the Premier, the Department of the Premier and Cabinet (DPC), and the Adelaide City Council. DPC offered to run a citizen's jury for children and young people on a topic of the Council's choice however, the offer was declined on the basis that the Young CJ had been about demonstrating the value-adding by children and young people when they're involved in existing forums, not about discrete processes for them on entirely different topics.

Cluster of rights	Particular right	What the previous UN Consideration report said or focused on (if relevant)
Civil rights and freedoms	Birth registration, name and nationality (Art. 7)	Access to birth certificates for vulnerable groups, including Aboriginal and Torres Strait Islander children and young people.

**The response below highlights:**

- bureaucratic processes compounding existing disadvantage for recent care leavers
- indirect discrimination against Aboriginal children and young people due to over-representation in the child protection system.

The Children and Young People (Safety) Act 2017 (SA) (Safety Act) Chapter 11, Part 3, Section 153 provides that certain persons will be provided with documents and information held by the Department for Child Protection (DCP).

These provisions are alleged to make it easier for care leavers to access personal information or records about themselves for the purposes of passports, driver's licenses, bank accounts or Medicare cards and that they would not have to pay a fee.

The new provisions should assist children and young people who are currently in care. However, the provisions are unlikely to facilitate easier access for care leavers to personal information or documentation.

The provisions appear to be an attempt to establish an alternative process to the Freedom of Information application process in SA however, any requirement to complete a form as part of the process means that applicants might still face processing and/or approval delays.

The (then) Council for the Care of Children had advocated at a national level with Commonwealth Ministers and the National Children's Commissioner as well as at a state level for care leavers to have access to their personal identifying documentation and information without delay or administrative barriers.

The Council had urged the DCP to:

- identify a list of identifying documents for children and young people in care
- proactively source the specified documentation for any child or young person taken into care (especially long term care)
- securely keep the documents
- provide them to care leavers upon request or when they transition from care.

The new legislative provisions in the Safety Act do not go far enough and the need for a solution in SA at a policy and an operational level remains.



Cluster of rights	Particular right	What the previous UN Consideration report said or focused on (if relevant)
Family environment & alternative care	Separation from parents (Art. 9)	Para 49 on p12 and para 56 on p13 of UN concluding comments mention ‘...strengthen the support provided to families...’ and ‘...prioritize early intervention approaches...’

**The response below highlights:**

- an incremental replacement of ‘best interest’ with ‘safety’ in legislation in South Australia (SA)
- indirect discrimination against Aboriginal children and young people due to over-reporting, over-investigation and ultimately over-representation in the child protection system
- inadequate consultation with, and decision-making power by, Aboriginal-controlled organisations
- inadequate compliance with the Aboriginal Placement Principle in placing Aboriginal children and young people
- a shortage of kinship carers for Aboriginal children and young people
- a lack of legislative imperatives for, and investment in, prevention and early intervention services and supports to assist families and/or communities to care for their children at home.

*‘All children, including Aboriginal children, are entitled to enjoy a range of rights, including the right to a full life, care and protection and an adequate standard of living. Aboriginal children also have specific rights to enjoy their culture, religion and language in their community. While there is potential for tension between these rights, the better view is to see them as mutually beneficial and interdependent; Aboriginal children flourish best when they can safely enjoy their land, language, community and culture.’<sup>11</sup>*

Given the already unconscionable and increasing proportions of Aboriginal and Torres Strait Islander children and young people in the child protection system and in out of home care, child protection legislation must have at its core a commitment to doing something fundamentally better for them, their families and communities.

The Aboriginal Placement Principle (APP) is far more than a hierarchy of placement aimed at keeping children and young people connected to family, culture and community. This is, of course, a critical element. It should be noted that SA is failing to meet the obligations of this aspect of the APP by placing an unacceptably large number of Aboriginal children and young people outside of kinship and without connections to culture and family.

The APP runs much deeper than placement practices and requires:

- a level of partnership in making decisions about the best interests of Aboriginal and Torres Strait Islander children and young people with their communities
- participation of children and young people, their parents and family members in determining how they can be both best protected and cared for and have meaningful
- connection with family, community and culture even after their removal, is critical most importantly, though, the APP demands a focus on meaningful
- substantive prevention efforts so as to reduce the increasing incidence of removal.

<sup>11</sup> South Australia, Child Protection Systems Royal Commission, *The life they deserve* (2016), 448



Cluster of rights	Particular right	What the previous UN Consideration report said or focused on (if relevant)
<b>Disability, basic health and welfare</b>	Measures taken to ensure <b>dignity, self-reliance</b> and <b>active participation</b> in the community for children and young people with disability (Art. 23) (emphasis added).	Talked about the underfunding of current supports and the need to provide better support for this cohort eg access to education.

