

Submission

Controlled Substances (Youth Treatment Orders) Amendment Bill 2018

Part 7A – Youth Treatment Orders

16 July 2018



Government of
South Australia



Child
Development
Council

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16 July 2018

Hon Stephen Wade MLC
Minister for Health and Wellbeing
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Dear Minister

I write in connection with the introduction into Parliament on 21 June 2018 of the Controlled Substances (Youth Treatment Orders) Amendment Bill 2018 (Bill).

Whilst recognising that the Bill is part of the South Australian Government's pre-Election commitments, the Child Development Council (Council) is concerned that the Bill targets children and young people, despite evidence that mandatory drug treatment may be less successful than coerced or voluntary treatment and, in some instances, harmful.¹

The Council's concern is compounded by an apparent lack of consideration of the developmental stages of children and young people and their international human rights. The Bill lacks safeguards and protections as well as congruence with or reference to the *Children and Young People (Oversight and Advocacy Bodies) Act 2016*; the *Children and Young People (Safety) Act 2017* and the *Mental Health Act 2009*.

The Bill takes a punitive approach to what is, primarily, a health condition. During the introduction of the Bill into Parliament, a statement that '(t)he Youth Court is the jurisdiction in this State with specialist expertise in matters relating to persons under the age of 18 years' was potentially misleading. The Youth Court's expertise may be limited and might not extend to an holistic understanding of all aspects of the health, development and wellbeing of children and young people from birth to 18 years.

The Council urges the Government to reconsider the inclusion of Part 7A (Youth treatment orders) in the Bill. Failing that, the Council recommends that careful consideration be given to balancing the provisions with specific protections and safeguards as per the attached comments.

Yours sincerely



Dr Anne Glover AO
Chair
Child Development Council

¹ D. Werb; E. Wood; M. C. Meacham; C. Rafful; S. A. Strathdee; A. Kamarulzaman; B. Fischer (2016). The Effectiveness of Compulsory Drug Treatment: A Systematic Review. February 2016. <https://www.iidp.org/article/S0955-3959%2815%2900358-8/fulltext> viewed 12 July 2018.

Controlled Substances (Youth Treatment Orders) Amendment Bill 2018

Part 7A – Youth Treatment Orders

Article 37(b) of the United Nations Convention on the Rights of the Child (UNCRC) provides that ‘no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time’.

The Council recommends that, in addition to the UNCRC, careful consideration be given to the Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules or Havana Rules), GA Res 45/113, 45th session, 68th plenary meeting, UN Doc A/RES/45/113 (14 December 1990) and the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), GA Res 40/33, 40th session, 96th plenary meeting UN Doc A/RES/40/33 (29 November 1985).

In the best interest of a child or young person, prior to last resort punitive measures, South Australia should provide non-stigmatising and respectful prevention and early intervention services, tailored to children and young people to foster recovery and build self-esteem.

South Australia has a shortage of appropriate treatment services for adults with drug dependence issues and none for children and young people who should be treated separately from adults, taking into account their different developmental stages.

Specific comments on the clauses of Part 7

Provisions and/or explanation of clauses	Comments/Issues/Discussion/Questions
<p>54-Interpretation of the <i>Controlled Substances Act 1984 (CSA)</i></p> <p>assessment order - see section 54A(l)(a);</p> <p>Court means the Youth Court of South Australia;</p> <p>detention order - see section 54A(l)(c);</p> <p>domestic partner - a person is the domestic partner of a respondent if the person lives with the respondent in a close personal relationship;</p> <p>family member in relation to a respondent means</p> <p>(a) a spouse or domestic partner of the respondent; or</p> <p>(b) a parent or guardian of the respondent; or</p> <p>(c) a person held to be related to the respondent according to Aboriginal or Torres Strait Islander kinship rules and observances;</p> <p>respondent - see section 54A;</p> <p>spouse - a person is the spouse of a respondent if the person is legally married to the respondent;</p> <p>treatment order - see section 54A(l)(b).</p>	<ul style="list-style-type: none"> • The Controlled Substances (Youth Treatment Orders) Amendment Bill 2018 (YTO Bill) uses the term ‘respondent’ when referring to children and young people. • The Council recommends the use of ‘child’ or ‘children’ and to include a definition that a reference to a child or young person or children is made in reference to a person under 18 years of age.
<p>54A-Orders that may be made under this Part</p> <p>This clause empowers the Youth Court of South Australia to make an order requiring a person under 18 years of age to attend a nominated assessment service (an assessment order) or treatment service (a treatment order).</p>	<ul style="list-style-type: none"> • The Bill would empower the Youth Court to make an assessment order and/or a treatment order and/or a detention order for up to 12 months. • There doesn’t appear to be any safeguards or protections eg legal representation (as per

