



Government of South Australia

Office of the Guardian
for Children and Young People

Review and Analysis

Youth Justice Administration Act 2016 (SA)

and

Youth Justice Administration Regulations 2016 (SA)

July 2018



Government
of South Australia

Enquiries about or comments on this publication should be addressed to:

Child Development Council
GPO Box 1152
Adelaide SA 5001
AUSTRALIA

Phone: (08) 8463 6429

Email: ChildrenSA@sa.gov.au

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1. Introduction

The *Youth Justice Administration Act 2016* (YJA Act) primarily provides for the establishment and management of training centres, community-based supervision services and other facilities and services relating to children and young people¹ who offend against the criminal law.

The YJA Act also establishes the Training Centre Visitor (TCV) and sets out the requirements for the *Charter of Rights for Youths Detained in Training Centres* (YJ Charter).

Furthermore, it encourages anyone involved in the administration of the Act to ‘promote the wellbeing and best interests of youths’ (s 3(2)(a)); to assist those involved in the youth justice system to become responsible members of the community and to realise their proper potential (s 3(2)(c)); and to protect the community from ‘violent or wrongful acts’ (s 3(2)(d)).

2. Purpose

A detailed review of the YJA Act and accompanying *Youth Justice Administration Regulations 2016* (YJA Regulations) was undertaken to:

1. Understand the statutory obligations for three key entities: the TCV; the Guardian for Children and Young People (the Guardian); and the Child Development Council (the Council)
2. Identify any implications in discharging their respective obligations, and
3. Determine whether the YJA Act may affect the rights, development or wellbeing of children and young people, or their access to any entitlements under relevant pieces of legislation or under the YJ Charter or the *Charter for Children and Young People* (CYP Charter).²

¹ Please note: there are inconsistencies in how persons up to the age of 18 are described in the legislation considered as part of this review. The YJA Act refers to “youths”, even though the legislation extends to children as young as 10; while the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (OAB Act) uses both “children” and “children and young people” to describe persons aged between 0 and 17 years. Unless a specific legislative provision is being quoted, this paper will typically use the term “children and young people” to describe this cohort.

² Please note: the YJ Charter is currently in effect but the CYP Charter is to be developed as part of the Council’s *Outcomes Framework for Children and Young People*, pursuant to s 57 of the OAB Act. In addition, the GCYP must prepare and maintain a third charter (the *Charter of Rights for Children and Young People in Care*), pursuant to s 13(1) of the *Children and Young People (Safety) Act 2017*.

In summarising the findings of the review, this document begins by explaining the broader legislative context in which the YJA Act operates before interpreting the specific provisions contained within the YJA Act and Regulations.

It continues by discussing the relevant functions that have been assigned to the TCV, Guardian and Council – either via this legislation or other related pieces of legislation – and explains the points of connectivity between the three entities.

The document then highlights five major themes that may affect the ability of these entities to perform their statutory functions, particularly in terms of giving effect to the respective charters.

It concludes with the suggestion that the themes be further contemplated and discussed prior to any decisions being made about the need for additional action.

3. Legislative Context

As a signatory to the *United Nations Convention on the Rights of the Child* (UNCRC), 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. Australian governments must therefore ensure that children and young people have their needs met and that they are supported to grow and develop in a way that allows them to reach their full potential.

The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (OAB Act)³ requires all State authorities to ‘protect, respect and seek to give effect to the rights’ (OAB Act, s 5) set out in relevant international human rights instruments, such as the UNCRC.

In addition, the parliamentary declaration contained within the *Children and Young People (Safety) Act 2017* (Safety Act) states that all children and young people should have the ‘opportunity to thrive’ (s 4(1)(c)) and requires that, at a minimum, they should benefit from four key outcomes: to be safe from harm; to do well at all levels of learning and to have skills for life; to enjoy a healthy lifestyle; and to be active citizens who have a voice and influence (s 4(2)).

³ This is the Act that continues the Guardian and establishes the Council.

