Submission to the Inquiry into the Potential for a Human Rights Act for South Australia

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Introduction

I make this submission in my capacities as Guardian for Children and Young People, Training Centre Visitor (TCV), Child and Young Person's Visitor (CYPV) and Youth Treatment Order Visitor (YTOV). In these positions, my role is to advocate for the rights and best interests of children and young people in care and youth detention.[1]

I fulfil these functions through providing advocacy on individual and systemic issues, as well as monitoring the safety and wellbeing of these children and young people.

In December 2023, I was pleased to hear the announcement of the Social Development Committee's inquiry into the potential of introducing a Human Rights Act. This is an exciting step for South Australia, and I strongly support legislation to embed human rights into laws, policies and decision-making.

In making this submission, I acknowledge that there are currently a range of laws in place in South Australia that contribute to protecting children and young people's human rights. This includes anti-discrimination legislation, compensation avenues for children and young people who experience abuse, and Charters of Rights for children and young people with specific attributes or needs (including those in care or detention). On the basis of existing protections, I understand some question the value of specific human rights legislation; including whether additional resourcing for oversight mechanisms and procedural steps in government decision-making are appropriate or necessary. There are numerous examples which evidence the considerable potential of statutory human rights legislation to improve rights awareness and substantive protections, when overlayed upon existing mechanisms.[2] Rather than reproducing those examples, my submission focuses on challenging the core belief that underlies such queries; namely, that we live in a community that respects human rights and has sufficient rights protections in place.

My experience, sadly, is that this belief is misplaced. In undertaking my statutory functions, I have observed a consistent and alarming lack of responsiveness in South Australia towards protecting, respecting, and fulfilling the human rights of children and young people in care and detention. Too

[1] Information about each of my roles and statutory functions is available on the Office of the Guardian for Children and Young People's website at https://gcyp.sa.gov.au/what-we-do/.

[2] For a comprehensive collection of such examples, see Australian Human Rights Commission (AHRC), *Position paper: A Human Rights Act for Australia* (2022), ('*A Human Rights Act for Australia*').

often, discourse is based on the convenience and capabilities of government systems, rather than the needs and best interests of the children and young people at the centre of those discussions. Considerable work is required to refocus relevant laws and policies towards treating children and young people, first and foremost, as rights holders.

The value of a Human Rights Act is its capacity to evolve government structures and culture to do just that – through placing rights at the centre of laws and policies, rather than an optional afterthought. Embedding rights-based processes into decision-making requires public officials to actively learn about rights as part of their core business. In a best-case scenario, this learning leads to self-correction. But when preventive potential is not met and rights are violated, a Human Rights Act provides transparent accountability mechanisms and access to justice.

In expressing my support for a Human Rights Act, my submission responds to the terms of reference for the current inquiry as follows:

- highlighting limitations of current laws and mechanisms for protecting human rights in South Australia (specifically regarding children and young people in care and detention)
- analysing the strengths of adopting a Human Rights Act in South Australia to better protect, respect and fulfil these rights
- outlining essential features to embed within the model, including which rights should be incorporated.

Limitations of current rights protections

Statutory charters of rights are a relatively new and developing field, which are progressively rolling out across Australian jurisdictions. We are still learning lessons about what does and does not work, including how to maximise the potential of these instruments and ensure they afford equitable access to rights across different population groups. As we follow this learning curve, discussions about rights protections across Australia can, at times, become technical and legalistic. In the spirit of promoting a rights-based culture, it is important to preface those technical discussions with a reminder of what's at stake.

When we make decisions about how we will protect fundamental human rights, it is not an academic matter. What we are determining is whether those who are most disenfranchised in our society will or won't be subject to violence, institutional abuse, torture, intense physical and psychological suffering and denial of the basic things we all need to stay alive (like food, water, shelter and clothing). We are determining whether children and young people will be protected from or continue to experience the type of rights violations I have reported on in recent months,[3] such as:

- widespread use of harmful practices in detention, including physically dangerous restraints, isolation and solitary confinement, and detention in adult police facilities
- young people in detention treated as 'test subjects' for a mandatory (and non-evidence based) drug treatment scheme
- placement of children and young people under guardianship orders into unsafe living environments, where they may be physically, sexually or emotionally abused
- limited access in detention and some OOHC arrangements to core services such as medical treatment, mental health supports, and education

[3] See my 2022-23 Annual Reports as Training Centre Visitor, Guardian for Children and Young People, Child and Young Person's Visitor and Youth Treatment Order Visitor.

