Training Centre Visitor

Guardian for Children and Young People

A rights-based approach to safety

OGCYP submission to the Five-Year Review of the *Children and Young People (Safety) Act 2017*

November 2022

PREPARED BY **Office of the Guardian for Children and Young People**

The Office of the Guardian for Children and Young People respectfully acknowledges and celebrates the Traditional Owners of the lands throughout South Australia and pays its respects to their Elders, children and young people of past, present and future generations.

Suggested citation
A rights-based approach to safety: OGCYP submission to the five-year review of the Children and Young People (Safety) Act 2017. Office of the Guardian for Children and Young People, Adelaide 2022.

Office of the Guardian for Children and Young People

Level 3, 111 Gawler Place, Adelaide 5000

www.gcyp.sa.gov.au

Ph. 08 8226 8570

gcyp@gcyp.sa.gov.au

GPO Box 2281
Adelaide SA 5001
DX 11

For further information about this submission, please contact:
Alicia Smith, Senior Policy Officer
Office of the Guardian for Children and Young People
Phone – 08 8226 8570, or at alicia.smith2@sa.gov.au

17 November 2022

The Hon. Katrine Hildyard, MP
Minister for Child Protection
GPO Box 1072
ADELAIDE SA 5001

By email: Minister.Hildyard@sa.gov.au
Cc: DCPCYPSActReview@sa.gov.au

Dear Minister

Please see the enclosed submission regarding the five-year review of the *Children and Young People (Safety) Act 2017*, written in my capacities as South Australia's Guardian for Children and Young People, Training Centre Visitor and Child and Young Person's Visitor.

With kind regards

Shona Reid

Guardian | Training Centre Visitor
Office of the Guardian for Children and Young People

Contents

Notes

A caution

This submission contains some case examples and sensitive information that may be distressing to some readers.

If that is the case for you, we encourage you to seek support from family, friends and community or contact a service like Kids Help Line on 1800 551 800 or Lifeline on 13 11 14.

Terminology

Reflecting community preference, the term Aboriginal as used in this report includes both Aboriginal and Torres Strait Islander people.

Data

Please note that some data may not add up due to decimal rounding.

Quotes from children and young people

Quotations from children and young people in care are included throughout this submission. They come from consultation sessions conducted by OGCYP, including the most recent in October 2022. All unattributed quotations in this submission are statements made directly from children and young people to our office.

Our determination to amplify the voices of children and young people means that this submission comes with a language warning. Some quotes may be considered offensive or non-inclusive, but we believe that the context for the citation warrants that use.

CYP Safety Act Review Discussion Paper

References in this submission to the 'Discussion Paper' refers to the following document:

> Department for Child Protection, *Review of the Children and Young People (Safety) Act 2017 Discussion Paper: Building the South Australian child protection system for the future* (September 2022).

At the start of each Part, our submission highlights questions from the Discussion Paper that are relevant to the topic and have informed OGCYP's response. Noting that the *CYP Safety Act* applies across areas outside of OGCYP's powers and functions, not all questions have been addressed.

Glossary

CARP	Contact Arrangements Review Panel
CRC	*United Nations Convention on the Rights of the Child*
CYP Safety Act	*Children and Young People (Safety) Act 2017*
CYP Visitor	Child and Young Person's Visitor
DCP	Department for Child Protection
DHS	Department for Human Services
GCYP	Guardian for Children and Young People
KTYJC	Kurlana Tapa Youth Justice Centre (formerly the Adelaide Youth Training Centre)
NDIA	National Disability Insurance Agency
OGCYP	Office of the Guardian for Children and Young People
OOHC	Out-of-home care
SACAT	South Australian Civil and Administrative Tribunal
TCV	Training Centre Visitor
VOOHC	Voluntary Out-of-Home Care
YTOV	Youth Treatment Orders Visitor

Introduction

The Office of the Guardian for Children and Young People (OGCYP) advocates for the rights and best interests of children and young people in care and youth detention in South Australia. We provide advocacy on individual and systemic issues, as well as monitoring the safety and wellbeing of these children and young people.

The office currently delivers three programs:

- The Guardian for Children and Young People promotes and protects the rights and best interests of children and young people in care,
- The Child and Young Person's Visitor promotes and protects the rights and best interests of children and young people in residential care, and
- The Training Centre Visitor[1] promotes and protects the rights and best interests of children and young people detained in the Kurlana Tapa Youth Justice Centre.

OGCYP welcomes the opportunity to comment on the operation of the *Children and Young People (Safety) Act 2017* (*CYP Safety Act*), as part of the legislated five-year review of the Act.[2] This submission is based on OGCYP's experience in advocating for children and young people across all programs, monitoring the provision of services, and talking with children, young people and staff about their experiences. It follows four previous submissions made between 2017 and 2020, providing feedback on the draft *CYP Safety Bill*, an initial review of the operation of the Act in 2019, and the *Children and Young People (Safety) Miscellaneous Amendment Bill 2020*.

OGCYP notes that the *CYP Safety Act*, as enacted in 2017, was not a comprehensive revisioning of the child protection system. Rather, it updated the pre-existing *Children's Protection Act 1993*, introduced elements from the *Family and Community Services Act 1972* and incorporated new initiatives in response to the Nyland Royal Commission recommendations.

In its current form, the *CYP Safety Act* remains primarily a framework for child removal, rather than a holistic document for promoting the best interests of children and young people in South Australia. However, we note that some constructive and incremental improvements have been made to the child protection system under the new legislation. OGCYP provides this submission as guidance about legislative amendments that we believe builds on this work, to improve practice and outcomes for children and young people.

The submission is set out in 10 parts, strongly influenced by international guidance on measures to promote, protect and respect human rights for children and young people. It is bookended by a discussion on the importance of infusing a 'best interests' approach into decision making for children and young people, and what it means to give substance to children and young people's rights. The remainder of the submission outlines suggested legislative reforms to embed a focus on achieving high standards for out-of-home care (OOHC) in South Australia.

[1] Since November 2021, the TCV has been assigned the Youth Treatment Orders Visitor role, pursuant to the *Controlled Substances Act 1984* (SA).
[2] *Children and Young People (Safety) Act 2017*, s 169.

The Best Interests of the Child

There is no hierarchy of rights in the Convention; all the rights provided for … are in the 'child's best interests' [3]

- United Nations Committee on the Rights of the Child

Discussion Paper, Question 11: *Do we have the right principles in place to guide decision making in South Australia's child protection legislation?*

Discussion Paper, Question 12: *In addition to safety as the paramount consideration, should the legislation be explicit that the best interests of the child is a matter to be considered in decision making?*

Discussion Paper, Question 22: *Should the legislation be clear that children and young people are at the centre of everything we do?*

Article 3 of the United Nations Convention on the Rights of the Child[4] (CRC) enshrines the child's right to have their best interests taken as a primary consideration in all actions that affect them. This fundamental right is aimed at ensuring that the wellbeing and development of children and young people is placed at the forefront of decision making that impacts upon their lives.[5]

There is no conflict between the right of the child to have their best interests taken into account, and the safety and wellbeing of the child. All rights for a child are in their best interests. Rather, Article 3 provides the methodology for achieving these rights: that the decision maker should give consideration to all of the child's rights under the CRC and identify the action that achieves these rights to the fullest extent possible.

Where a decision ***affects*** a child or young person, then their interests should be ***considered***. If the decision is ***about*** a child or young person, then their interests should be ***at the centre*** of the decision making process.[6]

For the reasons outlined in the below discussion,

the GCYP recommends that the best interests of the child should be included in the formulation of the 'paramount consideration' in the *CYP Safety Act*.

[3] UNCRC, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, 29 May 2013, CRC/C/GC/14, [4].
[4] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577 ('CRC'), p.3.
[5] UNCRC, n 3, [4].
[6] Ibid, [20]; John Tobin, *The UN Convention on the Rights of the Child* (Oxford University Press, 2019), p. 79.

The 'paramount consideration' in Australian child protection legislation

Most jurisdictions in Australia articulate the best interests of children and young people as the 'paramount' consideration in child protection legislation.[7] This paramountcy does not place 'best interests' over another right of the child. Rather, it expresses a principle that the interests of the child should be placed above the interests of other persons or systems.

The best interests principle is at 'the heart of the contemporary out-of-home care legislative and practice framework'[8] – and it must be, in order to meet Australia's obligations under the CRC. In its concluding observations to Australia in 2019, the United Nations Committee on the Rights of the Child expressly highlighted that inconsistent application of Article 3 across jurisdictions, and the use of different criteria for child removal and placement in OOHC, was a human rights issue for children in Australia. The Committee recommended that Australia harmonise child protection models across the country,[9] and ensure that guidance for determining the best interests of the child is coherent and consistently applied.[10]

In addition to being required by the CRC, consideration of a child's best interests is a useful tool for guiding child-focused systems and processes. Rather than applying blanket rules, it provides the important protection for each child to be considered as an individual in their own right, accounting for their age, gender, culture, maturity and other personal characteristics. It is also responsive to the dynamic nature of best interests for developing children and young people, with issues and circumstances that are continuously evolving.

The only jurisdictions in Australia that do not place the best interests of the child as the paramount consideration are **South Australia** and **New South Wales**.

South Australia

Section 7 of the *CYP Safety Act* states that the paramount consideration in the administration, operation and enforcement of the Act is that children and young people are 'protected from harm'.[11]

'Harm' is defined to mean physical or psychological harm, caused by act or omission, including by sexual, physical, mental or emotional abuse or neglect. The definition expressly excludes 'emotional reactions such as distress, grief, fear or anger that are a response to the ordinary vicissitudes of life'.[12]

---

[7] See Figure 1.
[8] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017), vol 12, [2.6.7].
[9] UNCRC, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, CRC/C/AUS/CO/5-6, [34].
[10] Ibid, [20].
[11] *Children and Young People (Safety) Act 2017* (SA), s 7.
[12] Ibid, s 17.

Despite the provision's title reading 'Safety of children and young people paramount', safety is not defined as a holistic concept in this context. It does not encompass a child's overall wellbeing, through physical, mental, emotional and cultural safety. Instead, it is focused on injuries that may be inflicted on children and young people, by 'act or omission'.

The paramount consideration in section 7 is supplemented by other guiding principles, including that early intervention is a priority,[13] children and young people have a need to be heard and have their views considered,[14] as well as the 'principles of intervention', 'placement principles' and the 'Aboriginal and Torres Strait Islander Child Placement Principle' (ATSICPP).[15]

The 'paramount consideration' in the *CYP Safety Act* appears in different terms to its initial iteration in the *Children's Protection Act 1993* (CPA). Historically, under the CPA, there was a provision setting out 'fundamental principles' – namely, that the child's wellbeing and best interests were the paramount considerations, in addition to the following principles:

- Every child has the right to be safe from harm, and
- Every child has a right to care in a safe and stable family environment or, if such a family environment cannot for some reason be provided, in some alternative form of care in which the child has every opportunity that can be reasonably provided to develop to his or her full potential.[16]

In April 2015, the coronial inquest into the death of Chloe Valentine recommended that the CPA be amended, to 'make it plain that the paramount consideration is to keep children safe from harm. Maintaining the child in her or his family must give way to the child's safety'.[17] In April 2016, this recommendation was implemented by removing the 'fundamental principles' from the CPA and simplifying the objects of that act, to clarify that the paramount consideration was to keep children safe from harm.

Following the 2016 *Child Protection Systems Royal Commission* ('the Nyland report'),[18] the *CYP Safety Act* reintroduced a number of the fundamental principles. However, the best interests as a paramount – or even primary – consideration was not reintroduced.

In reflecting on the history of these legislative amendments, it is important to consider the former State Coroner's recommendation in its context. The coronial inquest primarily considered why statutory investigation, assessment and removal powers were not utilised in a child's circumstances. However, the *CYP Safety Act* has a much broader application than statutory removal, including governing the standards for children and young people who are in alternative care and not residing with their birth families. As such, the core of this recommendation is about ensuring sufficient weight is given to protecting children from harm, in decisions about removal. This did not necessarily require amending the legislation to remove the best interests of the child as the paramount consideration across the entirety of the legislation.

---

[13] Ibid, s 9.
[14] Ibid, s 8.
[15] Ibid, ss 8 – 12.
[16] *Children's Protection Act 1993* (SA), historical version (11.4.2015 to 27.4.2016), s 4.
[17] *Inquest into the Death of Chloe Lee Valentine: Finding of the State*, 9 April 2015, [22.12].
[18] Hon Margaret Nyland, *The Life they deserve: Child Protection Systems Royal Commission* (2016).

An example of alternative ways to address such an issue can be seen in the Nyland report, which similarly concluded that failure to give primacy to a child's safety has been responsible for harm to children in South Australia.[19] In the specific context of screening individuals engaged in child-related work, the Nyland report recommended that 'the paramount consideration in screening assessment must be the best interests of children, having regard to their safety and protection'.[20] This formulation is consistent with a child's right to consideration of their best interests, while elaborating on one of the key factors that should guide decision making in a particular context.

Comparison to other Australian jurisdictions

Child protection and out-of-home care legislation in all state and territory jurisdictions ***except*** South Australia and New South Wales explicitly names the best interests of the child as the paramount consideration (see Figure 1 below).

While New South Wales identifies the safety, welfare and wellbeing of the child as the paramount consideration, South Australia adopts the more limited framing of 'protection from harm', that explicitly excludes emotional wellbeing. As such, South Australia's child protection legislation is the articulation that is most removed from the child's right under the CRC to have their best interests taken as a primary consideration.

Figure 1: The 'paramount consideration' in Australian jurisdictions

Jurisdiction	Paramount consideration
Australian Capital Territory, Northern Territory, Tasmania, Victoria and Western Australia[21]	Best interests of the child
New South Wales[22]	Safety, welfare and well-being of the child
Queensland[23]	Safety, wellbeing and best interests of the child, both through childhood and for the rest of the child's life
South Australia[24]	Children and young people are protected from harm.

[19] Ibid, Case Study 5, 139. This was specifically highlighted in the context of the Shannon McCoole case study.
[20] Ibid, recommendation 238.
[21] *Children and Young People Act 2008* (ACT), s 8; *Care and Protection of Children Act 2007* (NT), s 10; *Children, Young Persons and Their Families Act 1997* (Tas), s 10E; *Children, Youth and Families Act 2005* (Vic), s 10; *Children and Community Services Act 2004* (WA), s 7.
[22] *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9.
[23] *Child Protection Act 1999* (Qld), s 5A.
[24] *Children and Young People (Safety) Act 2017* (SA), s 7.

The best interests of the child is also the paramount consideration under federal legislation, with respect to family court proceedings.[25] Separate provisions outlines guidance about how to determine what is in a child's best interests, by way of 'primary considerations' and 'additional considerations'.[26] This includes matters such as the need to protect the child from physical or psychological harm, the views expressed by the child, and the maturity, sex, lifestyle and background of the child (including culture and traditions).

Consequences of removing the 'Best Interests' consideration

In addition to being inconsistent with a children's rights framework, there are two primary implications arising from removing the best interest's principle as the paramount consideration for children and young people in care.

1. A lack of harmony in the principles and frameworks guiding different agencies, individuals and authorities

The *Youth Justice Administration Act 2016* clearly enshrines that consideration should, at all times, be given to promoting the wellbeing and best interests of youths.[27] Similarly, the functions of the Training Centre Visitor (TCV) include to promote the best interests of the residents of a training centre.[28] This binds the Minister for Human Services to the standard of promoting best interests, with respect to children and young people under their custody. There is synergy between the functions of the TCV and the Minister's obligations.

The functions of the GCYP are also to promote the best interests of children under the guardianship or in the custody, of the Chief Executive, and in particular those in alternative care.[29] However, the Chief Executive of the DCP is under a different obligation with respect to children and young people under her guardianship or custody. Accordingly, **there is a misalignment** between the standards for care, and the standards guiding independent oversight and advocacy.

2. Impact on decision making and review rights

Section 84 of the Act sets out the Chief Executive's 'powers' in relation to children and young people in the Chief Executive's custody or guardianship, including with respect to placement, medical treatment, education and other aspects of their care.

In exercising these powers, the Chief Executive, must have regard to the principles of intervention, the placement principles and the Aboriginal and Torres Strait Islander Child Placement Principle. Further, to the extent that the child or young person is willing and able to do so, section 84 requires that they should be involved in the decision making process and their views should be given due weight in making the decision, in accordance with their developmental capacity and the circumstances of the case. However, there is **no expressed requirement** under

[25] *Family Law Act 1975* (Cth), s 60CA
[26] Ibid, s 60CC.
[27] *Youth Justice Administration Act 2016* (SA), s 3(2).
[28] Ibid, s 14(1)(c).
[29] *Children and Young People (Safety) Act 2017* (SA), s 26(1)(a).

section 84 – or the principles of intervention, placement principles or the Aboriginal and Torres Strait Islander Child Placement Principle – to promote the best interests of the child.