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<p>The Court may also make detention orders to ensure compliance with an assessment or treatment order. Such orders may not operate for longer than 12 months.</p>	<p>Article 37(d) of the UNCRC) or interpreter services or advocacy assistance for a child or young person. An order could be made whether or not a child or young person understands or speaks English well.</p> <ul style="list-style-type: none"> • Legal representation would be especially important where the applicant for an order is the parent or carer of a child or young person to ensure procedural fairness to mitigate against potential conflicts of interest. • Twelve months is a very long time in the life of a child or young person, not only in terms of their perception of the passage of time but, more importantly, in terms of their developmental stages. • The Council recommends that careful consideration be given to the proposed provisions eg the <i>Mental Health Act 2009</i> (MHA 2009) contains special protections and safeguards for children and young people. These include shorter community treatment orders or detention and treatment orders and more frequent review of orders. Orders must expire during the day (not at midnight) and on a usual week day (not weekends).
<p>54B-Application for order</p> <p>This clause allows the Court to make an order of its own motion or on application by a person of a listed class.</p>	<ul style="list-style-type: none"> • Applications by a broad range of lay people are proposed. What is the evidence base for the proposal? • If a child or young person is receiving treatment from a medical practitioner who decides to apply to the Youth Court for an order in respect of his or her patient, is this not a conflict of interest and a breach of trust? • Will the provisions disproportionately affect children and young people who are vulnerable eg those with disability or who are of Aboriginal descent? • What is the evidence base (if any) for the inclusion of an order when a child or young person is already before the Court for an offence?
<p>54C-Making of orders</p> <p>This clause outlines the factors that the Court must be satisfied of before making an assessment or treatment order. This clause also provides that the Court may make a detention order if the respondent is non-compliant with an assessment or treatment order. This clause empowers the Court to request information from the Department and requires the Court, before making an order in relation to a respondent who is in the custody, or under the guardianship, of the Chief Executive of the administrative unit of the Public Service</p>	<ul style="list-style-type: none"> • Clause 54C(1) of the YTO Bill refers to a child or young person ‘...habitually using 1 or more controlled drugs’ (emphasis added). • The term ‘habitually’ should be clearly defined to prevent varying/inconsistent interpretations or scope creep. • The Bill would allow the arrest of a child or young person for non-compliance with an assessment or treatment order, thus imposing a criminal penalty for breach of, or non-compliance with, a civil order. The

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<p>responsible for assisting a Minister in the administration of the <i>Children and Young People (Safety) Act 2017</i>, to ensure that Chief Executive has been given notice of the proceedings and has been given an opportunity to make submissions in the proceedings.</p>	<p>response/punishment is disproportionate to the breach.</p> <ul style="list-style-type: none"> The Bill would allow the detention of a child or young person for up to 12 months on the basis of a 'reasonable likelihood' of habitual use of one or more controlled drugs. The detention of a child or young person who has not been charged with or committed a crime, may infringe his or her rights under statutory or common law or the international human rights instruments. Detention causes harm to children and young people and, especially in the absence of therapeutic services. Detention may have life-long negative impacts a child or young person's relationships and future prospects in terms of employment, accommodation and social integration. While severing nurturing and supportive relationships, detention may encourage negative connections and pre-dispose a child or young person to future involvement in the juvenile or adult justice systems. Children and young people must be treated separately from adults. South Australia does not have appropriate detention facilities for children and young people who come into contact with the youth justice system via the mental impairment provisions of the <i>Criminal Law Consolidation Act 1935</i>, let alone children and young people with substance abuse disorders (keeping in mind that these are primarily health conditions requiring therapeutic treatment, not punitive detention). Refer below for the World Health Organisation ICD10 clinical description of 'dependence syndrome' and reference to the Australian Medical Association's view of dependence and addition being health conditions.²
<p>54D-Proceedings in the absence of respondent</p> <p>This clause empowers the court to make an order under the Part in the absence of the respondent,</p>	<ul style="list-style-type: none"> An order could be made without the child or young person being present, or having legal representation or advocacy support. There appears to be no requirement of the

² **ICD-10 Clinical description of 'Dependence Syndrome' - World Health Organisation**

A cluster of physiological, behavioural, and cognitive phenomena in which the use of a substance or a class of substances takes on a much higher priority for a given individual than other behaviours that once had greater value. A central descriptive characteristic of the dependence syndrome is the desire (often strong, sometimes overpowering) to take psychoactive drugs (which may or may not have been medically prescribed), alcohol, or tobacco. There may be evidence that return to substance use after a period of abstinence leads to a more rapid reappearance of other features of the syndrome than occurs with nondependent individuals. http://www.who.int/substance_abuse/terminology/definition1/en/ viewed 13 July 2018.

and

Law Society submission on the Statutes Amendment (Drug Offences) Bill 2018, 14 June 2018

'Substance dependence and behavioural addictions are recognised as chronic diseases of the brain's reward, motivation, memory and related circuitry...the AMA is of the view that substance dependence and behavioural addictions are serious health conditions and those who are impacted should be treated like other patients with serious illness, and be offered the best available treatments and supports to recovery.' <https://www.lawsocietysa.asn.au/LSSA/Media/Submissions.aspx> viewed 13 July 2018.