- young people discharged from care and detention into homelessness, with little support or planning for their future.

Each of the limitations I discuss below contribute to the social and systemic conditions which expose children and young people to the risk of these rights abuses. I firmly believe a Human Rights Act in South Australia has the potential to fill those gaps in a way that can meaningfully improve our capacity to respect, protect and fulfil children's rights.

Limitation 1: Clear articulation of rights in legislation

One of the most significant challenges in adopting rights-based approaches in South Australia is the absence of a single, consolidated legislative instrument that details our rights. Instead, there is a selective approach to embedding human rights into laws, most often through:

- broad statements about rights in objects clauses,
- which may or may not be supplemented by procedural rights protections in specific provisions.

This results in a confused and inconsistent legislative framework, which prioritises those rights suited to procedural (rather than substantive) protections. Often, this approach loses sight of the core intention and indivisible nature children's rights. When translated to on-the-ground practice, a 'compliance' culture can arise, which prevents rights from flowing through to practice unless required by a specific legislative provision. The below example demonstrates how this issue can arise.

Example: The right to participation in decision-making for children in care

Article 12 of the *United Nations Convention on the Rights of the Child* (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.[4]

This right has been incorporated partially into the *Children and Young People (Safety) Act 2017* (*CYP Safety Act*) through:

- overarching principles that children and young people should be given the opportunity to participate and express their views,[5]
- specific provisions which set different standards for how this should occur in some processes.

As an example of the latter, sections 62 and 159 imposes an obligation on the Youth Court and the South Australian Civil and Administrative Tribunal to provide children and young people with a reasonable opportunity to *personally present* their views about their ongoing care and protection. In contrast, section 85 sets a different standard for children and young people's participation in the departmental annual review of their circumstances in care;[6] namely, that they must be given a reasonable opportunity to *make submissions* to the panel. The latter does not expressly require that opportunity to make those submissions personally.

Each of these processes relate to fundamental decisions about the child or young person's care arrangements and best interests, and it is not apparent why there should be any variation in the

[4] 4 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577 ('CRC'), Art 12.

[5] *CYP Safety Act*, ss 4, 10.

[6] 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: *CYP Safety Act*, s 85. This is referred to as an 'annual review'.

legislative standard for ensuring participation in those processes. The variation appears arbitrary and may in fact be unintended, relating to some feature of the drafting process.

Regardless of the origins, the result is that the *CYP Safety Act* imposes a lower standard for ensuring children and young people can express their views in one process, compared to another. My 2022 submission to the review of the *CYP Safety Act* evidenced how this has translated into children and young people's attendance and involvement in their annual reviews. Based on data collected through my office's audit of 193 annual reviews in 2021-22, my relevant findings included:

- 45% of children and young people *were not invited* to their annual review.
- a further 20% were invited but *did not attend*
- For those who did not personally attend, most commonly this was due to the annual review being scheduled during school hours (44%)
- Some concerning bases for children and young people's non-attendance included a child who was COVID-positive (and the review was not rescheduled), and another where the recorded reason was 'would have declined if invited'.[7]

This concerningly low attendance at annual reviews demonstrates the risks of implementing Article 12 on a case-by-case basis within specific provisions. There is nothing that precludes a policy standard which sets best practice for children's participation in annual reviews, above that imposed by the legislation. However, the reality of overburdened systems is that practice tends to gravitate towards minimum legislative compliance, rather than the intent of Article 12: to promote children's ability to participate in decision-making to the fullest extent possible, as a fundamental mechanism to achieve decisions that are in their best interests.

A Human Rights Act addresses the issue illustrated in the above example, through requiring consideration of rights as a separate step, overlayed across ordinary application of policies and procedures. Establishing a single authoritative source of human rights:

- promotes consistency across government agencies and work units regarding which rights must be incorporated into practice – and how
- provides clear guidance about processes for balancing competing rights
- ensures accountability and transparency through associated record-keeping and reporting.