But it has been recognised that some groups of children and young people are particularly vulnerable and need additional support to achieve such outcomes.

Children and young people in alternative care which includes those in youth training centres (OAB Act, s 26(4)) are one such group.

However, the common sentiment was that legislation governing youth justice in South Australia had become ‘highly complex’⁴ and was not reflective of the ‘powers and functions of all youth justice operations’.⁵

The introduction of the YJA Act sought to consolidate the administration of youth justice⁶ and to contemporise other relevant pieces of legislation (including the *Young Offenders Act 1993* (YO Act) and the *Youth Court Act 1993* (YC Act)) to better reflect best practice in youth justice.⁷

Although the YJA Act and the YO Act are to be read together and construed as if they are a single piece of legislation (YJA Act, s 5(1)), they each have very different functions.

The YO Act establishes the age of criminal responsibility in South Australia (YO Act, s 5). It also steps through how children and young people are to be dealt with if they commit a minor offence (YO Act, pt 2) and details the processes to be followed – from arrest right through to release from detention – in the case of more serious offences (YO Act, pts 3-6).

In doing so, the YO Act seeks to secure the necessary care, correction and guidance to help children and young people who offend against the criminal law develop into responsible and useful members of the community and to realise their proper potential (YO Act, s 3).

⁴ South Australia, *Parliamentary Debates*, House of Assembly, 23 September 2015 (The Hon. Z.L. Bettison, Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Multicultural Affairs, Minister for Ageing, Minister for Youth, Minister for Volunteers).

⁵ Ibid.

⁶ South Australia, *Parliamentary Debates*, Legislative Council, 10 March 2016 (The Hon. J.A. Darley).

⁷ Ibid.

The accompanying *Young Offenders Regulations 2008* (YO Regulations) support the provision of youth justice by detailing the required practices and procedures of the Training Centre Review Board.⁸

The YC Act and the YJA Act supplement the YO Act.

The YC Act establishes the Youth Court of South Australia and defines the Court's jurisdiction and powers. The accompanying *Youth Court Fees Regulations 2010* (YC Fees Regulations) set out the fees 'payable to the Court in relation to [Court] proceedings' (YC Regulations, Reg 3).

In contrast, the YJA Act primarily provides for the establishment and management of training centres, community-based supervision services and other facilities and services relating to children and young people who offend against the criminal law. It is supported by the accompanying YJA Regulations, which provide further detail about the operational requirements relating to the day-to-day management of training centres.

The YJA Act also establishes the TCV; sets out the requirements for the YJ Charter; and encourages anyone involved in the administration of the Act to 'promote the wellbeing and best interests of youths' (s 3(2)(a)); to assist those involved in the youth justice system to become responsible members of the community and to realise their proper potential (s 3(2)(c)); and to protect the community from 'violent or wrongful acts' (s 3(2)(d)).

4. Summary of statutory provisions

The YJA Act is divided into six main parts.

Part 1 contains preliminary provisions about the Act's objects and guiding principles, as well as a glossary of key terms.

Part 2 addresses administrative issues, such as the delegation powers of the Minister and Chief Executive and the functions to be performed by the Chief Executive

⁸ The function of the Training Centre Review Board is to review the progress and circumstances of children and young people while they are in the training centre (s 39(1)(a) and to hear and determine any other relevant matters (s 39(1)(b)).

Part 3 defines who can visit a training centre as an Official Visitor. It then establishes the new TCV and requires the person performing the role to ‘act independently, impartially and in the public interest’ (s 12(1)).

This part also sets out the TCV’s main functions, as well as prescribing how information can be used and obtained; outlining the requirements for visiting and inspecting training centres; and detailing the reporting obligations.

Part 4 provides the legislative basis for establishing training centres, facilities and programs. It also details operational requirements relating to admission procedures; day-to-day management of residents; absences; interstate transfers; and release.

Additionally, this part sets out the requirements for the YJ Charter.

Part 5 authorises the provision of community programs, including community service, where suitable.

Part 6 contains miscellaneous provisions relating to topics such as confidentiality; the disclosure of information; and the making of regulations.