This means that children and young people who wish to make internal complaints, request a review of a decision or initiate proceedings may be unable to do so on the ground that the decision did not take their best interests into account (unless the legislation expressly refers to this right in the particular provision).

Not only does this have the potential to affect legal outcomes, but it also impacts upon the framework and organisational culture that child protection practitioners work within. Rather than a requirement to engage in comprehensive rights impact assessments and planning the best care for a child or young person, the system places paramountcy on moving from crisis to crisis and avoiding a narrow, statutorily-defined set of harms.

Concerningly, there are a number of provisions where the child's best interests expressly provide a decision-maker with a discretionary basis to *not* take a certain action or provide a right otherwise available. For example, in relation to contact arrangements, section 93(4) clarifies:

- That the Chief Executive is not required to make a contact arrangement in favour of a particular person if there is a significant possibility that a child or young person would be at risk in the course of contact with the person or it would otherwise *not be in the child or young person's best interest* to have contact with the person.
- However, there is nothing in that provision which requires the Chief Executive to make contact arrangements that *are* in the best interests of the child or young person.

This approach reframes the best interests of the child in the overall context of the Act as a basis for exception, rather than a principle that must be upheld for children and young people.

Recommendation 1

The legislation should be explicit that the best interests of the child – which includes their safety and wellbeing – is the **paramount consideration** in decision making.

Aboriginal and Torres Strait Islander Child Placement Principle

Discussion Paper, Question 1: *Do you support the Aboriginal and Torres Strait Islander Child Placement Principle being embedded in the legislation to the standard of active efforts?*

Discussion Paper, Question 2: *...what changes can we make throughout the legislation to demonstrate the commitment to active efforts?*

Discussion Paper, Question 10: *How do we better ensure that the voices of Aboriginal children, young people and families are heard and acted upon?*

Current framework

The *CYP Safety Act* includes a Parliamentary declaration acknowledging that 'outcomes for Aboriginal and Torres Strait Islander children and young people in care have historically been poor, and that it is unacceptable for outcomes for those children and young people to be any different to those for children and young people in care generally.'[30]

Section 12 of the *CYP Safety Act* enshrines aspects of the Aboriginal and Torres Strait Islander Child Placement Principle, establishing legal requirements for the exploration and engagement of Aboriginal and Torres Strait Islander families and communities in kinship and family-based care.

The principle requires DCP to explore the following, in preference:

1. A member of the child or young person's family,
2. A member of the child or young person's community who has a relationship of responsibility for the child or young person,
3. A member of the child or young person's community, and
4. A person of Aboriginal or Torres Strait Islander cultural background (as the case requires).

If an Aboriginal child or young person is unable to be placed in accordance with the above, or it is deemed not in their best interests to do so, the legislation requires that the child or young person should be given the opportunity for continuing contact with their family, community and culture.

Consultation with a recognised Aboriginal or Torres Strait Islander organisation is required, 'where reasonably practicable', before making any placement for an Aboriginal child or young

[30] *Children and Young People (Safety) Act 2017* (SA), s 4.

person. To the best of our knowledge, there remains only one recognised organisation for this consultation.

In addition to the Principle, there are currently a number of provisions that expressly address cultural support and connection for Aboriginal children and young people in OOHC:

1. A case plan prepared under section 28 must, where 'relevant', include a part setting out a 'cultural maintenance plan',[31]
2. A long-term care plan, prepared under section 90, must contain a 'cultural maintenance plan' for a child or young person,[32] and
3. If required by any determination or requirement of the Chief Executive, the Contact Arrangements Review Panel (CARP) must, in the case of a review relating to an Aboriginal child or young person, include a member who is an Aboriginal person.[33]

Current practice issues

In June 2022, the Commissioner for Aboriginal Children and Young People commenced an inquiry into the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle across the five elements of *prevention, participation, placement, partnership* and *connection*.[34]

The GCYP strongly welcomes the Inquiry, noting the need for systemic reform across the entire child protection system to improve the availability of culturally appropriate specialist services, approaches and responses to children and their families.

For children and young people in OOHC, the GCYP holds concerns about the application of the Principle, with respect to both placement decisions and maintaining connection with family, community and culture. In 2021-22, more than half of enquiries to OGCYP relating to Aboriginal children and young people raised issues about contact with significant others, including children and young people's cultural connections and community.[35]

The GCYP was concerned to learn from case management (during annual review audits conducted in late 2021-22 in a regional area), that the Aboriginal Family Finding and Mapping Team (AFFMT) is reprioritising its resources to 'front end' family mapping (i.e. scoping for Aboriginal children entering care), placing efforts to source appropriate placements as early as possible in a child or young person's entry into care. We understand that, if required, mapping for children and young people on longer term orders can be referred to this program. However, OGCYP have been advised by DCP that they may not be triaged 'in' for service due to reprioritising.

---

[31] Ibid, s 28.
[32] Ibid, s 90; *Children and Young People (Safety) Regulations 2017*, r 22.
[33] *Children and Young People (Safety) Regulations* 2017, r 26.
[34] CACYP, *Inquiry into the application of the Aboriginal and Torres Strait Islander Child Placement Principle in the removal and placement of Aboriginal children in South Australia: Background Paper* (2022).
[35] OGCYP, GCYP Annual Report 2021-22 (2022), p. 23-24.

The GCYP maintains the importance of this program and for regional and remote areas to have full access. Our observations through Annual Review audits have been that staff may only engage in basic family mapping and contact attempts. This office acknowledges that regional locations and staff within those locations often have very good connections with their local community, which may assist with family mapping. However, it is important to note this is variable across areas and locations, relying on relational abilities that may not be sustained when individuals move on or change jobs. Systemically, this does not provide a uniformed approach to local community family mapping opportunities.

Restricted access to AFFMT services lends to concerns about the cultural appropriateness of some placements and cultural safety for children and young people in care. This may, in turn, contribute to reduced compliance with the Principle and efforts to ensure children and young people can maintain their connection with their Aboriginal family and community.

Embedding 'active efforts' in the legislation

The GCYP supports embedding the Aboriginal and Torres Strait Islander Child Placement Principle in the legislation to the standard of 'active efforts', being 'purposeful, thorough and timely efforts' to enact and implement this principle.[36] The standard of 'active efforts' should apply across early intervention and safety planning, extending to supported reunification and case planning for children in OOHC that is in partnership with a child's family and community. Guidance published by SNAICC – National Voice for Our Children highlights that active efforts for children in OOHC includes:[37]

- Talking to children, families and communities, where appropriate, to find out whether they identify as Aboriginal,
- Cultural support plans address not only the methods of supporting connection, but how they will be resourced and enacted,
- Aboriginal organisations are resourced and given the opportunity to participate in decision making,
- Families can participate in Aboriginal family-led decision making,
- Placements with non-Aboriginal carers are regularly reviewed, with a goal to reconnect children to Aboriginal kinship placements, and
- Thorough family mapping, scoping and contact efforts, involving Aboriginal organisations.

The GCYP notes that achieving 'active efforts' is equally a matter of legislation, policy and practice. It is important to embed principles, standards and protections in legislation, which are supported to flow down into implementation through resourcing, leadership and organisational competency.

[36] SNAICC, *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation* (2019), p. 4.
[37] Ibid, p. 5.

In addition to articulating the standard of 'active efforts' within section 12, the GCYP considers that the following legislative amendments would strengthen the 'connection' component of the Principle:

- Clarifying that a cultural plan must be prepared for Aboriginal children and young people (rather than, 'where relevant'),
- Embedding a requirement that cultural plans should be developed in consultation with, to the fullest extent possible, a child or young person's family and community and an Aboriginal organisation, and
- Inserting a guiding principle recognising that, for an Aboriginal child or young person, providing the opportunity to maintain and build connections to their Aboriginal family, community and culture must be taken into account in determining their best interests.[38]

Recommendation 2

Embed the standard of 'active efforts' for implementation of the Aboriginal and Torres Strait Islander Child Placement Principle, accompanied by legislative guidance of actions that evidence active efforts.

Recommendation 3

The legislation should be explicit that, for an Aboriginal child or young person, providing the child or young person with the opportunity to maintain and build connections to their Aboriginal family, community and culture must be taken into account in determining their best interests.

Recommendation 4

Embed a requirement in the legislation that a case plan for an Aboriginal child or young person must include a cultural plan. The plan should be developed in consultation, to the fullest extent possible, with the child or young person, their family, community and relevant Aboriginal organisations.

Legislative commitment to self-determination

Discussion Paper, Question 6: *Do you support legislative reform that will explicitly provide for the progressive delegation of legislative functions to recognised Aboriginal entities?*

Aboriginal children and young people, as well as their families and communities, may experience unique and culturally specific traumas when engaging with the child protection system. This occurs against a background of the history of racially discriminatory child removal practices across Australia, including the Stolen Generations. This history means that Aboriginal children

[38] See, eg, *Children, Youth and Families Act 2005* (Vic), s 10(3)(c).

and young people and their families can find engaging with government services to be distressing, and they may carry different fears and worries to non-Aboriginal families. Receiving services through Aboriginal organisations can help people feel safe to talk about what is happening within their family and receive culturally tailored supports.

South Australia has taken some steps towards funding Aboriginal organisations to provide relevant child protection services, including residential care and supports for kinship carers. However, a commitment to reconciliation, and meeting Australia's obligations under the *United Nations Declaration of the Rights of Indigenous Peoples*,[39] requires greater and more purposeful progress towards implementing a framework of legislation and practice that provides space for Aboriginal-led decision making. As highlighted in the *Bringing them Home Report*:

> *'Self-determination requires more than consultation, because consultation alone does not confer any decision making authority or control over outcomes. Self-determination also requires more than participation in service delivery because in a participation model the nature of the service and the ways in which the service is provided have not been determined by Indigenous peoples. Inherent in the right of self-determination is Indigenous decision making carried through into implementation'.*[40]

Australian jurisdictions are making this progress at different speeds, noting that Victoria and Queensland are currently the only Australian jurisdictions that expressly provide for the delegation of legislative functions to Aboriginal organisations.[41] An important foundational step is reforming legislation to allow functions to be performed by Aboriginal organisations, so the child protection system can then grow into delegating these functions.

Accordingly, GCYP supports legislative reform to allow the progressive delegation of functions to Aboriginal organisations, and notes that this is an essential part of implementing the Aboriginal and Torres Strait Islander Child Placement Principle.[42] It is important, though, that this delegation should occur via an express power in the *CYP Safety Act* to authorise an appropriate officer of an Aboriginal organisation to exercise the legislative powers conferred on the Chief Executive. It should also be accompanied by corresponding financial and human resources.

Progress towards this reform will require an extensive consultation process with children and young people, Aboriginal peak bodies, Commissioner for Aboriginal Children and Young People, elders and community members in South Australia. OGCYP welcomes the inclusion of this topic as a matter for consideration in the review of the *CYP Safety Act*, as an early step in this process. We are also pleased to note the new Partnership Agreement on Closing the Gap, signed by the Minister for Aboriginal Affairs and SAACCON in November 2022, which includes measures to support progress in this area.

---

[39] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly,* 2 October 2007, A/RES/61/295.
[40] Commonwealth of Australia, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), p. 276.
[41] *Child Protection Act 1999* (Qld), s 148BB; *Children, Youth and Families Act 2005* (Vic), s 18.
[42] SNAICC, n 36, p. 33.

OGCYP notes that this legislative reform must occur parallel to an ongoing commitment to build and improve cultural competency within DCP and other mainstream organisations that exercise child protection functions for Aboriginal children.

Listening to children and young people's views about placement

The GCYP acknowledges that Aboriginal children and young people in care have varying experiences of their connection to culture, identity, family and community. For many children and young people, their connection is a lifeline. Others may be at an early stage of their connection journey and worry about their place, or they may not want to engage or identify with their cultural connections or ancestry at a particular stage in their life.[43]

Decision makers should be equipped to assist children and young people to navigate this important area. To explore both the reasons why children and young people with Aboriginal ancestry may not identify as Aboriginal or show desire to engage with their culture, and how identity and desire to connect with culture may change over the course of their childhood, adolescence and adulthood.

OGCYP advocates for core fundamental approaches that should be utilised in supporting children and young people in these situations, such as:

- Providing opportunities for children and young people to express their views,
- Giving due weight to these views, in accordance with trauma-informed practice and the child or young person's age, maturity and development,
- Undertaking active efforts to identify key information about the young person's culture and support networks, including their nation and people within their family and community who can support the young person,
- Maintaining opportunities for future engagement and connection with their family, community and culture, if these connections cannot be utilised immediately, and
- Regularly reviewing changes in their views or circumstances throughout their time in care. It is important that review of a young person's circumstances and views occurs throughout case planning processes and is not limited to transition planning when a young person is leaving care.

Cultural safety in judicial proceedings

> ***"Acknowledge our cultures" – Young person in care***

In providing an advocacy function for children and young people in out-of-home care, it has been noted that children and young people and their families have minimal understanding of the roles and processes of the Youth Court and SACAT, or are reluctant and hold significant worries about

[43] This was a theme that arose in several interviews with Aboriginal children and young people for OGCYP's South Australian Dual Involved Project. See OGCYP, *Six Month Snapshot of the South Australian Dual Involved Project: Children and young people in South Australia's child protection and youth justice systems* (2021), p. 15.

engaging in these processes. While these challenges may be experienced widely throughout the community, there are specific stories and histories behind these concerns for Aboriginal communities that require particular attention.

The inclusion of Aboriginal membership in decision making bodies is one measure that we consider carries significant potential to promote cultural safety for Aboriginal children and young people and their families and incorporate a First Nations cultural lens into decision making. This is consistent with the National Principles for Child Safe Organisations, which requires child safety and wellbeing to be embedded in organisational leadership, governance and culture. Meeting this standard involves a broad understanding of safety, which encompasses cultural safety.[44] This means that Aboriginal children and young people, as well as their family and communities, should feel safe when travelling through the child protection system that their culture and identity is acknowledged, respected and unchallenged.[45]

The GCYP acknowledges the positive step to include a legislative requirement in the *CYP Safety Act* that the Contact Arrangements Review Panel (CARP) must, in the case of a review relating to an Aboriginal child or young person, sit with a member who is an Aboriginal person. OGCYP is also aware that DCP practice is to include Aboriginal representation on Annual Review panels, where possible. We consider that similar requirements and practices have an equally important role to play in judicial proceedings.

This membership should be supported by culturally and trauma informed practice, recognising the importance of taking the time to safely engage with children and young people and their families, build trust and rapport, and receive the fulsome information needed to understand their circumstances, strengths and needs. Culturally safe practice also involves respecting the boundaries children and young people and their families may have, and the reasons why engagement may be retraumatising or inappropriate in some circumstances. Accordingly, in addition to incorporating Aboriginal membership in decision making bodies, it is also important to consider other aspects of Youth Court and SACAT practice that can be improved to support trust, engagement, choice and participation in proceedings. This includes reviewing the physical environment, information and communication practices, and individual and organisational cultural competency.

> ***"[a] mother could be worried about white people"***
>
> ***– Young person in care***

Supporting cultural competency in SACAT and Court proceedings could include – as recommended by the 2019 NSW Family Culture Review Report – induction and ongoing training about the Aboriginal and Torres Strait Islander Child Placement Principle for judicial members.[46]

---

[44] Australian Human Rights Commission, *National Principles for Child Safe Organisations* (2018), p. 9.
[45] SNAICC, *Keeping Our Kids Safe: Cultural Safety and the National Principles for Child Safe Organisations* (2021), p. 5.
[46] Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal Out-of-Home Care in NSW* (Final Report, 2019), p. 305.

Creating Aboriginal specific resources, practices and processes is another method that may help foster trust and encourage children and young people and their families to feel culturally safe. An example of positive practice in this respect is Marram-Ngala Ganbu (meaning 'we are one' in Woiwurrung language)**,** a weekly Koori Family Hearing Day at the Children's Court of Victoria. The process incorporates a yarning circle format, physical representations of Aboriginal culture in the environment and Aboriginal staff to provide support to families and coordinate listings.[47]

SNAICC's 2020 Implementation Review of the Aboriginal and Torres Strait Islander Child Placement Principle noted that stakeholders reported higher standards of cultural safety through the Marram-Ngala Ganbu program in comparison to ordinary court processes. One notable feature was the inclusion of a broader network of family to be involved, which also assists the Court to receive higher quality information about the needs of children and young people and make decisions in their best interests.[48]

Recommendation 5

Consult with Aboriginal organisations and community members in South Australia about methods to improve cultural safety for children and young people and their families in Youth Court and SACAT proceedings.