Limitation 2: The need for a preventive approach

A further challenge is the absence of mechanisms in South Australia that are designed and suited to *prevent* rights abuses, such as:

- accessible educational programs to promote rights awareness, for both government agencies and 'consumers' of rights (including children and young people)
- statutory requirements to undertake and evidence rights impact assessments in legislative, policy or administrative decisions
- funding and legislating oversight mechanisms with a specific preventive focus.

In this context, it is notable that there remains no funding or legislation in South Australia to support activities required under the United Nations *Optional Protocol to the Convention against Torture* (OPCAT) regarding respect to places where children and young people may be deprived of

[7] Office of the Guardian for Children and Young People (OGCYP), *A rights-based approach to safety – OGCYP submission to the five-year review of the Children and Young People Safety Act 2017* (2022), pp 20-22 (*'A rights-based approach to safety'*).

their liberty.[8] This includes youth detention facilities, police facilities, health facilities (including hospital emergency departments and wards), residential care houses and other places where OOHC is provided.

OPCAT compliance is the key standard of international best practice regarding methods to prevent mistreatment of people in detention settings. Meeting OPCAT requirements includes undertaking inspections of places of detention and closed environments, a range of preventive oversight strategies and broad civil society engagement (including, but not limited to providing community education). Yet, at the time of this submission, the OPCAT process in Australia continues to be problematic, particularly in the context of the United Nations Subcommittee for the Prevention of Torture's (SPT) aborted Australian inspection in late 2022.[9] Commonwealth and state governments have been seriously criticised (nationally and internationally) for failure to comply with basic OPCAT commitments.

While South Australia remains unwilling to legislate and fund a mechanism to prevent torture in places where children are young people are deprived of their liberty should not be treated as an indication that the mechanism is unnecessary. As highlighted above, my experience is that serious rights violations are currently occurring in the Youth Justice Centre and places where out-of-home care is provided. The lack of this mechanism is a concerning gap in South Australia's human rights infrastructure, which should be considered – and addressed – within the context of the current inquiry.

It is also important to acknowledge that OPCAT requirements are just one example of a preventive mechanism, within a discrete area of human rights; namely, preventing torture in places where people are deprived of their liberty. Accordingly, it is essential to also focus on preventive mechanisms to promote fulfilment of the full range of human rights – beyond the mere baseline of preventing torture – in all settings.

A fundamental way that human rights legislation can achieve preventive benefits is a requirement to transparently address incompatibility with human rights when legislation is passed. The urgent need for this accountability mechanism is highlighted in the below example.

Example: The Youth Treatment Order Scheme

The Youth Treatment Order Scheme in South Australia enables court-ordered mandatory treatment for children and young people who are drug-dependent, with associated power to deprive them of liberty while treatment is underway.[10] The enacting legislation came into force in November 2021, despite strong rights-based objections across the sector.

[8] I have been administratively assigned a role in Australia's NPM by the state government with respect to young people detained at the Youth Justice Centre, that presumptively commenced in January 2023. In a nominal role, I participate actively in National NPM network meetings convened by the Commonwealth Ombudsman. However, I am neither funded nor legislated to undertake the separate responsibilities required for an NPM under OPCAT. Performance of NPM functions is vastly different to that of the TCV (with the TCV being a responsive mechanism and the NPM being a preventative mechanism). Without appropriate legislation and resources, it is not possible to undertake the NPM function as intended. Considerable problems about enabling appropriate scope and capacity to conduct an NPM role remain to be resolved, including with respect to a capacity to engage with Civil Society and the SPT itself.

[9] United Nations, Office of the High Commissioner for Human Rights, *UN torture prevention body terminates visit to Australia, confirms missions to South Africa, Kazakhstan, Madagascar, Croatia, Georgia, Guatemala, Palestine, and the Philippines* (20 February 2023), <https://www.ohchr.org/en/press-releases/2023/02/un-torture-prevention-body-terminates-visit-australia-confirms-missions>.

[10] Part 7A of the *Controlled Substances Act 1984* allows the Youth Court to make, vary or revoke mandatory Youth Treatment Orders (YTO) of three sorts: Assessment, Treatment and Detention. In the current 'Phase One' of the YTO Scheme, orders can only be sought with respect to young people already detained at the Youth Justice Centre. Possible extension of the Scheme is subject to review, with a report to be prepared and submitted to the Minister after 21 November 2024 (but before 21 November 2025).