The YJA Regulations provide further detail about day-to-day operational requirements, especially the circumstances under which isolation; segregation; and the use of mechanical restraints are allowed. Guidance is also provided in relation to drug testing and the way in which visitors and communications are to be managed.

Importantly, the Regulations also prescribe the underpinning requirements of the Aboriginal and Torres Strait Islander Youth Justice Principle (the Principle).

5. Functions

a. Training Centre Visitor

The TCV is an independent statutory office holder, established by the YJA Act (s 11(1)).

Pursuant to section 14(1) of the YJA Act, the TCV’s primary functions are to:

- (a) Conduct visits to, and inspections of, training centres⁹
- (b) Promote the best interests of training centre residents
- (c) Advocate for residents and promote the proper resolution of issues relating to the care, treatment and control of residents
- (d) Inquire into, and advise the Minister about, any systemic reforms necessary to improve:
 - a. The quality of care, treatment or control of training centre residents, or
 - b. The management of a training centre
- (e) Inquire into and investigate any matter referred by the Minister (noting however that the TCV cannot be controlled by the Minister (YJA Act, s 12(2))), and
- (f) Any other functions assigned by the YJA Act or any other Act.

Interestingly, the TCV cannot delegate a function or power under the YJA Act to a specified body or person. This is in stark contrast to the Guardian's delegation powers, which are prescribed in section 23 of the OAB Act.

At the time of writing, the scope of the TCV's functions were being further considered, which may result in legislative clarification being sought.¹⁰

b. Guardian for Children and Young People

The Guardian is also an independent statutory office holder, but the position was established under the OAB Act (s 21(1)).

Pursuant to section 26(1) of the OAB Act, the Guardian's primary functions are to:

- (a) Promote the best interests of children and young people under the guardianship, or in the custody of, the Minister,¹¹ particularly those in alternative care

⁹ The requirements relating to visits to, and inspections of, training centres are discussed in more detail in s 16 of the YJA Act.

¹⁰ Advice from TCV Unit, 16 July 2018.

¹¹ During 2016-17, 21.9 per cent of the 388 individuals admitted to the training centre were in care at the time of their admission. Moreover, anecdotal evidence suggests that between half and two thirds of the children and young people admitted to the training centre have had some level of contact with the child protection system during their lives.

- (b) Advocate for the interests of children and young people under the guardianship, or in the custody of, the Minister, especially those who have suffered (or are alleged to have suffered) sexual abuse
- (c) Monitor the circumstances of children and young people under the guardianship, or in the custody of, the Minister
- (d) Provide advice to the Minister on the quality of the provision of care for children and young people under the guardianship, or in the custody of, the Minister and on whether their needs are being met
- (e) Inquire into, and advise, the Minister about systemic reforms necessary to improve the quality of care provided for children and young people in alternative care
- (f) Investigate and report on matters referred by the Minister, and
- (g) Any other functions assigned under the OAB Act or any other Act.

Please note: in accordance with section 11(2) of the YJA Act, the person appointed as the Guardian has also been appointed as the TCV.

c. *Child Development Council*

The Council has a vastly different role, having been established to guide ‘the Government’s work for children and young people’¹² across South Australia.

While its primary function ‘is to prepare and maintain an Outcomes Framework’ (OAB Act, s 55(1)),¹³ which must include the CYP Charter (OAB Act, s 57(2)), the Council is also responsible for:

- (a) Advising and reporting to Government on the effectiveness of the Framework
- (b) Promoting the implementation of the Framework, and
- (c) Undertaking any other functions assigned by the Minister, under the OAB Act or any other Act.

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 In doing so, the Council must provide a cooperative (reg 12(2)(c)), 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)) in the areas of health; safety; wellbeing; education; and preparedness for adulthood (reg 12(2)(b)).