[47] K Arabena (et al), *Evaluation of Marram-Ngala Ganbu: A Koori Family Hearing Day at the Children's Court of Victoria in Broadmeadows* (2019), pp. 17-18.
[48] SNAICC, *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Victoria* (2020), pp. 14-15.

Promoting The Right to be Heard

> "I do need to talk with you. I need to let you know what is important to me, to get what I want and need, and to be kept safe"
>
> - Young person in care

Discussion Paper, Question 23: *How can the legislation better support children of all ages to express their views and wishes, and uphold their right to participate in important decision making processes that affect them?*

Current participation framework for children and young people

The CRC enshrines the child's right to express their views freely in all matters affecting them, with their views being given due weight in accordance with their age and maturity.[49] In recognition of the importance of this right, the GCYP must, in carrying out her functions, encourage children who are affected by issues to express their own views and give proper weight to those views.[50]

The *CYP Safety Act* contains several broad statements of respect for young people's voices, which guide the operation, enforcement and administration of the Act:

- **Parliamentary declaration (s 4): '**It is the intention of the Parliament of South Australia that the performance of functions … be done in collaboration with, and with the cooperation of, children and young people and their families rather than simply being done to or for them.'
- **Needs of young people to be considered (s 8):** Without derogating from the paramount consideration to protect children and young people from harm, their need to be heard and have their views considered must also be taken into account.
- **Principles of intervention (s 10):** If a child or young person is able to form their own views on a matter concerning their care, they should be given an opportunity to express those views freely. The views are to be given due weight, in accordance with the developmental capacity of the child or young person and the circumstances.

There are also provisions which expressly provide for a particular right to participate or express views,[51] or limit a child or young person's right to do so in some circumstances.[52]

[49] CRC, Art 12.
[50] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA), s 26(2)(a).
[51] See, eg, *Children and Young People (Safety) Act 2017* (SA), s 84(4).
[52] See, eg, ibid, s 159(2).

Strengthening participation requirements

In the course of advocacy matters for children and young people, the GCYP has identified a number of specific areas where children and young people have expressed (or we have observed) that they were not adequately consulted in decision making, and/or their views were not given sufficient weight. These areas are discussed below.

Youth Court and SACAT proceedings

In the course of our work, children and young people have raised concerns about lawyers not listening to them and not advocating for views they expressed in Court or SACAT proceedings, or that they felt they did not have a say during court proceedings.

The *CYP Safety Act* provides that children and young people must be represented by a lawyer in child protection proceedings, unless the child or young person makes 'an informed and independent decision' not to be represented.[53] Whether or not they are legally represented, both the Court and SACAT have an obligation to provide the child or young person with a reasonable opportunity to personally present their views about their ongoing care and protection, unless the child or young person is not capable of doing so, or to do so would not be in the best interests of the child or young person.[54]

These provisions recognise that children and young people may wish to speak directly at proceedings, even when they have a lawyer. Taking this step may aid a child or young person to feel in control of their own safety and wellbeing, and the decisions that will affect their life.

> ***"I need you to understand where I have come from and how I am dealing with this situation so that you can understand me when I have a say" – Young person in care***

It is common for children and young people involved in child protection proceedings to have numerous adults involved in decision making on their behalf. While there can be benefits from a wide range of views contributing to decisions, there are also significant challenges; timeliness is often lost, information may be spread across different sources, the likelihood of disputes is multiplied, and children and young people in care may be reliant on adults acting on their behalf who do not know them well. Ensuring children and young people can communicate directly to decision makers is a key mechanism for understanding what is important to the individual child or young person and that they travel safely (emotionally and psychologically) through legal processes.

In addition to the opportunity to personally present their views, the *CYP Safety Act* also requires lawyers to act in accordance with any instructions given by a child or young person in child protection proceedings, as far as is reasonably practicable. To the extent that the child or young person has not given, or is not capable of giving, instructions, the legal practitioner must act in

[53] Ibid, s 64(1)
[54] Ibid, s 62(1)

accordance with the legal practitioner's own view of the best interests of the child or young person.[55]

The GCYP acknowledges that child protection proceedings are complex, and there may be circumstances where it is appropriate for a lawyer's submissions to be contrary to the child's voice, or it may not be in their best interests to present their views personally (particularly for trauma-related reasons). However, it is important to ensure that these decisions are evidence-based and implement children and young people's participation rights, to the fullest extent possible. [56]

Assessing the extent to which a child or young person is willing and able to provide instructions, or able to present their views personally to the Court or SACAT, is a complex matter. Views can be expressed by children in a variety of forms, so it is important that legal representatives, advocates and judicial officers encourage and value the different ways that views may be expressed.

Assumptions that a child or young person does not have capacity to provide instructions can arise due to biases, culturally unsafe practices or knowledge and skill limitations surrounding appropriate communication techniques. This is particularly the case when the assessment is made before professionals have had the opportunity to build a trusting relationship with the child or young person. Children may be non-verbal or present as reluctant to engage in verbal interviews due to complex and interrelated factors, including age, gender, disability, experiences of trauma and cultural and linguistic barriers.

> ***"some ways of communicating with me don't work" – Young person in care***

Promoting children and young people's right to express their views requires professionals to work from the starting position that children and young people are capable of expressing views and giving instructions to their legal representative, unless there is evidence to the contrary. Further, that young age or disability does not amount, on its own, to evidence that the child or young person is not capable of doing so. As emphasised by the UNCRC in guidance about the application of Article 12 of the CRC:

> *Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences …*

---

[55] Ibid, s 63.

[56] OGCYP's recent submission to the Law Society of South Australia regarding the development of guidelines for legal practitioners in child protection proceedings highlighted the need for specific guidance on this issue. This includes engaging experts to ascertain the most appropriate communication methods for a particular child or young person, utilising alternatives to direct participation where appropriate and respecting the wishes of a child or young person if they make an informed choice not to participate. See, OGCYP, *Submission to the Law Society of South Australia: Guidelines on the Legal Representation of Children in the Youth Court (Care and Protection) Jurisdiction*, 27 May 2022.

> *States parties are also under the obligation ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disability should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language.*[57]

This obligation is reflected in domestic legislation, which requires that children and young person are not discriminated against on the basis of their age or disability. Further, children and young people with disability are entitled to 'reasonable adjustments' or 'special assistance' in service provision under both state and federal anti-discrimination law, to ensure that they can access services on an equal basis to their peers.[58]

Developing and implementing guidelines that are specific to representing children and young people in care and protection proceedings was a key recommendation arising from the 1997 inquiry into children and the legal process, jointly conducted by the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission.[59] Twenty five years later, South Australia and Tasmania are the only jurisdictions that do not have relevant guidelines in place, specific to care and protection proceedings.[60]

In early 2022, the Law Society of South Australia (LSSA) sought the former GCYP's views regarding the development of guidelines for the legal representation of children in the Youth Court (Care and Protection) jurisdiction. In accordance with our submission to the LSSA,[61] the GCYP maintains that legal practitioners in South Australia require clearer guidance and resources to support the use of processes and communication methods that are responsive to a child's age, stage of development, disability and cultural needs.

Annual reviews

Every child in care is entitled to have their circumstances reviewed by DCP at least once per year, by a panel appointed by the Chief Executive.[62]

One of the key responsibilities of the OGCYP Principal Advocate is to audit a proportion of DCP annual reviews each year, to gain an overview of the circumstances of children in care. This

---

[57] UNCRC, *General comment no 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, p. 7.
[58] *Disability Discrimination Act 1992* (Cth), ss 5, 24; *Equal Opportunity Act 1984* (SA), ss 66, 76.
[59] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process* (1997), Chapter 13.
[60] See, Legal Aid Queensland, *Best Practice guidelines framework: Working with children and young people* (April 2015); Victoria Legal Aid, *Representing children in child protection proceedings: A guide for direct instructions and best interests lawyers* (2019); Law Society NT, *Protocols for lawyers representing children* (2017); Children's Court of Western Australia, *Guidelines for Child Representatives in Protection Proceedings* (2019); The Law Society of New South Wales, *Representation Principles for Children's Lawyers,* 4th edition (2014); ACT Law Society, *Guidelines for Lawyers Representing Children and Young People in Care and Protection Matters in the ACT Children's Court* (2004).
[61] OGCYP, *Submission to the Law Society of South Australia: Guidelines on the Legal Representation of Children in the Youth Court (Care and Protection) Jurisdiction*, 27 May 2022.
[62] *Children and Young People (Safety) Act 2017* (SA), s 85.

includes ensuring that the child or young person is included in their annual review and decision making process. Ways that children and young people may participate include attending the annual review (in-person, by phone or videoconference), completing a 'Viewpoint Survey', or second-hand, through sharing their views with their case manager or carer.

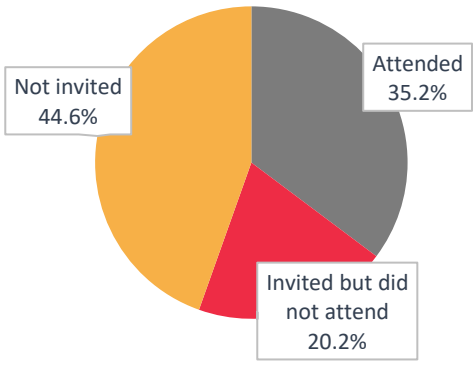
In 2021-2022, OGCYP conducted audits of annual reviews for 193 children and young people (approximately 4% of the care population) and identified that (as depicted in Figure 2):

- 35.2% (n: 68) participated directly by attending the review
- 20.2% (n: 39) were invited, but did not attend
- 44.6% (n: 86) were not invited.[63]

The most common reason that young people were either not invited, or were invited but did not attend, was that they were at school (see Figure 3).

Further, less than 1 in 4 children and young people (23.8%) completed a Viewpoint Survey, with the most common reason for not doing so being their age and capacity. For children and young people of an age and developmental ability to be able to complete the survey, approximately one third had done so. Concerningly, over 1 in 3 surveys were not completed because they were not actioned by the case manager (see Figure 4).[64]

Figure 2 Attendance of children and young people at OGCYP audited annual reviews (n:193): 2021-22

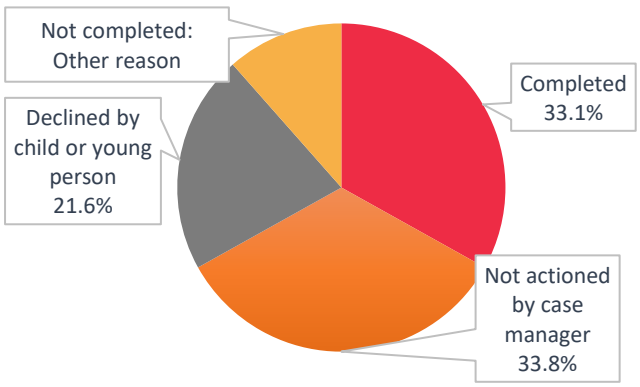


[63] OGCYP, GCYP Annual Report 2021-22 (2022), p. 34.
[64] Ibid.

Figure 3 Reasons for children and young people's non-attendance at OGCYP audited annual reviews (n:193): 2021-22

Reason	Number of children and young people invited but did not attend	Number of children and young people not invited	Total
School	25	30	55
Age or capacity	-	38	38
Attendance 'triggering'	-	12	12
Not interested	10	1[65]	11
Extenuating circumstances	4	1[66]	5
Behavioural	-	2	2
Unknown	-	2	2
Total	**39**	**86**	**125**

Figure 4 Completion of Viewpoint Survey for OGCYP audited annual reviews (n:193): 2021-22



The GCYP is concerned that the attendance of children and young people at their own annual reviews, and participation in the process, is consistently low based on our experience and analysis. When children and young people are not in attendance, their 'voice' at the annual review may be largely second-hand and reliant on carer or case manager feedback.

[65] Recorded reason was 'would have declined if invited'.
[66] Recorded reason was 'COVID-positive'.

While children and young people may have opportunities to communicate their views to carers and case managers through the course of the year, the annual review is an important opportunity for the panel to holistically assess whether care arrangements remain in their best interests. On this basis, section 85 of the *CYP Safety Act* requires that the panel must notify the child or young person of the review and give them a reasonable opportunity to *make submissions* (in whatever manner the child or young person thinks fit including, if they so wish, in the absence of a person who has care of them). Further, the principles of intervention in section 10 requires that, if a child or young person is able to form their own views on a matter concerning their care, they should be given an opportunity to express those views freely and due weight must be given to these views.

> ***"If it involves me, it's important that I know" – Young person in care***

The low participation of children and young people in the annual review process indicates that there is a gap between the guiding principles in the legislation, and DCP practice. An important mechanism to improve practice in this area is to ensure that the legislative responsibilities are clear and measurable.

Relevantly, the obligation on the annual review panel to seek the voice of the child is framed in different terms to that placed on both the Court and SACAT. These provisions require that a child or young person to whom the proceedings relate must be given a reasonable opportunity to *personally present* their views related to their ongoing care and protection, unless the child or young person is not capable of doing so, or to do so would not be in the best interests of the child or young person.

This formulation would be preferable to the current participation requirement in section 85 for the following reasons:

1. To clarify that it is a priority to hear *personally* from children and young people in decisions affecting them,
2. To improve transparency and accountability of decision making, via a procedural right for children and young people that is more readily measurable, and
3. The obligation to notify a child or young person of the annual review does not include an exception based on the child's age or capacity. In practice, there are some circumstances where the child or young person will not be able to be notified, including very young children. However, without legislative guidance on the circumstances where children and young people do not need to be notified, the decision relies on individual discretion. This risks inconsistent approaches, which may include a broader ambit than the exceptions provided for the Court and SACAT.

Internal reviews

Under section 157, a child or young person – or other 'person who is aggrieved by a decision of the Chief Executive or a child protection officer under this Act' – is entitled to apply for an internal review of the decision. The Chief Executive may confirm, vary or reverse the decision on review.

Currently, internal reviews are only available for decisions made under Chapter 7 of the *CYP Safety Act*, excluding contact determinations under Part 4 of that Chapter.[67] This means internal reviews can be sought for decisions including:

- Provision of assistance to care leavers,
- Transition to long-term guardianship,
- Temporary placements, and
- The Chief Executive's powers under section 84, including placement, education and other matters relating to the care and protection of the child or young person.

These matters are highly significant for the day-to-day lives of children and young people. However, section 157 does not include any express procedural right for children and young people to present their views for the purpose of the internal review. In the absence of an express right, there is a risk that internal administrative processes will not incorporate (or maintain where they exist) processes for seeking these views.

> ***"Show us respect by informing us about what is going on and seek our input to decision making that affects our lives" – Young person in care***

This is **inconsistent** with the requirement under Article 12(2) of the CRC, that the child must be provided the opportunity to be heard directly, or through a representative, in both judicial and *administrative* proceedings affecting the child.

Contact determinations

Under section 93 of the *CYP Safety Act*, the Chief Executive has the power to determine contact arrangements in respect of a child or young person in care. Contact arrangements may relate to any person, including parents, siblings, grandparents, previous carers and other members of a child or young person's family or community.

The only avenue for reviewing a contact determination made by the Chief Executive is through the Contact Arrangements Review Panel (CARP). Contact determinations have expressly been excluded from both internal and SACAT reviews.[68]

Despite the far-reaching implications for a child and young person's wellbeing and social development, the *CYP Safety Act* and Regulations do not expressly provide a process for obtaining the views of children and young people in either the initial contact determination, or the CARP review. Further, as contact determinations are not reviewable by SACAT, children and young

[67] *Children and Young People (Safety) Regulations 2017* (SA), r 40.
[68] Ibid, r 40; *Children and Young People (Safety) Act 2017* (SA), s 158(1).

people are unable to access the important procedural right in section 158, which requires SACAT to provide reasonable opportunity for a child or young person to personally present their views.

As with the process for internal reviews discussed above, this is inconsistent with the child's right under Article 12(2) of the CRC. Legislative amendment is required to ensure that children and young people have reasonable opportunity to personally provide their views to decision making processes about their contact with significant people in their lives.

Recommendation 6

The following provisions of the *CYP Safety Act* be amended to mirror the requirement on the Court and SACAT to provide reasonable opportunity for children and young people to personally present their views unless they are not capable of doing so or it would not be in their best interests:

a. Section 85: Annual reviews

b. Section 157: Internal reviews

c. Section 95: Review by Contact Arrangements Review Panel

Improving access to advocacy

An important theme that arose from the Mullighan inquiry[69] is the power of listening to children and young people as a way of preventing abuse. As highlighted by former GCYP, Pam Simmons,

> *Much of the response to abuse in care has rightly focussed on regulation, monitoring and scrutiny. Less attention has been paid to the organisational culture and power imbalances between children and adults … that prevent the alarm being raised when things go wrong. … The stories of children telling someone but nothing happening are chilling.*[70]

This perspective highlights the role that access to advocacy services plays in improving safety and wellbeing outcomes, through providing mechanisms for children to speak up when they are unsafe or worried.