**The response below highlights:**

- indirect discrimination against children and young people with disability as a result of suspension or exclusion from school in terms of their social inclusion and short-, medium-, and long-term outcomes.
- indirect discrimination against the parents/carers of children and young people with disability as a result of suspension or exclusion from school in terms of their social inclusion, employment options and wellbeing.

On 1 July 2013, the National Disability Insurance Scheme (NDIS) Trial commenced. In SA the Trial gradually involving children and young people from birth to 14 years. In mid-2014 the (then) Council for the Care of Children had spoken to children and young people with disability (6-13 years) and their families. The Council learned that of 30 children who had originally commenced in a mainstream school in a general classroom, only seven had remained there by their eighth birthday.

From April to July 2015, the Council again heard from children and young people with disability and their families (66 families). Fourteen children and young people answered questions about their lives at home, school, friendships and the future and there were in-depth conversations with four others (with their families' assistance).

The conversations highlighted the perceived benefits and drawbacks of mainstream as opposed to special schools. They identified an apparent lack of proactivity to monitor bullying or isolation in school settings and poignantly portrays young people's lived experiences of their school experiences, drawing attention to how deeply they report on, and feel about, the bullying/rejection they experience from their peers and adults in an education setting.

In terms of the outcomes for, and the social inclusion of, children and young people with disability in education settings, the conversations highlighted that:

- using suspension alone to manage the behaviour of a student with disability was counter-productive and negatively impacted on families eg their physical and mental health and employment options
- regularly excluding a student from school could further disadvantage him or her in terms of having access to training or employment after school or housing
- teachers and other staff at schools appeared to lack the training and knowledge to support students with disabilities, especially those with a diagnosis within the autism spectrum disorder
- schools might not have been utilising the (then) Department for Education and Child Development 'Team Around The Child' model.

The conversations were documented in Part 5 of *The National Disability Insurance Scheme – Highlights, hurdles and hopes* report in September 2015.

Cluster of rights	Particular right	What the previous UN Consideration report said or focused on (if relevant)
Education, leisure and cultural activities	Right to education, including vocational training and guidance (Art. 28)	Special mention: bullying. Recommendation to intensify efforts to prevent and address bullying in schools.

**The response below highlights:**

- the need for considered and evidence-based approaches (policy, strategies, funding and services) to address bullying at a systemic, community level.

School bullying needs to be seen as a complex social relationship problem which does not only exist in school/educational settings, but which reflects the surrounding community cultures in terms of aggression and violence. In the same way that only dealing with the victimised child is inadequate, rather, the whole peer context and social dynamic needs attention in order for there to be change. This is also true for the school.

Only dealing with bullying in schools will remain inadequate whilst the community does not address its levels of violence, harassment and bullying. To see real societal and cultural change will take a generation, so the sooner bullying across the community is acknowledged, the sooner a change will occur within schools.

Ensuring that the role of youth voice is prominent in the co-design and development of such frameworks is paramount, so as to ensure relevancy and authenticity.<sup>12</sup>

From both an SA and a national perspective, it is recommended that pre-service teachers' training about bullying be considered as part of the solution; so that they are trained, mentored and supported as part of an holistic approach to prevention and intervention.

At the moment, pre-service teachers are not part of the whole-of-school/community approach, and our data suggests that they need and want to be.<sup>13</sup>

<sup>12</sup> - Spears, B. & Kofoed, J. (2013), Transgressing research binaries: Youth as knowledge brokers in cyberbullying research. In P. Smith and G. Steffgen (Eds.) *Cyberbullying through the new media: Findings from an international network* (pp 201-221), London: Psychology Press

- Spears, B., Slee, P., Campbell, M., and Cross, D. (2011), *Educational Change and Youth Voice: Informing School Action on Cyberbullying*, 208: Centre for Strategic Education: Victoria

<sup>13</sup> - Spears, B., Taddeo, C., Ey, L., Carslake, T., Stretton, A. Langos, C., Sandhu, D. & Sundaram, S. (2018), Pre-service teachers' understanding of bullying in Australian and India: Implications for practice, in P.K. Smith, S. Surandam, B. Spears, C. Blaya, M. Schafer, D. Sandhu. (Eds), *Bullying, cyberbullying and pupil well-being in schools: Comparing European, Australian and Indian Perspectives*, Cambridge University Press

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