6. Points of connectivity

a. Giving effect to the relevant international human rights instruments

Despite their differing mandates, the three entities have an obligation to protect, respect and seek to give effect to the rights set out in relevant international human rights instruments, such as the UNCRC (OAB Act, s 5).

b. Supporting children and young people to realise their potential and become responsible members of the community

The three entities also have an important role to play in supporting children and young people to realise their potential and become responsible members of the community.

Firstly, the management of training centre residents and those subject to supervision in the community should be designed to help children and young people develop into responsible members of the community and realise their proper potential (YJA Act, s 3(2)(c)). As bodies arguably involved in the administration of the YJA Act, both the TCV and Guardian should have regard for this guiding principle when undertaking their inquiries into any systemic reforms required to either improve the quality of care, treatment or control of training centre residents or the management of a training centre (TCV) or to improve the quality of care provided for children and young people in alternative care (Guardian).

Furthermore, in advising and reporting on the effectiveness of the Outcomes Framework, the Council has been directed to ensure that 'children and young people are cared for in a way that allows them to realise their potential' (OAB Act, s 55(2)(a)(ii)) and that they 'are properly prepared for taking their position in society as responsible citizens' (OAB Act, s 55(2)(a)(vi)).

c. Giving effect to the parliamentary declaration

The three entities are further connected by their roles in ensuring that, at a minimum, all children and young people be safe from harm; do well at all levels of learning and have skills for life; enjoy a healthy lifestyle; and be active citizens who have a voice and influence (Safety Act, s 4(2)).

While every South Australian has a duty to promote these outcomes (Safety Act, s 5), the TCV, Guardian and Council have additional obligations to ensure the specific needs of vulnerable groups are met. For example:

- When promoting the best interests of training centre residents, the TCV must focus on those who are under the guardianship, or in the custody of, the Minister; are Aboriginal or Torres Strait Islander; or have a physical, psychological or intellectual disability (YJA Act, s 14 (2)(b))
- When promoting the best interests of children and young people under the guardianship, or in the custody of, the Minister, the Guardian must carefully consider the needs of those in alternative care (OAB Act, s 26(1)(a)), and
- When preparing and maintaining the Outcomes Framework, the Council must ensure priority population groups receive an appropriate level of focus (OAB Act, s 57(4)(d)) and pay close attention to the needs of Aboriginal and Torres Strait Islander children and young people (OAB Regulations, reg 12(2)(d)).¹⁴

7. Implications

Against this backdrop, the following five themes emerged.

a. Wellbeing and best interests

The UNCRC acknowledges that the best interests of the child are paramount and obligates States Parties to care for and protect children and young people in a way that promotes their wellbeing (Art 3).

In South Australia, the Minister, Chief Executive, Department and other persons and bodies involved in the administration of the YJA Act are encouraged to consider and promote the wellbeing and best interests of children and young people whenever they exercise their powers under the Act (YJA Act, s 3(2)).

The OAB Act provides some assistance, defining 'wellbeing' to mean:

1. The care, development, education, physical and mental health and safety of each individual from birth through to adulthood, and

¹⁴ As acknowledged in the Safety Act, 'outcomes for Aboriginal and Torres Strait Islander children and young people in care have historically been poor' (s 4(3)).

2. The cultural welfare and wellbeing of children and young people (OAB Act, s 4 (3)).

But, despite both the TCV and Guardian having a statutory obligation to promote the best interests of certain sub-groups of children and young people (YJA Act, s 14(1)(a) and OAB Act, s 26(1)(a), respectively), the term ‘best interests’ does not appear to be explicitly defined in legislation.

This may trigger uncertainty about the meaning of the term, which could have ramifications for children and young people if actions concerning them are not undertaken consistently.

Similarly, the words ‘wellbeing’ and ‘best interests’ are not contained anywhere within the YJ Charter.

While there is a strong argument that other rights contained within the YJ Charter address the individual elements of wellbeing well enough to achieve the same overall sentiment, it may give rise to a perception that the training centre is failing to comply with section 5 of the OAB Act, which requires that it seeks to give effect to the UNCRC.

b. Respect and dignity

Children and young people who have been deprived of their liberty are to ‘be treated with humanity and respect’ (UNCRC, Art 37(c)); a notion that has been carried through to the YJ Charter in the form of residents having the right ‘to be treated with respect and dignity by staff’ (right 2).