> ***"I can have a say most easily with people I know and trust and with whom I have a relationship" – Young person in care***

The GCYP has identified a number of gaps in advocacy services, and other ways that children and young people may experience barriers to accessing critical assistance to navigate internal complaints processes and legal proceedings. These issues are discussed below.

Advocacy in administrative proceedings

The *CYP Safety Act* provides that the Court must not hear an application under the Act unless the child or young person to whom the application relates is represented in the proceedings by a legal practitioner, or the Court is satisfied that the child or young person has made an informed and independent decision not to be so represented.[71]

There is no equivalent provision to ensure a child or young person has the opportunity to be represented in SACAT, an internal review or a CARP review, despite the potential that decisions made in those forums may have significant impacts on their lives and care. While it may be appropriate for administrative reviews to be conducted with less formality than court proceedings, children and young people may still rely significantly on advocacy in these circumstances to navigate processes, explain information in child-friendly ways and ensure they have the opportunity to express their views. Children and young people should be entitled to access advocacy or representation in Internal Reviews, CARP Reviews and at SACAT, including to ensure that the child or young person understands their rights and is supported to express their views.

---

[69] Hon EP Mullighan QC, *Children in State Care Commission of Inquiry: Allegations of Sexual Abuse and Death from Criminal Conduct* (Final Report, 31 March 2008).
[70] OGCYP, *Six themes from the Mullighan Report*, 13 May 2008.
[71] *Children and Young People (Safety) Act 2017* (SA), s 64(1).

It is understood that this places additional administrative and operational pressures on relevant authorities, however, such a fundamental right must be overlayed consistently across all areas of decision making about a child or young person.

Recommendation 7

The *CYP Safety Act* should include a provision that requires children and young people to be represented by an advocate in SACAT proceedings, Internal Reviews and CARP Reviews, unless the child or young person has made an informed and independent decision not to be so represented.

Advocacy gaps for children and young in 'alternative care'

While the majority of GCYP functions relate specifically to children under the guardianship or in the custody of the Chief Executive, the following function is of broader application:

> *to 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.*[72]

Alternative care is defined to mean care provided for a child on a residential basis by (or through) a government or non-government agency, or in a foster home (including a foster home provided by a member of the child's family).[73] It expressly includes independent living arrangements for a child under the guardianship of the Chief Executive, and children and young people in a detention facility for a child who is held there in lawful detention.

In the course of the GCYP's individual advocacy function, we have become aware of a number of cohorts of children and young people who we consider to be living in alternative care, **and are not** under the guardianship or custody of the Chief Executive or in youth detention. Accordingly, neither the GCYP nor the TCV have the power to provide individual advocacy services to these young people.

Enquiries to the GCYP regarding children and young people in care consistently relate to safety and stability of placements, and the GCYP often uses her powers to advocate for the resolution of safety issues within a placement or, where necessary, for a placement move. In those situations, the GCYP frequently observes that the children or young people affected, or adults on their behalf, have raised issues within internal DCP complaints and review structures without success. There is no reason to suspect that these presenting concerns, or experiences of administrative barriers to accessing resolution of complaints, are substantially different for children and young people in other forms of alternative care – whether via DCP or other agency channels.

[72] *Children and Young People (Oversight and Advocacy Bodies) Act* 2017 (SA), s 26(1)(e).
[73] Ibid, s 26(4).

Access to child-friendly advocacy systems is an essential safety mechanism to prevent and address breaches of children's rights in alternative care. In recognition of this matter, the 2021 UN Day of General Discussion on Children's Rights and Alternative Care recommended the development of **independent monitoring systems for all children in alternative care**.[74] This recommendation was not limited to children who are under guardianship of the state under child protection laws.

While children and young people may have access to mainstream quality assurance or monitoring bodies, **child-friendly advocacy** and justice systems require speciality training and services: 'adults need preparation, skills and support to facilitate children's participation effectively, to provide them, for example, with skills in listening, working jointly with children and engaging children effectively in accordance with their evolving capacities'.[75] This includes to:

- Be child-safe, with child-specific measures in place to reduce the risk of child exploitation and sexual abuse,
- Encourage and be respectful of children's views,
- Create processes and resources that are adapted to children's needs, and
- Accountable to evaluation and feedback from children and young people.[76]

The GCYP supports efforts to respect and promote children and young people's right to family life through exploring alternatives to coming under the custody or guardianship of the Chief Executive, where this is safe and in their overall best interests. However, the GCYP has concerns that, diverting children and young people away from the child protection system can carry unintended consequences for their access to child-friendly advocacy and justice systems. Children and young people living in these forms of alternative care may experience many of the same vulnerabilities as those who are in OOHC under formal guardianship orders and it is important that they can access legal, procedural and advocacy protections available under *CYP Safety Act*, including:

- Access to legal representation,
- Access to child-friendly advocacy services, such as the GCYP or TCV,
- The right to review of decisions made about their care, protection and treatment, and
- Clear legislative responsibility for who holds a duty of care for their safety and wellbeing.

In particular, the GCYP has received enquiries, and requests for advocacy, on behalf of children and young people living in Voluntary Out-of-Home Care (VOOHC), under Long Term Guardianship (Specific Person) Orders (LTGSP Orders), or who have been removed under DCP 'Safety Plans'. These children and young people are outside the scope of the GCYP's individual advocacy powers, and there are no alternative specialist, child-focused advocacy referral options.

OGCYP understands that children and young people in these circumstances may be referred to the Commissioner for Children and Young People (CCYP) or the Commissioner for Aboriginal

[74] UNCRC, *2021 Day of General Discussion: Children's Rights and Alternative Care* (Outcome Report), 13 June 2022, pg. 32.
[75] UNCRC, *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, [134].
[76] See, eg, ibid.

Children and Young People (CACYP). The Commissioners are playing an important role in filling this advocacy gap, in the absence of dedicated funding or a legislated 'individual advocacy' function. While the GCYP, TCV and CYPV functions include to act as an advocate for individual young people in care and youth detention, the legislative functions of the CCYP and CACYP do not encompass the core business of providing information and advocacy support for individual children and young people experiencing confusion, trouble or roadblocks navigating through a system. Instead, their powers and functions are framed in broader terms with a primary focus on matters related to the 'rights, development and wellbeing of children and young people at a systemic level'.[77] For the CCYP, this involves promoting and advocating for the rights and interests of **all children and young people in South Australia**,[78] or a particular group. For the CACYP, this involves promoting and advocating for the rights and interests of **all Aboriginal children and young people in South Australia**, or a particular group.[79]

There is a potentially significant number of children and young people in the circumstances identified by OGCYP. Information provided to our office suggests that, at 30 June 2022, 34 children and young people were in VOOHC and over 300 orders were in force granting long term guardianship of children and young people to approved carers.[80]

In this context, it is problematic to rely on the organisational goodwill of services that are not established to meet the specific needs of this highly vulnerable cohort of children and young people. Legislative amendment is required to ensure all children in alternative care can access a child focussed independent advocacy body. One option is to **amend** the *Children and Young People (Oversight and Advocacy Body) Act 2017* to expand the GCYP's advocacy function. However, this is subject to the caveat that any advocacy body, including OGCYP, is unable to perform an advocacy function for children in broader categories of alternative care without the appropriate financial and human resources.

Any legislative expansion of functions without resources will reduce the capacity of an advocacy body to perform functions for children and young people within existing mandate. For the GCYP, that would prejudice the safety, wellbeing and best interests of children and young people in care.

The special vulnerabilities of these cohorts of children and young people which may require targeted advocacy support are discussed in detail below.

---

[77] *Children and Young People (Oversight and Advocacy Bodies) Act 2017*, ss 14, 20I.
[78] Ibid, s 14(1).
[79] Ibid, s 20I(1).
[80] This includes LTGSP Orders, and equivalent orders made under the *Children's Protection Act 1993* (SA). OGCYP also requested information from DCP about the number of relevant children and young people affected by DCP Safety Plans, for the purpose of preparing this submission. At the date of this submission, that information has not been made available.

Voluntary Out-of-Home Care

The Department of Human Services provides voluntary out-of-home care (VOOHC) for children and young people with disability and 'exceptional needs', under a joint funding arrangement with the National Disability Insurance Agency (NDIA).

Figures provided by DHS indicate that, at 30 June 2022, there were 34 children and young people living in VOOHC placements in South Australia. During 2021-22, two children and young people in VOOHC were arrested and spent time on remand at Kurlana Tapa, and one young person spent periods missing from their placement.

Figures recently reported by the Commissioner for Children and Young People indicate that children in VOOHC during 2021-22 also experienced:

- 3 placements in temporary accommodation (Airbnbs or caravan parks),
- 5 social admissions to hospital, and
- 6 placement moves due to care concerns.[81]

For a small cohort of vulnerable children and young people, this data represents a high rate of care concerns, periods of institutionalisation and placement instability.

While it is a requirement that providers of care services be registered with the NDIS Quality and Safeguards Commission, this oversight is focused on the quality of disability services. Accordingly, the GCYP is concerned about the level of child-focussed oversight for this vulnerable cohort, including with respect to placement stability, safeguarding against abuse, coordinated service provision between agencies and promoting the child's right to family life, without discrimination on the grounds of their disability.

Safety planned removals

OGCYP advocates have become aware of processes where DCP may require a child or young person's parents or guardians to agree, as a condition of a 'Safety Plan', that:

- A different person assume primary care of the child or young person, or
- A particular person – including a parent, guardian or carer – must move out of the family home.

The GCYP notes the Ombudsman's recent investigation[82] into a complaint arising from a Safety Plan which placed a child in the care of their father, directly following their birth. The child's mother informed the Ombudsman that she was not consulted in the drafting of the Safety Plan, and refused to sign it. The Ombudsman noted that, in these circumstances, compliance with DCP policy required consideration of statutory removal options.

[81] CCYP, *Submission to the Social Development Committee Inquiry into NDIS participants with complex needs living in inappropriate accommodation* (August 2022), p. 5.
[82] Ombudsman SA, Investigation Summary: 2020/00827, December 2020.

The Ombudsman concluded that, in these circumstances, DCP had acted in error and inconsistently with Article 9 of the CRC. This article requires States to ensure that a child is not separated from his or her parents except where competent authorities, subject to judicial review, determine that doing so is in the child's best interest.

In early 2022, DCP advised the former GCYP that the department remains committed to pursuing options for children and families that do not require Youth Court intervention, and the Manual of Practice had been updated to strengthen guidance regarding the application of safety plans and safety planning processes following the Ombudsman's investigations.

The GCYP is mindful that the *CYP Safety Act* provides for temporary and voluntary guardianship and custody agreements and orders. And, where those agreements and orders are made or sought, the *CYP Safety Act* imposes particular legislative obligations and rights in those circumstances. If Youth Court orders are sought, children and young people may gain access to important legal protections and rights, designed to promote and support the best interests of vulnerable children and young people. This includes a regime for the assessment and approval of carers, decisions regarding contact arrangements, internal reviews to ensure the placement is in their best interests and access to legal representation. It is important that decisions about Youth Court intervention remain centred on the best interests of the child and compliant with statutory obligations where there is a risk of harm.

Where informal arrangements effectively place children and young people in a form of alternative care, children and young people may experience similar vulnerabilities and traumas as if statutory removal powers were used. However, they **do not** have access to the rights and protections associated with the exercise of those powers.

Long-Term Guardianship (Specified Persons) Orders

Where a child or young person has been in the care of an approved carer for at least 2 years, the approved carer may apply to the Chief Executive to seek an Order on their behalf placing the child or young person under their guardianship.[83] This triggers an obligation on the Chief Executive to assess whether the approved carer is suitable to be the child or young person's guardian. If so, the Chief Executive must prepare a long-term care plan, addressing the following matters:

- How the child or young person's educational, health and disability needs (if any) will be met,
- Details of any compensation paid or payable to the child or young person under the *Victims of Crime Act 2001*,
- Details of contact arrangements with the child or young person's family or other significant people in their life,
- Details of financial or other support that DCP will provide to the approved carer, and

[83] *Children and Young People (Safety) Act* 2017, s 89. This application may be made where a child or young person has been in the care of the approved carer for less than 2 years, if the Chief Executive determines that a shorter period is appropriate.

- A 'cultural maintenance plan'.[84]

Once the long-term care plan is complete, the Chief Executive must then apply to the Court for an order placing the child or young person under the guardianship of the approved carer.[85] This may be for a period of 12 months, or up until when they turn 18.[86]

OGCYP advocates have been made aware of circumstances where, once the LTGSP Order was made, the guardian (approved carer) did not follow through on contact arrangements in the long-term care plan. Once this Order has been made, however, the **child or young person is no longer within the scope of our advocacy services.**

While any party to the initial proceedings – including DCP – may apply to the Youth Court to enforce, vary or revoke the LTGSP Order, the GCYP understands that DCP does not ordinarily take this action. In the absence of DCP initiating these proceedings, the GCYP understands that there can be significant barriers to enforcement of arrangements in the long-term care plan. In the context of contact arrangements, this includes whether people included in contact arrangements have legal 'standing' to bring proceedings to enforce the arrangements.[87] Even where a person has the right to bring proceedings, another barrier is whether family and other significant people understand this right, and/or have the resources and support to do so. This is a particular barrier for contact arrangements involving child siblings.

In these situations, a child or young person may lose contact with people who are important to their social and emotional wellbeing and development, and vulnerable families and children will often lack a clear and accessible path to address the issue. This has the potential to cause both immediate distress and long-term harm to the child, in relation to their birth family identity and connections. For Aboriginal children and young people, or those from a culturally or linguistically diverse background, this may risk severing their connections with their culture and communities.

Recommendation 8

Children and young people in all forms of alternative care should have access to independent advocacy and oversight by GCYP. This advocacy function must be funded.

[84] Ibid, s 90; *Children and Young People (Safety) Regulations 2017*, r 22.
[85] *Children and Young People (Safety) Act 2017* (SA), s 92.
[86] Ibid, s 53(h)(i).
[87] Ibid, ss 51, 55.

Funding for advocacy services

A right to advocacy, without a funded advocacy body, is a right in name only. A commitment to achieving the protective potential of advocacy services requires spending.

The *CYP Safety Act* established the Child and Young Person's Visitor to conduct visits to residential care facilities and act as an advocate for children and young people living in those facilities, in accordance with a key recommendation from the Nyland report.[88] This role does not have an associated funding commitment clause.

The former GCYP, Penny Wright, was appointed to the CYP Visitor role in 2018 for a five-year term. At the conclusion of a two-year funded trial visiting program, the government declined to provide ongoing funding for the scheme. As there was no legislative obligation on the government to fund the scheme, there was no available legislative recourse to challenge this decision. Ms Wright resigned from the role on the basis that she was unable to perform the functions without dedicated funding to do so.[89]

Achieving the intent of the Nyland report recommendation to establish a community visiting scheme for children in residential care requires a legislative amendment to introduce a funding commitment clause for the CYP Visitor role.

Recommendation 9

The *CYP Safety Act* should be amended to legislate a funding commitment clause for the CYP Visitor role, that:

a. Obliges the Minister to provide the CYP Visitor with the staff and other resources that she reasonably needs for carrying out her functions,

b. Ensures that the CYP Visitor may, by agreement with the Minister responsible for an administrative unit of the Public Service, make use of the services of the staff, equipment or facilities of that administrative unit.

[88] Nyland, n 18, recommendation 137.
[89] OGCYP, *Guardian resigns from her role of Child and Young Person's Visitor*, 24 August 2021.

Equality for Children in Care

"I want to be treated like other children who do not live in care."

- Young person in care

Discussion Paper, Question 26: *Could the CYP Safety Act be strengthened to enable all young people in care, and leaving care, to access the services they need to heal from trauma, to grow up healthy and strong, and to be supported as they transition into independence?*

The right to non-discrimination is one of the core guiding principles for the interpretation and implementation of all rights contained in the CRC.[90] Respecting, protecting and promoting this right involves positive steps by governments, to ensure that children and young people grow up in inclusive societies where they can participate in their communities on an equal basis to their peers – regardless of characteristics such as their age, gender, sexual orientation, race, religion, disability, socioeconomic status or other special vulnerabilities.[91]

International rights instruments recognise the special vulnerabilities that children living in alternative care experience and require states to take active efforts to ensure they have equal opportunities to grow up in safe, stable and nurturing environments.[92]

Sadly, the GCYP is aware that young people in care too often experience discrimination, or the effects of stigmatisation associated with their care status. This includes:

- Barriers to accessing education, due to preconceptions of 'high needs' for children and young people in care or failures to provide the supports they need to thrive,
- Breaches of their privacy, connected with inflammatory media reporting about child abuse and child protection matters, and
- Discrete State powers that have a discriminatory application to children and young people in care.