I have been vocal in my view that, as currently enacted, the scheme is fundamentally incompatible with children's rights. This is supported by relevant scrutiny from the Legislative Review Committee in August 2023, which raised concerns that the relevant regulations allowed circumstances which may constitute an 'undue trespass upon the rights and liberties' of children and young people'.[11]

In October 2023, I made a recommendation to government to repeal the legislation, on the basis that it exposes children and young people to a real risk of serious human rights violations.[12] The government's public response to relevant media enquiries was that my views would be considered in the review of the legislation, to be undertaken more than a year later (in November 2024).[13]

At the time the legislation was passed, there was no mechanism which required government to consider or report on rights implications. Nor is there any current obligation to publicly answer or address concerns regarding the rights implications of declining to act on my recommendation to repeal the legislation.

This lack of accountability and transparency is entirely unacceptable, when the legislative scheme in question has the potential to result in such serious rights violations against children.

Limitation 3: Fair access to justice

International guidance is clear that appropriate access to redress is an essential precondition to promoting, respecting and fulfilling human rights. Ensuring this access is both a preventive step – incentivising government systems to avoid the financial, legal and reputational consequences associated with rights breaches – and a remedial step.

Access to justice is currently a strong focus for the United Nations Committee on the Rights of the Child, with a relevant General Comment currently in draft. In the concept note for the General Comment, the Committee has explained that access to justice requires:

> *[T]he ability to seek, individually or collectively, and obtain a just, equitable and timely remedy for rights' violations …*
>
> *While the term "remedy" can refer to several concepts (i.e. compensation, a restoration of rights, an apology or other means of redressing a violation), it should be understood, in the frame of this General Comment**, as a process through which violations of human rights can be challenged**, without necessarily going to a formal justice system*.[14]

In South Australia, we do not have a clear process for children to challenge rights violations. As a result, a consistent theme arising across my functions is children and young people in care and detention who do not know their rights, or how to access and resolve complaints. For those who do make complaints, they often receive little direct engagement during the complaints process and commonly express feeling that the complaint did not lead to any meaningful change – whether for themselves, or others.[15]

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[11] Parliament of South Australia, Legislative Review Committee, Report of the Legislative Review Committee on the Controlled Substances (Youth Treatment Orders) Regulations 2021 (2023), p 2.

[12] Youth Treatment Order Visitor, Youth Treatment Order Visitor 2022-23 Annual Report (2023), pp 14-15.

[13] Thomas Kelsall, 'Call to ditch 'unconscionable' SA youth drug laws', *Indaily* (Online), 1 November 2023, available at: <https://www.indaily.com.au/news/2023/11/01/call-to-ditch-unconscionable-sa-youth-drug-laws>.

[14] United Nations Committee on the Rights of the Child, *Concept Note: General Comment on Children's Rights to Access to Justice and Effective Remedies* (2024), pp 1-2. available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc27/2023-01-31-gc27-concept-note.pdf>.

[15] See, eg, Training Centre Visitor, *Training Centre Visitor 2022-23 Annual Report*, pp 112-117.

My observation is that most available mechanisms are inherently designed to focus on *how the system should respond to complaints* rather than the child or young person's experience of rights violations. This can result in complaints systems that are overly focused on responses to individual staff misconduct or poor practice, while being dismissive of issues that require harder 'fixes' such as funding, cross-agency coordination or legislatively addressing risks of harm to children and young people. Where systemic matters are addressed, the desire to achieve efficiencies and reduce risks to government tend to take precedence. While each of these matters are important in their own right, none are focused on the child or young person's experience, their immediate circumstances or what they need to heal and process the rights violation.

While systems can attempt to introduce more child-focused pathways and responses, this does not address the core issue: namely, that the process are not designed for the children and young people at the centre of the complaint, but rather to guide systemic responses.

Example: Enforcing charters of rights for children in care and detention

Children in care and detention have special rights in the CRC that respond to their particular needs, circumstances and vulnerabilities. These rights are broadly incorporated into the:

- Charter of Rights for Children and Young People in Care, established under the *CYP Safety Act*
- Charter of Rights for Youths Detained in Detention Centres, established under the *Youth Justice Administration Act 2016*.