Interestingly, there is no explicit use of this terminology in the YJA Act.

This raises a question about whether procedures relating to the day-to-day management of the training centre are suitably compatible with the rights afforded to residents via the YJ Charter and the UNCRC.

Take, for example, the power to search residents (YJA Act, s 30). The Act does not require a resident ‘to be completely naked at any time during the search’ (s 30 (2)(a)) but ‘the resident may be required to remove the clothing from his or her upper body or lower body (but not at the same time)’ (s 30(2)(e)(ii)).

Recent legislative amendments in the Northern Territory have resulted in a change to search procedures in their detention centres. A detainee's clothes may now only be removed and their body (but not their body cavities) searched if the superintendent of a detention centre reasonably believes that doing so will prevent harm to the detainee or another person (*Youth Justice Legislation Amendment Act 2018* (NT), s 161(3)(a)). However, this is very clearly an option of last resort¹⁵ because of the humiliating and degrading nature of these types of searches, 'particularly for children and young people who have experienced physical and sexual abuse'.¹⁶

Within this context, the omission of the phrase 'respect and dignity' from the YJA Act may also have implications for the Guardian, especially given her obligation to advocate for the needs of children and young people under the guardianship, or in the custody of, the Minister, who have suffered (or allegedly suffered) sexual abuse (OAB Act, s 26(1)(b)).

c. Vulnerability

The preamble of the UNCRC references the *Declaration of the Rights of the Child* to note that children and young people need special safeguards and care because of their physical and mental immaturity.

Similarly, the YJ Charter offers a right to 'special care and protection if [children and young people] are vulnerable or have special needs' (right 7).

However, the concept of 'vulnerability' is not apparent in the legislation.

This raises questions about how 'vulnerability' will be defined in practice and which children and young people will have the opportunity to access the special care and protection on offer, should they need it.

Moreover, there is a risk that the lack of clarity will create confusion, which may result in some children and young people shying away from seeking additional support or trigger an inconsistent approach to the provision of special care and protection by training centre staff.

¹⁵ *Youth Justice Legislation Amendment Act 2018* (NT), s 161(3)(b).

¹⁶ Explanatory Statement for the *Youth Justice Legislation Amendment Act 2018* (NT), Serial No. 48, p 8

Establishing some clearer parameters may be pertinent, especially given the concerns voiced by the Hon. Bruce Lander QC in his report, *Oakden: A Shameful Chapter in South Australia's History*,¹⁷ where he observed that the 'vulnerable'¹⁸ Oakden residents had been let down by the State and had not received 'the level of care that they deserved'.¹⁹

d. Care

'[T]he United Nations has proclaimed that childhood is entitled to special care and assistance' (UNCRC, preamble referencing the *Universal Declaration of Human Rights*).

Similarly, the YJ Charter provides a right to 'special care and protection if [a resident is] vulnerable or [has] special needs' (Right 7).

But the concept of 'care' in relation to youth justice in South Australia is not clear cut.

While there is a degree of consistency between the YO Act²⁰ and the YJA Act²¹ in that they both refer to children and young people who have offended against the criminal law needing *care, correction and guidance*, there is an apparent anomaly within the YJA Act itself.

Under section 14 of the YJA Act, the TCV has been tasked with:

1. Advocating for training centre residents to promote the proper resolution of issues relating to their *care, treatment or control* (s 14(1)(d)), and
2. Inquiring into, and providing advice to the Minister, in relation to any systemic reform necessary to improve the *quality of care, treatment or control* of residents of a training centre (s 14(1)(e)(i)).

¹⁷ South Australia, Royal Commission into the Management of Services and Care at the Oakden Older Persons Mental Health Facility, Final Report (2018).

¹⁸ Ibid, 14.

¹⁹ Ibid.