Access to education

The benefits of attending school can go far beyond academic education and results. At school, children and young people can socialise, learn about new things, have important relationships with teachers and find stability in consistent places, faces and routines.

[90] UNCRC, *General comment no 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, [12].
[91] UNCRC, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, 29 May 2013, CRC/C/GC/14, p. 11.
[92] See, eg, CRC, Article 9.

Noting the fundamental importance of education, it is worrying that a small – but highly vulnerable – cohort of children and young people in care are either attending school at reduced hours or are completely disengaged from any type of education.[93] Others may experience alienation and isolation from their peers, flowing from the instability of shifting between schools when their care arrangements change.

School suspensions and exclusions have a serious and unique impact for children and young people in care, including for their placement stability. As recognised in the Nyland report:

> *'School suspensions or exclusions can generate hopeless circularity for children and young people with complex needs. The burden on caregivers can contribute to placement breakdowns which create instability across all aspects of a child's life. Instability affects a child's capacity to participate in education, and the cycle repeats."*[94]

In addition to providing advocacy for children and young people experiencing issues accessing education, OGCYP monitors the circumstances of children in care in government schools via an annual dataset provided by the Department for Education. This dataset does not include information about the Independent or Catholic school systems, and, in previous years, Catholic Education South Australia has advised that it is unable to provide education data to OGCYP. In 2021-22, OGCYP were advised that work was underway to establish protocols with the Department for Child Protection to share data for those in care attending Catholic schools.[95]

As a result, the circumstances of children and young people in Catholic (and Independent) schools remains unclear. But for children and young people enrolled in government schools, the figures are concerning. Data provided for a school term in 2020 indicates that children and young people in care were four times more likely to be suspended and seven times more likely to be excluded than the broader government school student cohort.[96]

This high rate of exclusion and suspension may be connected, in part, to broader systemic disadvantage experienced at school by children and young people with disability.[97] In Term 3 2020, 43.9% of children and young people **in care** enrolled in government schools were recognised to have a disability, in comparison to 12.1% for the overall government school population.[98] However, disability discrimination does not account for the whole picture. OGCYP advocates note with concern that some schools have expressed unwillingness to accept new or additional enrolments for children in care. This is inconsistent with the child's right to access education on an equal basis to their peers, without discrimination.

---

[93] Linda J Graham (et al) *Inquiry into Suspension, Exclusion and Expulsion Processes in South Australian government schools: Final Report* (The Centre for Inclusive Education, QUT, 2020), [8.4].
[94] Nyland, n 18, Case Study 4, p. 70.
[95] See, eg, OGCYP, *Children and Young People in State Care in South Australian Government Schools 2010-2020* (August 2021), p. 1.
[96] Ibid, p. 14.
[97] See, eg, Graham et al, n 93; *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, 'Education and Learning' (Issues paper, October 2019).
[98] OGCYP, *Children and Young People in State Care in South Australian Government Schools 2010-2020* (August 2021), p. 9.

> ***"no one ever says, 'Do you want to go to school?' 'cause they just think, 'Oh, he's, he just wants to go out and do crime,' 'cause that's all they know about me when they read on the folders that and they think, 'Oh, yeah, he's a bad kid. He doesn't need nothing. We can just let him, let him do his thing,' you know. I don't know. I don't feel safe for my future. I feel like I'm in a road that's just going to go downhill every day." – Young person in care***

The right to non-discrimination is not limited to actions which directly treat a person unfairly because of their special needs or vulnerabilities. The right also extends to a positive obligation for education providers to provide additional support for a child or young person with a characteristic that is protected by equal opportunity law, to enable them to participate in education (referred to as 'special assistance' or 'reasonable adjustments').

It is apparent from the high rate of exclusion for children and young people in care that this cohort require such additional support to keep them engaged and safe at school. However, children and young people in care are not protected from discrimination in education, or entitled to 'special assistance', under South Australia's equal opportunity legislation.

The circumstances for children and young people in youth detention are considerably worse. Access to education in this environment is not only based on 'behavioural' or particular characteristics of an individual, but also strongly affected by operational considerations. The TCV 2020 Pilot Inspection Report highlighted serious issues young people face with 'getting to school', as identified by KTYJC operational management. This includes issues arising from:

- The prioritisation of other activities, such as attendance at court, professional interviews and health appointments,
- Perceived risk factors, including children and young people on management plans that authorise their segregation from other detainees, and
- The presence of modified or structured routines, and Centre lockdowns.[99]

The TCV's 2021-22 Annual Report explored the impact that these issues continue to have upon young people in detention. Data published in this report revealed that, for 2021-22, more than three quarters of children and young people detained at KTYJC over the course of the year were of compulsory school or education age.[100] Nearly 1 in 5 of those children were under the age of 14 years old.[101] Despite the high number of children and young people requiring access to education, data provided to the TCVU by the Youth Education Centre indicates that, for one school term in 2022, school was cancelled for all detainees on 15% of days. On average, children and young people lost between 1.5 – 4 hours of education per school day, depending on their age, gender and the 'unit' they were housed in.

[99] Training Centre Visitor, *Great Responsibility: Report on the 2019 Pilot Inspection of the Adelaide Youth Training Centre (Kurlana Tapa Youth Justice Centre)* (2020), p. 120.
[100] Training Centre Visitor, 2021-22 Annual Report (2022), p. 34.
[101] Ibid, p. 9.

When the primary purpose of youth detention is to promote rehabilitation,[102] these stark figures raise serious questions about the care and service model for highly vulnerable children and young people. At the very least, it is clear from this data that children and young people in youth detention are not receiving equal access to education as their peers. These matters require urgent attention from the Department of Human Services and Department for Education.

The *Equal Opportunity Act 1984* makes it unlawful for children and young people to be discriminated against in education, on the basis of their gender, race, age, disability or religion. But there are **no provisions** making discrimination unlawful – **in school or otherwise** – for children and young people on the basis of their 'alternative care' status, including being in youth detention. This means that, if a school refuses to enrol a child or young person because they are in care, or KTYJC is unable to facilitate education due to matters such as resource constraints, the child or young person is unable to access the important protections and remedies available under equal opportunity law. This includes conciliation, compensation and court orders to compel compliance with equal opportunity law.[103]

> ***"Treat us fairly" – Young person in care***

Legislative amendment is required to insert an additional Part in the *Equal Opportunity Act 1984* (SA) that mirror existing protections against discrimination for children and young people on the basis of their age, gender, religion, race and disability.[104]

While the above discussion focuses on equality in accessing school, stigma surrounding care and youth detention experiences may lead to discrimination in a range of other aspects of a child or young person's life, including medical treatment, housing and employment. Legislative protection against discrimination should extend to the following areas, to mirror existing protections for children and young people with other protected characteristics:

- Employment,
- Associations and qualifying bodies,
- Education, and
- Land, goods, services and accommodation.

This would also extend victimisation protections under the *Equal Opportunity Act 1984* (SA), so that a child or young person cannot be treated unfairly if they make a complaint about discrimination on the basis of their alternative care status.[105]

---

[102] *Youth Justice Administration Act 2016*, s 3.
[103] *Equal Opportunity Act 1984* (SA), Div 1.
[104] This was a key recommendation made in the recent independent inquiry into child protection in the United Kingdom: Josh MacAlister, *The independent review of children's social care: Final Report* (2022), Ch 6, p. 148.
[105] *Equal Opportunity Act 1984* (SA),

Recommendation 10

The *Equal Opportunity Act 1984* should protect children and young people in care from discrimination on the basis of their care status or involvement in the child protection system. This should mirror existing protections for children and young people against discrimination on the basis of their age, gender, religion, race and disability.

Privacy

A complex issue facing the child protection system is how to ensure that the system is subject to the important public accountability mechanism of media reporting, while also protecting the privacy of children and young people in care. The GCYP is concerned to note examples of inflammatory media practices in 2022 in child protection cases and there are times where we have advocated – including on a recent occasion – for articles to be removed from circulation or edited to remove information that may identify children and young people in care.

When information is reported about child protection cases, that information is on the public record for the child or young person's whole life. Long after public interest has subsided, children and young people may experience ongoing effects of shame, stigmatisation and re-traumatisation. This may arise from accessing the information personally, the knowledge that the information is publicly available, or adverse treatment from friends, family or community members who become aware of the information.

As noted by an international study into media coverage of child abuse, media publicity has particularly negative impacts for children and young people due to their stage of development:

> *The effects of the publicity of their victimization may … be particularly hard on children because their self-concept is so dependent upon others, peers in particular. By middle childhood, anxiety about peer relationships intensifies and reputation becomes very important to children. Children as young as 8 years old perceive that associating with a stigmatized person may affect their own reputation. The stigma of abuse or victimization could lead to avoidance and rejection by a child's peers, which in turn is associated with isolation, loneliness, impaired school performance and the greater likelihood of future social problems that can persist into adulthood. Furthermore, research on victimization and bullying suggests that a past history of victimization and a reputation as a victim sometimes causes children to be targeted for further hazing, exclusion and victimization*.[106]

In OGCYP's experience, current provisions in the *CYP Safety Act* are inadequate to protect children and young people in care from the consequences of public reporting on child abuse and neglect cases, which may reveal their identity in connection with highly sensitive and distressing information.

[106] Lisa M Jones, David Kinkelhor and Kessica Beckwith, 'Protecting victims' identities in press coverage of child victimization' (2010) 11(3) *Journalism* 347, p. 350 (citations omitted).

Legislative amendment is required to strengthen protections to ensure that children and young people are protected from the harm associated with breaches of their privacy in the media.

Recommendation 11

Insert a legislative provision into the CYP (Safety) Act to expressly restrict:

a. publishing information that identifies that a child or young person is, or has been, in care, or

b. publishing personal information relating to a child or young person who is or has been in care, such as details of their abuse or trauma, in circumstances where the child or young person may be identifiable.

This amendment will require appropriate exceptions to allow children and young people to make decisions, in accordance with their age and maturity, about publicly telling their story.

Consent to medical assessment and treatment

Section 35 of the *CYP Safety Act* permits the Chief Executive to direct a child or young person to be professionally examined or assessed. Subsection (5) specifically provides that the examination may occur despite the absence or refusal of the consent of the child or young person's parents or guardians, noting this may contravene the *Consent to Medical Treatment and Palliative Care Act 1995*.[107] The age of consent in this context is 16 years.

This existing provision of the *CYP Safety Act* permits subjecting 16 and 17-year-old young people to medical assessment and examination without their consent, in circumstances that would not be permitted if they were not involved in the child protection system. Young people may experience non-consensual medical examination or assessment as a trauma, or even an assault. This provision is discriminatory and exposes vulnerable young people in the child protection system to the potential of a highly distressing event.

> ***"don't overburden us, but when we can lead – let us" – Young person in care***

Recommendation 12

a. Amend section 35(5) to remove the words: 'Without otherwise limiting the *Consent to Medical Treatment and Palliative Care Act 1995*'.

b. Insert subsection 35(7) as follows: *'Nothing in this section authorises the examination, assessment or treatment of a child or young person that would be in contravention of the* Consent to Medical Treatment and

Palliative Care Act 1995 *(SA) or the* Mental Health Act 2009 *(SA).'*

[107] *Consent to Medical Treatment and Palliative Care Act 1995* (SA), s 6.

Accessing the Right Supports

Discussion Paper, Question 16: *Should the legislation set out the roles and responsibilities of relevant government and non-government agencies for children's safety?*

Discussion Paper, Question 26: *Could the CYP Safety Act be strengthened to enable all young people in care, and leaving care, to access the services they need to heal from trauma, to grow up healthy and strong, and to be supported as they transition into independence?*

The State's parental responsibility

Article 20 of the CRC provides that a child temporarily or permanently deprived of his or her family environment 'come[s] under the direct responsibility of the State which must provide them with special protection and assistance, including by ensuring that appropriate alternative care is provided.'[108]

The *CYP Safety Act* places the primary responsibility for the safety, welfare and wellbeing of children and young people in care on the Chief Executive, as their appointed guardian. However, as required by Article 20, the obligation to provide special protection and assistance is not imposed solely on DCP, but the whole of the South Australian government. Figure 5 depicts a (non-exhaustive) representation of other agencies who hold significant power to impact upon the lives of children and young people in care.

Figure 5: Relevant agencies exercising responsibilities for children and young people in care

[108] UNCRC, *2021 Day of General Discussion: Children's Rights and Alternative Care* (Concept note, 2021), p. 4.

The *CYP Safety Act* makes some express provision for the responsibilities of agencies outside DCP, including in the following relevant ways:

1. **Parliamentary declaration:** Section 5 sets out a statement of Parliamentary recognition that the provisions of the Act form 'only a small part' of how the State discharges its duties to children and young people.[109]
2. **Referral powers:** The Chief Executive has the discretion to refer a matter to a State authority, relating to a child or young person at risk of harm, if satisfied that it is more appropriate that a State authority other than the Department deal with the risk to the child or young person. The State authority is then under an obligation to deal with the matter in a timely manner, having regard to the need to ensure that children and young people are protected from harm.[110]
3. **Transition from care plans:** Any State Authority specified by the Chief Executive in a transition from care plan must take reasonable steps to implement the plan. However, the plan does not create legally enforceable rights or entitlements.[111]
4. **Information sharing:** The Chief Executive has the power to require a State authority to provide information, and it is an offence to refuse or fail to comply with notice of this requirement. The Chief Executive may also report the refusal or failure to the Minister responsible for the State authority.[112]

While these provisions place some discrete obligations on agencies, if requested or required by DCP, they do not provide a comprehensive articulation of the broader South Australian government responsibility to work collaboratively across departmental boundaries.

OGCYP acknowledges that there are distinct benefits to establishing a clear central point of legislative responsibility, via the Chief Executive's guardianship. For example, it limits the potential that disputes about the roles of various agencies and services will result in no one taking responsibility for the child or young person's care.

Conversely, the pooling of primary legislative responsibility within a single department masks the overarching responsibility of the South Australian government for children and young people in care. It may also pose a challenge to accessing the full gamut of government services required to meet the holistic social, emotional, health, educational and developmental needs of children and young people in care. As noted in the recent independent review of the children's social care system in the United Kingdom:

> *'Local authorities cannot promote the wellbeing of children in care and care leavers when they do not possess all the levers to affect change'.*[113]

The independent review concluded that new legislation should be introduced to broaden 'corporate parenting' responsibilities across a wider set of public authorities, consistent with the

[109] *Children and Young People (Safety) Act 2017*, s 5.
[110] Ibid, s 33.
[111] Ibid, s 111.
[112] Ibid, s 150.
[113] Josh MacAlister, n 104, p. 146.

model under the *Children and Young People (Scotland) Act 2014*.[114] The Scottish model assigns six corporate parenting responsibilities – relating to the wellbeing, needs and interests of children and young people in care – to 25 organisations, including police, health, housing and legal aid.[115]

In recognition of the importance of collaboration and accountability across government, a number of Australian jurisdictions have imposed firmer legislative responsibilities on other agencies. In particular:

- The Northern Territory legislation clarifies that the Northern Territory government has responsibility for promoting and safeguarding the wellbeing of children, and agencies have a responsibility to work cooperatively,[116]
- New South Wales and Western Australia include provisions that permit the child protection department to request assistance from another department (or non-government agency that receives public funding). The agency must then endeavour to comply with the request, if compliance is consistent with its functions and does not unduly prejudice the performance of its functions,[117] and
- Western Australia includes an additional obligation that specified public authorities must prioritise a request to provide assistance to children and young people in care, or care leavers. This includes across local government, health, mental health and education services.[118]

In OGCYP's experience, both internal and external advocacy can stall due to disputes about funding, responsibility or prioritisation of services for children and young people in care attempting to access already stretched public resources. Examples include DCP case management experiencing issues with achieving (and/or maintaining):

- School enrolments (as discussed in Part 4 above),
- 'Category 1' status with Housing SA, for young people approaching their transition from care, and
- Access to inpatient mental health treatment for children and young people with intensive mental health needs.

Meeting these needs for children and young people in care requires buy-in from other government agencies. In the absence of specific legislative responsibilities for children, escalation avenues for DCP case management may be limited and require disproportionate resources and collaborative efforts on their part. Ultimately, this leads to poorer outcomes,

[114] Ibid.
[115] The Scottish Government, *Children and Young People (Scotland) Act 2014: Statutory Guidance on Part 9: Corporate Parenting* (2015).
[116] *Care and Protection Act 2007* (NT), s 7.
[117] *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 17 – 18; *Children and Community Services Act 2004* (WA), s 22.
[118] *Children and Community Services Act 2004* (WA), s 22(4AA); *Children and Community Services Regulations 2006* (WA), r 22.

arising from bureaucratic barriers and disputes that are inconsistent with overarching policy aims for children and young people in care.