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<p>irrespective of whether the respondent was summoned (but in the case of the respondent not being summoned, the Court must summon the respondent to appear to show cause why the order should not be confirmed). The date for the hearing to which the respondent is summoned must be within 7 days of the date of the order. Evidence may be given by affidavit, but the deponent must make themselves available to give oral evidence if the respondent so requires. The Court may adjourn the hearing, for a period of usually not longer than 7 days. Another judicial officer may constitute the Court at the adjourned hearing. At the hearing, the Court may confirm or amend the order.</p>	<p>court or the applicant for an order to provide transport or other assistance to a child or young person to enable them to present to court or to explain the implications of an application or an order.</p> <ul style="list-style-type: none"> • An order could be made even if a child or young person lacks the means to travel to attend or is unable to telephone (eg due to a lack of credit) to seek assistance eg a taxi voucher or bus fare. • An order could be made for a child or young person with physical disability or mental impairment eg brain damage subsequent to petrol sniffing.
<p>54E-Variation or revocation of order</p> <p>This clause empowers the Court to vary or revoke an order of its own motion or on application by the persons set out at clause 54B. An application may also be made by the respondent with the permission of the Court, which may only be granted in the event of a substantial change in circumstances. The Court must allow all parties to be heard.</p>	<ul style="list-style-type: none"> • The Bill is silent on the rights of a child or young person to have regular reviews by a multidisciplinary treatment team to ensure an holistic, best-practice, evidence-based approach to assessing the child or young person's health, wellbeing, development and circumstances. • There appears to be no provision for continuity of care, discharge planning or community follow up.
<p>54F-Service</p> <p>This clause provides that an order must be personally served on the respondent, and is not binding until so served. The same holds true for any confirmation of an order in amended form or any variation of an order. An assessment or treatment order must be given to the assessment or treatment service nominated in the order.</p>	<ul style="list-style-type: none"> • Provisions for a child or young person to have support when an order would be served on them are lacking. • Safeguards / protections could include an obligation to: <ul style="list-style-type: none"> • provide a copy of an order to a parent or carer or family member related by kinship rules (to prevent an order being accidentally misplaced or lost). • verbally explain, in a language that the child or young person can understand and uses to communicate in, the implications of being served with an order • include a statement of rights and information about sources of assistance with advocacy, legal representation, finance etc.
<p>54G-Effect of order</p> <p>This clause provides that, in accordance with the Part, a respondent may, in the absence or refusal of their consent, be assessed or be given treatment, and reports may be provided. A respondent to whom a treatment order applies may be given treatment for dependency on controlled drugs, or any other condition or illness of a kind authorised by an examining medical practitioner. Subclause (3) provides that treatment under this clause is limited by the regulations.</p>	<ul style="list-style-type: none"> • It is of the utmost concern that, in addition to treatment for dependency, clause 54G proposes the treatment of a child or young person, without consent or a second opinion or it being a life-threatening emergency, for 'any other condition or illness of a kind authorised by a medical practitioner who has examined' him or her (emphasis added). • A safeguard would be to require consent from the child or young person (or the parents/carers) and/or to obtain a second

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	opinion and/or to apply to the South Australian Civil and Administrative Tribunal (or failing that, the Youth Court).
<p>54H-Treatment may continue after respondent's 18th birthday</p> <p>This clause provides for the continuance of assessment or treatment after the respondent reaches 18 years of age, if the Court did not specify that an order was to expire on the respondent reaching 18 years of age.</p>	-
<p>54I-Costs of assessment or treatment</p> <p>This clause gives the Court a discretion to make orders in relation to the costs of any assessment, treatment, or report. However the Court cannot make an order requiring payment of such costs by the respondent or an agency or instrumentality of the Crown. A person subject to an order for payment of costs may apply for variation or revocation of the order.</p>	-
<p>54J-Regulations</p> <p>This clause provides that the regulations may regulate any matter relating to assessment, treatment, detention, and reporting. This clause does not derogate from the general regulation making power in section 63.</p>	-
<p>54K-Review of Part</p> <p>This clause provides for a review and report to be completed after the third, but before the fourth, anniversary of the commencement of the clause. A copy of the report must be laid before both Houses of Parliament within 6 sitting days.</p>	-