²⁰ The object of the YO Act is to secure the necessary *care, correction and guidance* to help youths who offend against the criminal law develop into responsible and useful members of the community and to realise their proper potential (s 3(1)).

²¹ One of the objects of the YJA Act is 'to promote the rehabilitation of youths by providing them with the *care, correction and guidance* necessary for their development into responsible members of the community and the proper realisation of their potential' (s 3(1)(e)).

The use of the two phrases within the one piece of legislation may have implications for the TCV, especially if discharging the section 14 obligations conflict with achieving the overall objectives of the Act.

This concept of 'care' is further complicated when considering that the Guardian is required to:

1. Advise the Minister on the '*quality of care* for children under the guardianship, or in the custody of, the Minister and on whether the children's needs are being met' (OAB Act, s 26(1)(d)), and
2. 'Inquire into and provide advice to the Minister in relation to, systemic reform necessary to improve the *quality of care* provided for children in alternative care' (OAB Act, s 26(1)(e)).

This raises the question as to how the Guardian should assess the quality of care. For example, should the level of quality be considered within the context of '*care, treatment and control*' or in terms of '*care, correction and guidance*'?

e. *Cultural identity*

Article 30 of the UNCRC gives every child and young person the right to enjoy their own culture; to practise their own religion; and to use their own language. This is meant to apply as much to children and young people of indigenous origins, as it is to children and young people from ethnic, religious or linguistic minorities.

This sentiment is echoed in the YJA Act, with one of the objects being 'to have regard to the particular needs and circumstances relevant to a youth's cultural identity and linguistic background' (s 3(1)(h)); a right that is also reflected in the YJ Charter (right 21).

Given the over-representation of Aboriginal and Torres Strait Islanders in youth detention in South Australia,²² it is arguably very appropriate that:

1. The YJA Act explicitly requires anyone involved in administering the Act to 'have regard to the particular needs and circumstances of Aboriginal or

²² In 2016-17, an average of 48.5 per cent of children and young people in detention identified as being Aboriginal or Torres Strait Islander, compared with 4.5 per cent of South Australia's child population. Moreover, 62.4 per cent of the training centre's daily average population were Aboriginal or Torres Strait Islander.

- Torres Strait Islander youths’ (s 3(3)(b)) and to ‘observe the Aboriginal and Torres Strait Islander Principle’ (s 3(3)(a)), and
2. The YJ Charter provides for Aboriginal and Torres Strait Islanders in the training centre to participate in cultural activities and celebrations, whenever possible (right 22).

But this raises a question as to whether the provisions in the YJA Act may inadvertently create (or be perceived to create) a different level of access to the ‘cultural identity’ rights, depending on whether a child or young person identifies as being Aboriginal or Torres Strait Islander or whether they are from a different minority group.

Any inequality in access – real or perceived – could, in turn, drive TCV contact requests from residents (or their guardians, relatives or carers), pursuant to section 17 of the YJA Act. It may even result in either the TCV or the Guardian having to look at this issue from a systemic viewpoint.

Additionally, the Council has a mandate to ensure there is an ‘appropriate focus [placed] on the needs of priority population groups’ (OAB Act, s 57(4)(d)). While children and young people with Aboriginal and Torres Strait Islander heritage are one of the Council’s current priority population groups, changing demographics may elevate the needs of other minority groups and require the Council to change its focus. There is a risk that if priority population groups are defined differently amongst the three entities, tension could emerge between those entities as they try to fulfil their statutory obligations.

8. Summary

The introduction of the YJA Act sought to consolidate the administration of youth justice and contemporise other relevant pieces of legislation to better reflect best practice in youth justice.

While the Act and accompanying YJA Regulations provide some solid guidance in relation to the administration of youth justice in South Australia, a thorough review of the legislation highlighted five major themes that may affect the ability of these entities to perform their statutory functions.

The themes related to the concepts of: wellbeing and best interests; respect and dignity; vulnerability; care; and cultural identity.

These themes will likely need further contemplation and discussion to determine whether any additional action will need to be taken.