Recommendation 13

a. Include a legislative power for the Chief Executive to request assistance from a State authority (or non-government agency that receives public funding), with a corresponding obligation to endeavour to comply with the request.

b. Include an additional obligation, based on the Western Australian model, to prioritise a request to provide assistance to children and young people in care, across areas including local government services, health, mental health and education.

Highly vulnerable children and young people

Through enquiries for advocacy, audits of annual reviews, visits to residential care facilities and working with 'dual involved' children and young people,[119] OGCYP has noted a number of children and young people in care who we consider to be highly vulnerable, with exceptional support needs. Often, these needs and vulnerabilities present alongside complex, undiagnosed and/or unmet disability needs.

A particular issue is children and young people who have not been able to receive the mental health care and support they need. Over some years, OGCYP has become aware of instances where particular young people in care have experienced severe mental ill-health, such as active psychosis, accompanied by high-level risky behaviour such as self-harm, aggression and/or severe self-neglect, but there has been considerable doubt about their access to adequate assertive treatment.

A significant issue this cohort may face is high levels of placement breakdown and instability. It is our observation that, when children and young people are living in unstable care placements where their workers do not know or understand them well, there is an increased risk that disability-related behaviours are misunderstood or classified as 'behavioural problems'. Where this leads to criminogenic responses and youth justice involvement, underlying health and disability needs may go unaddressed.

> ***"Yeah, that actually was doing my head in and I just grabbed something, threw it at the door. Twenty minutes later the cops rock up and say I'm***

[119] OGCYP uses the term 'dual involved' to refer to children and young people who have been subject to both a care and protection order, and youth detention. OGCYP's *Final Report of the South Australian Dual Involved Project: Children and young people in South Australia's child protection and youth justice systems*, published in June 2022, explores the experiences and needs of dual involved children and young people in depth.

> ***getting done for fucking aggravated assault 'cause I threatened them." – Young person in care***

South Australian research confirms that children in care are significantly overrepresented in all aspects of the youth justice system, including youth detention.[120] Despite accounting for only 1% of the child population in South Australia,[121] nearly a third of the average daily detention population at Kurlana Tapa Youth Justice Centre in 2021-22 were young people also under the guardianship of the Chief Executive.[122]

A recent OGCYP report into the circumstances of dual involved children and young people in South Australia[123] identified that 36.6% of dual involved children and young people who spent time on remand or detention in Kurlana Tapa between February and December 2021 had a diagnosed disability.[124]

> ***"I've been taking pills for it my whole life until I was 12 when I was in resi care and that's when I stopped taking them because they weren't, they weren't telling me I needed to. So that's when I started going downhill and not focusing and started getting into trouble. Yeah, that's how everything started" – Young person in care***

Concern about the disconnect between disability needs, and behaviour management responses, is not unique to South Australia. For example, the *Royal Commission into the Protection and Detention of Children and Young People in the Northern Territory* concluded that 'the two primary factors contributing to care-criminalisation are the use of police to manage behaviour and the lack of care, staff training and support.'[125]

The very presence of police can have an escalating effect on children and young people in care. Police may not be trusted people to turn to in times of crisis, and the normalising effects of police interaction can erode any deterrent effect which these interactions may otherwise have (or be intended to have).

In OGCYP's experience, this highly vulnerable children and young people cohort require intensive and dedicated human and financial resources to support their time in care. OGCYP plays an advocacy role for a number of children and young people in these situations and advocate regularly for service responses to be:

- Evidence-based,
- Subject to strict standards of procedural fairness and independent oversight,

---

[120] See, eg, Catia Malvaso (et al), *The intersection between the child protection and youth justice systems in South Australia* (2020).
[121] Child Development Council, *How are they faring? South Australia's 2021 Report Card for children and young people* (2021), p. 9.
[122] OGCYP, TCV 2021-22 Annual Report, p. 49.
[123] OGCYP, *Final Report of the South Australian Dual Involved Project: Children and young people in South Australia's child protection and youth justice systems* (June 2022).
[124] Ibid, Appendix 1.
[125] *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final report, 17 November 2017), vol 3B, p. 20.

- Adopt methods that are the least restrictive option for a child or young people's liberty and other rights, and
- Tailored to the needs and best support plan for an individual child or young person.

It is recognised that at times, meeting the above requirements may involve a support plan which carries a significant immediate financial cost to the State. In these circumstances, it is important for financial assessments to consider the high costs associated with alternatives to community-based supports – both in an immediate sense,[126] and the lifelong costs that can follow institutionalisation from a young age.[127]

The GCYP notes that the above discussion relates primarily to matters of practice and funding rather than legislative reform. In this respect, the GCYP anticipates that the proposed reforms in Recommendation 13 may support DCP and other agencies to implement policies that aim to support highly vulnerable children and young people, through expanded interagency responsibilities.

We also highlight that the South Australian government has not yet formally responded to the recommendations of OGCYP's *Final Report of the South Australian Dual Involved Project*, published in July 2022, which includes measures aimed at:

- Improving safety in residential care units,
- Early assessment and interventions for disability support needs, including for children and young people who are not (or would not) be eligible for NDIS services,
- Inclusion of cultural support needs into case planning (both identification and implementation),
- Assessing both DCP and police responses to behavioural incidents for children and young people in residential care,
- A specialist DCP team for highly vulnerable dual involved children and young people,
- Bolstering independent oversight and advocacy, including for places of detention, and
- Transition planning from youth detention back to DCP care.

Undiagnosed disabilities

In addition to mental health and trauma-related needs, OGCYP observe that undiagnosed or unconfirmed physical, intellectual and neurodevelopmental disabilities may contribute to the presentation of vulnerabilities or exceptional needs.

Information DCP has provided to the GCYP indicates that 25 – 26% of children and young people in OOHC in South Australia have a NDIS plan. However, there is no authoritative data available regarding the total number of children and young people in OOHC in South Australia who have a

[126] In 2020-21, the average cost per day per young person in youth detention in South Australia was $3,827.68: Productivity Commission, *Report on Government Services 2022* (2022), Table 17A.21. This equates to an average yearly cost of $1,398,060.20 to detain one young person.
[127] See, eg, Office of the Public Advocate (Qld), *People with intellectual disability or cognitive impairment residing long-term in health care facilities: Addressing the barriers to deinstitutionalisation, A systemic advocacy report* (2013).

disability. DCP has previously advised OGCYP that there are impediments to publishing data about disability, due to limited datasets available and difficulties in retrieving data about disability type and placement from existing software.

The GCYP understands that there are significant challenges with collecting and collating national and jurisdictional data regarding children and young people with disability. This includes varying disability criteria across jurisdictions and datasets, significant underreporting and underdiagnosis of disability for children and young people and system failures to record disability data. However, noting that not all people with disability are eligible for NDIS services, it is likely that the rate of children and young people with disability in OOHC is higher than 1 in 4. A comprehensive systemic understanding of the prevalence of disability is a necessary ingredient to appropriately respond to the needs of this cohort. This is also important for the GCYP to fully perform her statutory obligation to pay particular attention to the needs of children and young people in care who have a physical, psychological or intellectual disability. [128]

Despite the overrepresentation of children and young people with disability in the care cohort, the primary reference to disability in the *CYP Safety Act* is through the principles of intervention, which apply before a child or young person enters care. The *CYP Safety Act* does not contain an acknowledgement of the high proportion of those in OOHC with disability (diagnosed and undiagnosed) and does not contain provisions that are responsive to their individual needs.

Including expectations for care and provision of appropriate support in the *CYP Safety Act* is an important safeguard to accompany existing DCP practices that protect the rights and developmental needs of children and young people in care with a disability. While the GCYP understands that DCP continue to make positive progress in identifying children and young people in care who have disability – and facilitating access for NDIS services – best practice requires that legislation oblige these steps. There is currently a legislative gap in the *CYP Safety Act*, to enshrine rights and obligations for children and young people with disability.

One available measure to promote this early identification, and planning to support disability needs, is to include a legislative requirement to address these matters in case planning and transition from care assistance.

Recommendation 14

a. Include a requirement in section 28 that case plans for a child or young person with disability must include a disability care plan.

b. Include a requirement in section 112 to expressly provide that access to disability services is a form of assistance the Minister should provide for children and young people transitioning from care.

[128] *Children and Young People (Oversight and Advocacy Bodies) Act 2017* (SA), s 26(2)(b).

Protection from neglect, abuse and Violence in Care

Article 19 of the CRC requires governments to take all available measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

This obligation applies not only to children and young people in the care of families, but also for those in state care. The GCYP continues to identify and report on serious safety concerns for children and young people in care, particularly children and young people with high therapeutic needs and/or disability.[129]

Reporting and response threshold

Discussion Paper, Question 18: *Does South Australia have the legal threshold right for child protection? If not, what is the right threshold?*

Discussion Paper, Question 19: *Would you support changes to the threshold that enables the Department for Child Protection to focus on children and young people at imminent risk of significant harm?*

Discussion Paper, Question 20: *Should there be any changes or exemptions to the existing mandatory reporting requirements? How else could mandatory reporters discharge their obligations (e.g. where support is already in place)?*

The GCYP notes questions 18 – 20 in DCP's Discussion Paper with concern.

The existing reporting and response threshold are intended to ensure that DCP are notified of, and investigate, circumstances where children are at risk of harm. The GCYP does not support the dilution of thresholds or mechanisms to trigger DCP investigation, including for children and young people in care.

The findings of the former State Coroner in the inquest into the death of Chloe Valentine act as a caution to this line of discussion. The Coroner identified that the threshold of imminent danger of serious harm was not reached until the circumstances that led to her death; yet there were many opportunities where, in the opinion of the State Coroner, statutory removal powers should have been initiated.

> *It appeared to me that there was an assumption that Chloe should remain with her mother and the threshold for removal would not be reached until Chloe was actually in imminent*

[129] See, eg, OGCYP, GCYP Annual Report 2021-22 (2022), Part 5.1.

danger of being harmed. But Chloe suffered neglect for her whole life until the final period of physical abuse that she was subjected to in the days preceding her death. Over that four and a half years of neglect, in each instance where Chloe was exposed to the risk of harm, her mother made some arrangement to lower the risk … So the Families SA threshold of imminent danger of being harmed was never reached.[130]

Recommendation 15

The GCYP recommends maintaining the strength of existing reporting and requirement thresholds.

Sexual and other abuse in care

The findings of multiple inquiries – including the Nyland Report, the *Royal Commission into Institutional Responses to Child Sexual Abuse* and the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* – make it clear that sexual abuse is still taking place with alarming regularity within institutions. Despite this reality, the *CYP Safety Act* is silent when it comes to recognising those who have been abused in care, and does not address the contemporary nature of this risk and harm.

The GCYP currently fulfils a monitoring function regarding certain categories of serious allegations of abuse in care. Under a process implemented in response to a Mullighan Inquiry recommendation,[131] OGCYP receives notification about all 'Care Concern Referrals' from the DCP Care Concern Management Unit, in which:

- the allegation relates to sexual abuse and/or neglect, and
- the direct conduct or actions of the carer are alleged to have resulted in the child or young person's alleged exposure to sexual abuse.

Through the R20 process, the GCYP's role is to monitor the progress, timeliness, and outcome of the investigations into the care concerns, and where necessary, advocate for the child's best interests. In addition, the GCYP considers systemic issues that may have contributed to the abuse and promotes discussion about reforms that would improve safety outcomes for children and young people.

It is important to highlight that 'care concern' referrals do not account for a complete picture of all allegations of sexual abuse of children and young people in care. In particular, allegations that relate to peer sexual abuse by other young people in care, or sexual abuse perpetrated by 'strangers' in the community, may not give rise to care concern referrals under DCP policies. As a result, the GCYP may not be made aware of these allegations.

The GCYP continues to have serious concerns about the prevalence of harmful sexual behaviour between children and young people in care, and the targeted sexual exploitation of children and

[130] *Inquest into the Death of Chloe Lee Valentine: Finding of the State*, 9 April 2015, p. 141.
[131] Hon EP Mullighan QC, *Children in State Care Commission of Inquiry: Allegations of Sexual Abuse and Death from Criminal Conduct* (Final Report, 31 March 2008), recommendation 20.

young people in care by some adults in the community. The GCYP also continues to identify significant other concerns regarding the safety and wellbeing of some children and young people in care as a result of peer violence, including being subjected to serious physical abuse perpetrated by co-residents, experiencing sustained emotional and psychological harm from co-resident intimidation, bullying, verbal taunts and threats, and witnessing critical incidents of physical violence, property damage and self-harm.

These experiences reinforce a sense of instability, unpredictability, fear, and anxiety about the future for the children and young people affected. Young people who are affected in this way are not being afforded the basic right of safety in care, and not given the opportunity to thrive, as is set out in the Parliamentary declaration in the *CYP Safety Act*.[132]

When children and young people are placed, or remain placed, with other children and young people in circumstances where there is a foreseeable risk of harm, this is inconsistent with the Chief Executive's obligation to exercise placement powers in a manner that is consistent with the *CYP Safety Act*,[133] including the paramount consideration that children and young people should be protected from harm.[134] Supporting the Chief Executive to fulfil this obligation requires transparency of information and allowing information about abuse in care, from the people who know the children or young people best, to reach senior decision-makers.

> ***"They need to protect children … it is called child protection and they need to live up to their name" – Young person in care***

OGCYP observation is that DCP internal escalation and review mechanisms may be challenging to navigate for staff, family, carers and other adults concerned about a child's wellbeing in a placement. For example, an internal review under section 157 may only be made by a 'person who is aggrieved by a decision of the Chief Executive or a child protection officer'. OGCYP understands that, when an application is made for an internal review, DCP internal legal services make an assessment about whether DCP believes the applicant meets this definition. If not, then no review will be conducted. This has flow-on effects for the right to apply for SACAT review, as this avenue is only available if a review under section 157 has been conducted in respect of the decision.[135]

The results of DCP eligibility assessments have, at times, been surprising to OGCYP. This includes circumstances where previous carers with positive connections to the child have not been eligible to apply for internal review of decisions surrounding placement of a child.

Another concern for the GCYP is that, where children and young people have experienced abuse in care, they should be supported to seek legal redress. As discussed above, a long-term care plan for an LTGSP Order explicitly requires, by regulation, that there be planning to identify compensation payable to the child or young person under the *Victims of Crime Act 2001* (SA).

---

[132] *Children and Young People (Safety) Act* 2017 (SA), s 4.
[133] *Children and Young People (Safety) Act 2017*, s 84(3)(c).
[134] *Children and Young People (Safety) Act 2017*, s 7.
[135] *Children and Young People (Safety) Act* 2017, s 158(2)(b).

However, this same obligation is not enshrined in equivalent provisions relating to DCP case planning processes for children under the custody or guardianship of the Chief Executive.

This same standard should be reflected in a requirement to consider eligibility for compensation in case planning under section 28 of the *CYP Safety Act*, to ensure that a child or young person's eligibility for statutory redress and compensation is considered in a timely manner; and, at least, on an annual basis.

The GCYP recommends legislative amendment to improve access to internal review, improved independent oversight of sexual and other abuse of children and young people in care and legislative provision to support timely access to redress when abuse is experienced.

Recommendation 16

The *CYP Safety Act* should be amended to enshrine the GCYP's independent oversight of the alleged sexual abuse of children and young people in care (known as the 'R20 arrangement', arising from recommendations made by the Mullighan Inquiry). This must be accompanied by a commitment to appropriate human and financial resources to perform function .

Recommendation 17

Section 157 should be amended to provide clear information about who is entitled to apply for an internal review. This should include the child's parents, siblings, family members and other people and professionals who are significant to the child.

Recommendation 18

Include a requirement in section 28 to identify eligibility for compensation payable to the child or young person under statutory redress schemes and other compensation avenues.

Contact with People who Matter

> "The child needs to be shown that they are loved and that they can be ok."
>
> - Young person in care

A key component of a child's best interests is their social and emotional wellbeing, developed and maintained through attachments with family, siblings, friends, carers and other people who are important to them.

The status of family life holds a special importance in international rights instruments, with the preamble to the CRC recognising that,

> *the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding*.

The importance of this issue for children and young people is reflected in requests for GCYP advocacy, with family contact and contact with other significant people consistently featuring among the top presenting issues.[136]

Sibling relationships

It is a sad reality that many children and young people in care reside in placements separate from their siblings. At times, this may be necessary for safety reasons or be in the children's best interests. However, in many cases, it is driven by difficulties in finding placements where siblings can be kept together.

The sibling relationship, if nurtured and maintained, can be a source of comfort and support for children and young people both while in care and into adulthood (when the majority of professional relationships cease). For some young people, their relationship with their siblings may be their only ongoing connection they have with their family.

> ***"it would just be a necessity to live with your siblings"***
>
> ***– Young person in care***

During 2021-22, OGCYP observed the following issues impacting on sibling contact arrangements:

- Lack of consensus among care team members regarding children's voices, needs, and best interests in relation to sibling contact,

[136] OGCYP, GCYP 2021-22 Annual report, p. 33.

- Limited availability of carers and DCP staff to transport and facilitate contact, as well as the distance between placements and DCP offices,
- Conflict between carers and other care team members,
- Logistical and communication issues associated with planning contact for large sibling groups and/or where siblings are case managed by different DCP offices, and
- Prioritisation of other activities and commitments above sibling contact, without recognising the potential therapeutic benefits of the sibling connection in its own right.[137]

The GCYP continues to advocate strongly for sibling connections to be nurtured and maintained, in accordance with children and young people's wishes and best interests.

However, significantly, the **word sibling does not appear** once in the *CYP Safety Act* or Regulations. South Australia is the only Australian jurisdiction not to make any reference to 'siblings' in care and protection legislation (see Figure 6).

To bring South Australia into line with this standard, the *CYP Safety Act* should expressly acknowledge that sibling relationships are a matter that should be taken into account in determining the best interests of children and young people, and enshrine a right to be placed with siblings to the extent that is possible.[138]

Figure 6 Comparison of references to siblings and sibling contact in Australian care and protection legislation

Jurisdiction	Relevant provisions
NT	In determining the best interests of the child, consideration should be given to the nature of the child's relationship with their family, including **siblings**, and other persons who are significant in their life.[139]
Vic	In determining the best interests of the child, contact arrangements between the child and their parents, **siblings**, family members and other persons significant to the child must be considered.[140] A permanent care order may include conditions that the Court considers to be in the best interests of the child, concerning contact with their **siblings** and other persons significant to the child.[141]

[137] Ibid.
[138] See, eg, *Child protection Act 1999* (Qld).
[139] *Care and Protection of Children Act 2007* (NT), s 10.
[140] *Children, Youth and Families Act 2005* (Vic), s 10.
[141] Ibid, s 321.

Jurisdiction	Relevant provisions
QLD	If a child is removed from the child's family, the child should be placed with the child's **siblings**, to the extent that is possible.[142] For ensuring the wellbeing and best interests of a child, the action or order that should be preferred is the one that ensures the child experiences or has ongoing positive, trusting and nurturing relationships with persons of significance to the child, including the child's parents, **siblings**, extended family members and carers.[143]
ACT	There is a rebuttable presumption that it is in the best interests of the child or young person to have contact with a person with parental responsibility for the child or young person or their **siblings**.[144]
TAS	In determining the best interests of a child, their relationship with parents, family members and other significant persons, including **siblings**, must be taken into account.[145]
NSW	If a child or young person is placed in out-of-home care, the child or young person is entitled to a safe, nurturing, stable and secure environment. Unless it is contrary to his or her best interests, and taking into account the wishes of the child or young person, this will include retention of relationships with people significant to the child or young person, including birth or adoptive parents, **siblings**, extended family, peers, family friends and community.[146]
SA	No reference to siblings or other significant persons. [147]
WA	In determining what is in the best interests of a child, the nature of the child's relationship with parents, **siblings** and other members of the child's family and with other people who are significant in the child's life must be taken into account.[148]

[142] *Child Protection Act 1999* (Qld), s 5B.
[143] Ibid, s 5BA.
[144] *Children and Young People Act 2008* (ACT), s 486.
[145] *Children, Young Persons and Their Families Act 1997* (Tas), s 10E.
[146] *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9(f).
[147] *Children and Young People (Safety) Act 2017* (SA).
[148] *Children and Community Services Act 2004* (WA), s 8(1)(d).

Recommendation 19

The *CYP Safety Act* should expressly acknowledge that sibling relationships are a matter that should be taken into account in determining the best interests of children and young people.

Recommendation 20

The placement principle under the Child Protection Act 1999 (Qld) should be replicated: 'if a child is removed from the child's family, the child should be placed with the child's siblings, to the extent that is possible'.

Accountability for contact decisions

As discussed earlier in this submission, sibling and family contact determinations made through the CARP are excluded from internal reviews and SACAT decisions.

It is a fundamental principle of administrative accountability and separation of powers that children and young people have access to judicial review of administrative decisions. Given the significance of contact determinations for a young person's life, these decisions should be reviewable by SACAT.

Recommendation 21

Amend section 158 of the *CYP Safety Act* to include Part 4 of Chapter 7 (contact determinations) in decisions reviewable by SACAT.

'Leaving' Care

Discussion Paper, Question 26: *Could the CYP Safety Act be strengthened to enable all young people in care, and leaving care, to access the services they need to heal from trauma, to grow up healthy and strong, and to be supported as they transition into independence?*

Among the young people and adults who contacted OGCYP for advocacy support in 2021-22, leaving care was a big issue.[149] Their concerns included:

- A lack of planning for their transition from care,
- A lack of post-care support, and
- The availability of post-care housing and the risk of homelessness.

The *CYP Safety Act* includes an obligation on the Chief Executive to prepare a transition plan for a child or young person, of any age, who is transitioning from care.[150] As explored in more detail in Part 9 below, these plans do not create legally enforceable rights.[151]

For care leavers aged 16 – 25 years who have been in care for more than 6 months, the *CYP Safety Act* requires that the Minister must make an offer of assistance for their transition. For a young person who has been in care for less than 6 months, making this offer is discretionary.[152]

Under the *CYP Safety Act*, the nature and duration of any assistance offered by the Chief Executive is entirely discretionary. However, the legislation specifies it may include:

- Information about services and referrals,
- Education and training,
- Finding accommodation and employment,
- Accessing legal advice and health services, and
- Counselling and support services.[153]

If a young person accepts an offer of assistance, the Minister must take 'reasonable steps' to ensure the assistance is provided to the young person. As with transition plans, the legislation expressly provides that the offer of assistance does not create legally enforceable rights or entitlements for the young person.[154]

[149] OGCYP, GCYP Annual Report 2021-22 (2022), p. 45.
[150] *Children and Young People (Safety) Act 2017* (SA), s 111(1).
[151] Ibid, s 111(3).
[152] Ibid, s 112.
[153] Ibid.
[154] Ibid, s 112(5).

Taken in totality, these provisions mean that, while financial assistance or accommodation support for a young person leaving care is not excluded by the *CYP Safety Act*, there is no expression provision or entitlement to this financial assistance.

As such, the *CYP Safety Act* currently does not provide any concrete protection to prevent a young person in care from becoming homeless, with no financial or other accommodation support, on their 18th birthday (when they are no longer under the guardianship or custody of the Chief Executive).

> ***"Well, I'm nearly 18 so I'm getting a bit worried that I'm going to end up in the big system, 'cause like I had no support from DCP while I was a youth so when I turn 18 what, what support am I going to have …? Are they just going to chuck me out on the street or what?"***
>
> ***– Young person in care***

As a matter of policy, South Australia has a number of positive programs in place for supporting care leavers, including extended care up to 21 years for young people in foster and kinship care, and post care support provided through Relationships Australia South Australia (RASA). Discretionary policy is not, however, a sufficient safety net to support young people (who often have complex trauma backgrounds) to feel secure as they transition to independence.

Further, young people in residential care and Supported Independent Living Services (SILS) are ordinarily expected to leave their placement when they turn 18,[155] and high demand for RASA services can cause access challenges for young people in need of post-care support.

The broader impacts of cost-of-living pressures and low rental vacancy rates which affect all young people in South Australia have a unique impact on care leavers, particularly those transitioning from non-family-based care. Many young people can stay living with their birth or foster family while they learn a trade or study at university, or receive financial support from birth families or carers, often into their 20's. In contrast, young people living in residential and other non-family-based care are reliant on state services to provide financial and accommodation support while they prepare for their futures.

In 2021-22, DCP launched a new trial program to fill the housing service gap for young people in residential care transitioning from care. The Next Steps pilot program is for young people aged 17 and a half years and over who are:

- Living in residential care in the Adelaide metropolitan area, and
- Have 'complex needs', and
- Are at risk of homelessness.

[155] DCP has advised OGCYP that SILS contracts only extend to a young person's 18th birthday, with provision for outreach support available until the age of 18 and 3 months. OGCYP is aware from individual advocacy matters that residential care placements are not intended to continue beyond the age of 18, but can be temporarily extended by DCP if post-care housing is not yet in place.

The program, developed and funded by DCP, is operated by Centacare in partnership with Aboriginal Sobriety Group, Housing Choices SA and DCP. The service is designed to work alongside participants to help them develop and achieve their goals, which might include:

- Finding and moving into new accommodation,
- Building life skills such as budgeting, paying bills and looking after their accommodation,
- Finding and using services they need,
- Starting or continuing education, training or employment,
- Connecting safely with people that matter to them,
- Connecting with their community and culture, and
- Managing legal issues.

The GCYP is pleased with the introduction of this pilot program, which we hope will go some way to filling service gaps for care leavers. However, we note with concern that the challenges facing young people in the housing market are more extensive than the scope of services offered through the Next Steps program, and young people not within the scope of the pilot program remain without critical housing support. This includes young people living in remote and regional areas.

A report by Deloitte Access Economics, commissioned by *The Home Stretch*, found that young people who stayed in care until the age of 21 experienced better outcomes across the following indicators (compared to leaving care at 18):[156]

Indicator	Leaving care at 18	Staying in care until 21
Teen pregnancy	16.6%	10.2%
Educational engagement (for non-parents)	4.5%	10.4%
Homelessness	39.0%	19.5%
Hospitalisation rate	29.2%	19.2%
Rate of mental illness	54.4%	30.8%
Rate of smoking	56.8%	24.5%
Interaction with the criminal justice system	16.3%	10.4%
Alcohol and drug dependence	15.8%	2.5%

Based on these findings, Deloitte estimated that, in each jurisdiction that engaged in extended care to 21, there would be a benefit cost ratio of 2.0 over 40 years for public spending. This means that, for every $1 spent on providing extended care to 21, the program would generate a return of $2 on other savings across public expenditure.[157]

[156] Home Stretch, Deloitte *A Federal and State Cost Benefit Analysis, Extending Care to 21 Years: Deloitte Access Economics* (July 2018).
[157] Ibid, vii.

The CREATE foundation has recently released two position papers, advocating for all governments to commit to (among other things):

- 'Implementing options for *all* young people in care to remain in, and be able to leave and return to, a supported placement until they are at least 21 years',[158] and
- '[To] provide consistent support for young people transitioning from care until age 25, covering finances, education, training, employment and social support'.[159]

Noting the above concerns and strong evidence-based indicators for extending care to 21 years – for both the wellbeing of children and young people and for public expenditure – the GCYP echoes the Create Foundation's call to extend supported placements for all care leavers to 21 years of age. This includes children and young people in non-family-based care.

To provide young people with the stability they need to safely transition into independence, the GCYP also echoes calls to ensure support until the age of 25 is an entitlement, rather than an 'opt-in' system on a discretionary basis.

In order to achieve this outcome and security for care leavers, the GCYP recommends legislative amendment to enshrine an entitlement to financial assistance and supported placement to the age of 21 years, to reduce the rate of young people exiting care to homelessness. In achieving this outcome, GCYP notes the recent introduction of section 85B to the Northern Territory *Care and Protection of Children Act 2007*, which commenced on 1 February 2022, which ***entitles*** a care leaver to assistance (including financial assistance) to maintain appropriate living and support arrangements until they turn 22 years of age.

Recommendation 22

Amend the Act so that assistance is guaranteed for all young people leaving care until the age of 25 years, and supported placement is guaranteed for all young people leaving care until the age of 21 years. This includes for children in both family-based and non-family-based care.

[158] CREATE Foundation, *CREATE Position Paper: Supported Placement until 21* (June 2022).
[159] CREATE Foundation, *CREATE Position Paper: Transition to Independence* (June 2022).

Making Rights Real

"If it's a right they should oblige by it. Kids are people too."
- Young person in care

Enforceability of the Charter

Section 13 of the *CYP Safety Act* provides that the GCYP must prepare and maintain a *Charter of Rights for Children and Young People in Care* ('the Charter'). It must be reviewed, in consultation with interested persons, at least every 5 years. The former GCYP conducted a review of the Charter in 2020, which resulted in a new Charter being published and tabled in Parliament in January 2021.

The Charter is based on the CRC and was developed with the help of children and young people who have a care experience. Because they know what it is like, they know what is important.

In a recent consultation, OGCYP asked young people in residential care about their relationship with the Charter. The young people spoken to reported high familiarity with the Charter and OGCYP resources explaining these rights. However, there were varying experiences on the Charter's utility in protecting their rights. One young person noted using the Charter with success to self-advocate for his rights at school. Another young person expressed frustration that, when he felt a carer was breaching his right to privacy, he articulated this right but it led to no outcome.

> ***"[The Charter] doesn't mean anything to me, but it's important when you need it" – Young person in care***

For rights to be real, they have to be actionable. Statements about how children and young people should be treated do not make a meaningful difference in children and young people's lives unless there are mechanisms in place to measure and achieve those standards, or consequences when they are breached.

The *CYP Safety Act* provides that every person must give effect to the Charter, when exercising their powers or performing their functions, to the extent that this is consistent with the paramount consideration to protect children and young people from harm. This provision is followed by a clause that the Charter does not create legally enforceable rights or entitlements.[160]

Statutory charters of rights are a new and developing field, which are progressively being rolled out in various capacities across Australian jurisdictions. Most statutory charters impose some limitations on enforceability, and we are still learning lessons about what works and what does not. Blanket statements that a charter does not create any legally enforceable rights or

[160] *Children and Young People (Safety) Act 2017* (SA), s 13.

entitlements risks defeating the purpose of embedding a human rights framework into legislation.

Alternatives to blanket exclusions include attaching procedural rights to statutory charters, rather than a guarantee that the rights within the charter will be met. An example is the *Victorian Charter of Human Rights and Responsibilities Act 2006*, which sets out 20 rights based on the *International Covenant on Civil and Political Rights*. The Charter makes it unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.[161] The obligation does not compel a person to act contrary to any other obligations they hold under law, and it does not create a right in and of itself to challenge the lawfulness of a decision. But, if a person already has a right to challenge the lawfulness of a decision or act (for example, under principles of administrative law), they can argue that the decision was unlawful because it was incompatible with a human right or the decision maker failed to give proper consideration to human rights.[162]

An example of how such a principle could apply in the current context is if a child or young person wanted to challenge a placement decision made under section 84 of the *CYP Safety Act* (which is a reviewable decision by SACAT). In the SACAT proceedings, a child or young person would then be able to raise that the placement was incompatible with rights they hold under the Charter, or that their rights were not considered in that decision. The right would not compel a decision maker to act contrary to any other obligations they hold under law, including the paramount consideration under section 7. But, if it was not contrary to other obligations under the *CYP Safety Act*, a failure to consider or meet the rights in the Charter would then be a basis that SACAT could exercise powers to overturn the decision or return the matter to DCP for further consideration.

The GCYP acknowledges that it may be in fact be Parliament's intention that the Charter should operate in such a manner. If so, the legislation should be amended to clarify this ambiguity. The most readily available solution to do so is by removing the caveat that the Charter does not create legally enforceable rights or entitlements. Notably, while nearly all Australian jurisdictions include a statutory charter of rights for children and young people in care,[163] **South Australia is the only jurisdiction** to include an express caveat that the rights created by the Charter **do not create** legally enforceable rights or entitlements.[164]

---

[161] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38.
[162] Ibid, s 39. See, eg, *Minogue v Dougherty* [2017] VSC 724.
[163] *Care and Protection of Children Act 2007* (NT), s 68A; *Children, Youth and Families Act 2005* (Vic), s 16; *Children and Community Services Act 2004* (WA), s 78; *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 162; *Child Protection Act 1999* (Qld), s 74. There is no statutory charter of rights for children and young people embedded in care and protection legislation for Tasmania and the Australian Capital Territory.
[164] It is notable, however, that the *Children and Community Services Act 2004* (WA), s 78, and *Care and Protection of Children Act 2007* (NT), s 68A, include a more general statement that the CEO must promote compliance with the Charter of Rights, rather than a specific obligation to apply the Charter in decisions and acts.

The GCYP notes the same concerns and advice regarding other provisions, which include important statements of rights for children and young people, accompanied by caveats that it does not create legally enforceable rights and entitlements:

- Section 29(2), with respect to giving effect to case plans,
- Section 111(3), with respect to a transition from care plan, and
- Section 112(5), with respect to offers of assistance for care leavers.

Removing these caveats is important to bring South Australia into line with contemporary best practice regarding children's rights frameworks in care and protection legislation.

Recommendation 23

Amend section 13, to remove subsection (10): 'However, the Charter does not create legally enforceable rights or entitlements'. If a limitation on Charter enforceability is maintained, an alternative model that clarifies the scope of Charter enforceability should be adopted (see, eg, section 38 and 39 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Recommendation 24

Delete sections 29(2), 111(3) and 112(5) of the *CYP Safety Act*.

Informing children and young people about the Charter

The *CYP Safety Act* does not require the Chief Executive to provide a copy of the Charter to all children and young people in care. By contrast, legislation in Western Australia, the Northern Territory and Queensland include obligations to ensure children in care are given a copy and information about their charter of rights.[165]

In Queensland, each child or young person must also be told about the Public Guardian (who holds the GCYP equivalent role) and that they are able to contact the Chief Executive if they have any questions or concerns about their protection and care needs.

The current provisions should be strengthened to help children and young people in care know about and understand their rights, including what to do if they need advocacy support.

Recommendation 25

Insert a statutory obligation on the Chief Executive to provide a copy of the Charter of Rights to all children and young people in care, as well as information about the Charter and the role and contact details for OGCYP.

[165] *Children and Community Services Act 2004* (WA), s 78(3); *Care and Protection of Children Act 2007* (NT), s 68A(6).

Budgeting for rights

The *CYP Safety Act* has made positive progress in strengthening safeguards and rights protections for children and young people. However, it is the experience and observation of the GCYP that the child protection system continues to be under immense pressure where decisions are made to sustain the survival of this system, and the workforce does not have the resources and space they need to explore the best interests of children and young people to their fullest extent.

During advocacy, DCP staff often agree with the OGCYP's view regarding the child's *best interests*. However, the crux of the issue frequently appears to be the system's capacity and flexibility to provide for the child's best interests. For example, while it may be in the child's best interests to receive specialist disability care, there may also be no suitable service providers. Too often, views are formed, and decisions made through the lens of what a system can actually provide (or not provide), rather than through the lens of the child or young person's best interests.

In its concluding observations to Australia in 2019, the UN Committee on the Rights of the Child provided comments on Australia's child protection systems and drew attention to the widespread under-resourcing across the country. The UNCRC highlighted the harm this causes for children and young people in care through –

- Relying on poorly or untrained and/or inadequately supported staff,
- Inadequate placement matching of children and young people in care, and
- Excessive reliance on police interference and the youth justice system when dealing with children and young people's behavioural problems, without ensuring appropriate therapeutic intervention.[166]

OGCYP have observed that these concerns remain current in South Australia.[167]

If a child protection system is under-resourced, the inevitable result is reduced capacity to make decisions which are in the interests of a child or young person. Decisions will instead, consistently, gravitate towards accommodating system and economic constraints. Whilst funding is not an issue of legislative reform, the human rights implications created by under-resourcing must be considered and addressed to achieve the best interests of children and young people in care.

The GCYP notes that challenges within the child protection system relating to resources and funding are aired and examined periodically through reviews and inquiries. Whatever responses are made to recommendations that may arise, it seems that there is inevitably a need for subsequent reviews and inquiries to revisit all or part of the same terrain. The persistence of these challenges suggests that a whole of government approach, across portfolios, is necessary to respond in practical and nuanced ways.

---

[166] UNCRC, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, CRC/C/AUS/CO/5-6.
[167] See, eg, OGCYP, *Final Report of the South Australian Dual Involved Project*, n 123, Part 4; OGCYP, GCYP 2021-22 Annual Report (2022), pp. 27-28.

Section 4 of the *CYP Safety Act* states that the Parliament of South Australia recognises the important to the State of children and young people, and that 'the future of the State is inextricably bound to [their] wellbeing'. This declaration recognises that the situation and prospects of the State's children and young people warrant continuity of parliamentary scrutiny.

This onus on Parliament is not sporadic or occasional, but ongoing and persistent. To honour the foundation and principles underlying this declaration, a Standing Committee of Parliament should be established with responsibility for ongoing oversight of the State's responsibilities to respect and promote the rights of the child.

Recommendation 26

Establish a Standing Committee of Parliament for ongoing oversight of the State's responsibilities to respect and promote the rights of the child.

List of Recommendations

Recommendation 1

The legislation should be explicit that the best interests of the child – which includes their safety and wellbeing – is the **paramount consideration** in decision making.

Recommendation 2

Embed the standard of 'active efforts' for implementation of the Aboriginal and Torres Strait Islander Child Placement Principle, accompanied by legislative guidance of actions that evidence active efforts.

Recommendation 3

The legislation should be explicit that, for an Aboriginal child or young person, providing the child or young person with the opportunity to maintain and build connections to their Aboriginal family, community and culture must be taken into account in determining their best interests.

Recommendation 4

Embed a requirement in the legislation that a case plan for an Aboriginal child or young person must include a cultural plan. The plan should be developed in consultation, to the fullest extent possible, with the child or young person, their family, community and relevant Aboriginal organisations.

Recommendation 5

Consult with Aboriginal organisations and community members in South Australia about methods to improve cultural safety for children and young people and their families in Youth Court and SACAT proceedings.

Recommendation 6

The following provisions of the *CYP Safety Act* be amended to mirror the requirement on the Court and SACAT to provide reasonable opportunity for children and young people to personally present their views unless they are not capable of doing so or it would not be in their best interests:

a. Section 85: Annual reviews

b. Section 157: Internal reviews

c. Section 95: Review by Contact Arrangements Review Panel.

Recommendation 7

The *CYP Safety Act* should include a provision that requires children and young people to be represented by an advocate in SACAT proceedings, Internal Reviews and CARP Reviews, unless the child or young person has made an informed and independent decision not to be so represented.

Recommendation 8

Children and young people in all forms of alternative care should have access to independent advocacy and oversight by GCYP. This advocacy function must be funded.

Recommendation 9

The *CYP Safety Act* should be amended to legislate a funding commitment clause for the CYP Visitor role, that:

a. Obliges the Minister to provide the CYP Visitor with the staff and other resources that she reasonably needs for carrying out her functions,

b. Ensures that the CYP Visitor may, by agreement with the Minister responsible for an administrative unit of the Public Service, make use of the services of the staff, equipment or facilities of that administrative unit.

Recommendation 10

The *Equal Opportunity Act 1984* should protect children and young people in care from discrimination on the basis of their care status or involvement in the child protection system. This should mirror existing protections for children and young people against discrimination on the basis of their age, gender, religion, race and disability.

Recommendation 11

Insert a legislative provision into the CYP (Safety) Act to expressly restrict:

a. publishing information that identifies that a child or young person is, or has been, in care, or

b. publishing personal information relating to a child or young person who is or has been in care, such as details of their abuse or trauma, in circumstances where the child or young person may be identifiable.

This amendment will require appropriate exceptions to allow children and young people to make decisions, in accordance with their age and maturity, about publicly telling their story.

Recommendation 12

a. Amend section 35(5) to remove the words: 'Without otherwise limiting the *Consent to Medical Treatment and Palliative Care Act 1995*'.

b. Insert subsection 35(7) as follows:
'Nothing in this section authorises the examination, assessment or treatment of a child or young person that would be in contravention of the Consent to Medical Treatment and Palliative Care Act 1995 *(SA) or the* Mental Health Act 2009 *(SA).'*

Recommendation 13

a. Include a legislative power for the Chief Executive to request assistance from a State authority (or non-government agency that receives public funding), with a corresponding obligation to endeavour to comply with the request.

b. Include an additional obligation, based on the Western Australian model, to prioritise a request to provide assistance to children and young people in care, across areas including local government services, health, mental health and education.

Recommendation 14

a. Include a requirement in section 28 that case plans for a child or young person with disability must include a disability care plan.

b. Include a requirement in section 112 to expressly provide that access to disability services is a form of assistance the Minister should provide for children and young people transitioning from care.

Recommendation 15

The GCYP recommends maintaining the strength of existing reporting and requirement thresholds.

Recommendation 16

The *CYP Safety Act* should be amended to enshrine the GCYP's independent oversight of the alleged sexual abuse of children and young people in care (known as the 'R20 arrangement', arising from recommendations made by the Mullighan Inquiry).

Recommendation 17

Section 157 should be amended to provide clear information about who is entitled to apply for an internal review. This should include the child's parents, siblings, family members and other people and professionals who are significant to the child.

Recommendation 18

Include a requirement in section 28 to identify eligibility for compensation payable to the child or young person under statutory redress schemes and other compensation avenues.

Recommendation 19

The *CYP Safety Act* should expressly acknowledge that sibling relationships are a matter that should be taken into account in determining the best interests of children and young people.

Recommendation 20

The placement principle under the Child Protection Act 1999 (Qld) should be replicated: 'if a child is removed from the child's family, the child should be placed with the child's siblings, to the extent that is possible'.

Recommendation 21

Amend section 158 of the *CYP Safety Act*, to remove the exclusion of Chapter 7, Part 4 (contact determinations) from decisions reviewable by SACAT.

Recommendation 22

Amend the Act so that assistance is guaranteed for all young people leaving care until the age of 25 years, and supported placement is guaranteed for all young people leaving care until the age of 21 years. This includes for children in both family-based and non-family-based care.

Recommendation 23

Amend section 13, to remove subsection (10): 'However, the Charter does not create legally enforceable rights or entitlements'. If a limitation on Charter enforceability is maintained, an alternative model that clarifies the scope of Charter enforceability should be adopted (see, eg, section 38 and 39 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Recommendation 24

Delete sections 29(2), 111(3) and 112(5) of the *CYP Safety Act*.

Recommendation 25

Insert a statutory obligation on the Chief Executive to provide a copy of the Charter of Rights to all children and young people in care, as well as information about the Charter and the role and contact details for OGCYP.

Recommendation 26

Establish a Standing Committee of Parliament for ongoing oversight of the State's responsibilities to respect and promote the rights of the child.

References

Articles/Books/Reports

ACT Law Society, *Guidelines for Lawyers Representing Children and Young People in Care and Protection Matters in the ACT Children's Court* (2004).

Arabena, K, W Bunston, D Campbell, K Eccles, D Hume and S King, *Evaluation of Marram-Ngala Ganbu: A Koori Family Hearing Day at the Children's Court of Victoria in Broadmeadows* (2019).

Australian Human Rights Commission, *National Principles for Child Safe Organisations* (2018)

Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process* (1997).

Child Development Council, *How are they faring? South Australia's 2021 Report Card for children and young people* (2021).

Children's Court of Western Australia, *Guidelines for Child Representatives in Protection Proceedings* (2019).

Commissioner for Aboriginal Children and Young People, *Inquiry into the application of the Aboriginal and Torres Strait Islander Child Placement Principle in the removal and placement of Aboriginal children in South Australia: Background Paper* (2022).

Commissioner for Children and Young People, *Submission to the Social Development Committee Inquiry into NDIS participants with complex needs living in inappropriate accommodation* (2022).

Commonwealth of Australia, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), p. 276.

CREATE Foundation, *CREATE Position Paper: Supported Placement until 21* (2022).

CREATE Foundation, *CREATE Position Paper: Transition to Independence* (2022).

Department for Child Protection, *Review of the Children and Young People (Safety) Act 2017 Discussion Paper: Building the South Australian child protection system for the future* (September 2022).

Graham, Linda J (et al) *Inquiry into Suspension, Exclusion and Expulsion Processes in South Australian government schools: Final Report* (The Centre for Inclusive Education, QUT, 2020).

Home Stretch, Deloitte *A Federal and State Cost Benefit Analysis, Extending Care to 21 Years: Deloitte Access Economics* (2018).

Inquest into the Death of Chloe Lee Valentine: Finding of the State, 9 April 2015.

Jones, Lisa M, David Kinkelhor and Kessica Beckwith, 'Protecting victims' identities in press coverage of child victimization' (2010) 11(3) *Journalism* 347.

Law Society NT, *Protocols for lawyers representing children* (2017).

Legal Aid Queensland, *Best Practice guidelines framework: Working with children and young people* (April 2015).

MacAlister, Josh, *The independent review of children's social care: Final Report* (2022).

Malvaso, Catia, Pedro Santiago, Rhiannon Pilkington, Alicia Montgomerie, Paul Delfabbro, Andrew Day and John Lynch, *The intersection between the child protection and youth justice systems in South Australia* (2020).

Mullighan, EP QC, *Children in State Care Commission of Inquiry: Allegations of Sexual Abuse and Death from Criminal Conduct* (Final Report, 31 March 2008).

Nyland, Margaret (Hon), *The Life they deserve: Child Protection Systems Royal Commission* (2016).

Office of the Public Advocate (Qld), *People with intellectual disability or cognitive impairment residing long-term in health care facilities: Addressing the barriers to deinstitutionalisation, A systemic advocacy report* (2013).

OGCYP, *Children and Young People in State Care in South Australian Government Schools 2010-2020* (August 2021).

OGCYP, *Final Report of the South Australian Dual Involved Project: Children and young people in South Australia's child protection and youth justice systems* (June 2022).

OGCYP, GCYP Annual Report 2021-22 (2022).

OGCYP, *Guardian resigns from her role of Child and Young Person's Visitor*, 24 August 2021.

OGCYP, *Six Month Snapshot of the South Australian Dual Involved Project: Children and young people in South Australia's child protection and youth justice systems* (2021).

OGCYP, *Six themes from the Mullighan Report*, 13 May 2008.

OGCYP, *Submission to the Law Society of South Australia: Guidelines on the Legal Representation of Children in the Youth Court (Care and Protection) Jurisdiction*, 27 May 2022.

Ombudsman SA, Investigation Summary: 2020/00827, December 2020.

Productivity Commission, *Report on Government Services 2022* (2022).

Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal Out-of-Home Care in NSW* (Final Report, 2019)

Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (Final report, 17 November 2017).

Royal Commission into Institutional Responses to Child Sexual Abuse (Final Report, 15 December 2017).

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Education and Learning' (Issues paper, October 2019).

The Scottish Government, *Children and Young People (Scotland) Act 2014: Statutory Guidance on Part 9: Corporate Parenting* (2015).

SNAICC, *Keeping Our Kids Safe: Cultural Safety and the National Principles for Child Safe Organisations* (2021)

SNAICC, *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Victoria* (2020).

SNAICC, *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation* (2019).

The Law Society of New South Wales, *Representation Principles for Children's Lawyers,* 4th edition (2014).

Tobin, John, *The UN Convention on the Rights of the Child* (Oxford University Press, 2019).

Training Centre Visitor, *Great Responsibility: Report on the 2019 Pilot Inspection of the Adelaide Youth Training Centre (Kurlana Tapa Youth Justice Centre)* (2020).

Victoria Legal Aid, *Representing children in child protection proceedings: A guide for direct instructions and best interests lawyers* (2019).

Legislation

Care and Protection of Children Act 2007 (NT).

Charter of Human Rights and Responsibilities Act 2006 (Vic).

Child Protection Act 1999 (Qld).

Children and Community Services Act 2004 (WA).

Children and Community Services Regulations 2006 (WA).

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

Children and Young People (Safety) Act 2017 (SA).

Children and Young People (Safety) Miscellaneous Amendment Bill 2020 (SA).

Children and Young People (Safety) Regulations 2017 (SA).

Children and Young People (Scotland) Act 2014.

Children and Young People Act 2008 (ACT).

Children and Young Persons (Care and Protection) Act 1998 (NSW).

Children, Young Persons and Their Families Act 1997 (Tas).

Children, Youth and Families Act 2005 (Vic).

Children's Protection Act 1993 (SA).

Consent to Medical Treatment and Palliative Care Act 1995 (SA).

Controlled Substances Act 1984 (SA).

Disability Discrimination Act 1992 (Cth).

Equal Opportunity Act 1984 (SA).

Family and Community Services Act 1972 (SA).

Family Law Act 1975 (Cth).

Mental Health Act 2009 (SA).

Youth Justice Administration Act 2016 (SA).

International

UNCRC, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, CRC/C/AUS/CO/5-6.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577.

UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly,* 2 October 2007, A/RES/61/295.

UNCRC, *General comment no 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12.

UNCRC, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, 29 May 2013, CRC/C/GC/14.

UNCRC, *2021 Day of General Discussion: Children's Rights and Alternative Care* (Concept note, 2021).

UNCRC, *2021 Day of General Discussion: Children's Rights and Alternative Care* (Outcome Report, 13 June 2022).

Guardian
for Children and
Young People