These documents play an important role in building rights awareness for children and young people, which can support self-advocacy and accessing help when rights aren't met. However, a significant issue that undermines the potential of these charters – and children and young people's sense of connection to their rights – is the limitations upon enforceability.[16]

There are no specific complaints avenues or legal causes of action that children and young people can use to make a claim that their rights under those charters have been violated. There is access to mainstream processes, such as generalised internal and external complaints systems, or administrative and tortious causes of actions. These are all important protections for children but, as they are not purpose-designed, they are not focused on rights culture, language or remedies.

In many circumstances, relying on charter rights in internal or external complaints processes may resolve issues even without solid or purpose-built enforceability mechanisms. However, where appealing to rights-based approaches and sympathies does not work, children and young people are left with highly limited avenues to challenge or seek remedies for rights violations. As such, despite the existence of the charters, it is not uncommon for young people to express considerable frustration or helplessness that these rights do not mean anything or help them when they really need it.

A Human Rights Act has the potential to improve children and young people's access to justice through expanding legal avenues to make complaints and seek remedies with tangible impacts (such as compensation, an apology, policy or practice change etc). Rather than attempting to fit rights violations within existing structures, a Human Rights Act can establish complaints and other

[16] For example, section 13 of the CYP Safety Act specifically states that the Charter of Rights for Children and Young People in Care does not create legally enforceable rights or entitlements. For a detailed discussion of this issue, see, OGCYP, *A rights-based approach to safety* (n 7), pp 58-60.

processes that are specifically designed to promote the fulfilment of rights and appropriately remedy violations.

An example is the type of mechanisms that have been developed for resolving complaints about the right to non-discrimination, which includes an option for restorative justice approaches via conciliation but also allows legal claims to be made on the sole basis of the rights breach.[17]

Summary: Strengths of adopting a Human Rights Act

A Human Rights Act in South Australia offers a targeted solution to each of the limitations identified above, which would lead to better lives, wellbeing and outcomes for children and young people in care and detention.

This wellbeing is, and should be, the primary focus in this discussion. However, I also acknowledge that embedding a rights-culture within agencies has many benefits outside social justice outcomes – including significant benefits for government through avoiding financial, legal and reputational impacts associated with rights violations.

Accessing these benefits requires the right model, as discussed in more detail in the following section.

The model

In 2023, the Australian Human Rights Commission released a Position Paper offering a model for an Australian Human Rights Act. The key focus of that paper is establishing a pathway to enforceable remedies when human rights are violated.[18]

I refer to that report as an authoritative and detailed source of information regarding the many benefits of implementing human rights legislation and note the strength of the AHRC's proposed model. As expressed by Emeritus Professor Rosalind Croucher, President of the AHRC:

> *The beauty of a Human Rights Act, and other measures that* front-load *rights-mindedness, is that they are expressed in the positive – and they are embedded in decision-making and* ahead *of any dispute.*
>
> *A Human Rights Act* names *rights; it provides an obligation to* consider *them and a* process *by which to do it – together supporting a cultural shift towards rights-mindedness, becoming part of the national psyche, not just an afterthought*.
>
> *The purpose of such an Act is to change the culture of decision making and embed transparent human rights-based decisions as part of public culture. The outcome needs to be that laws, policies and decisions are made through a human rights lens and it is the upstream aspect that is so crucial to change*.[19]

The AHRC's proposed model is based on learnings from human rights legislation in other Australian jurisdictions across the last two decades, and the AHRC's own experience as a relevant complaints body for non-discrimination and other human rights complaints. It addresses the

[17] For more information, see AHRC, *Complaints*, available at: <https://humanrights.gov.au/complaints> (accessed March 2024).

[18] AHRC, *A Human Rights Act for Australia* (n 2).

[19] Ibid, p 8.

limitations in South Australia's current child rights framework that I have highlighted above, with the following notable features:

- establishing a distinct cause of action associated with the positive duty on public authorities to act compatibly with human rights and properly consider human rights in decisions (in addition to the potential to raise incompatibly or non-consideration in connection with an existing cause of action)
- articulating a 'participation duty' which requires actively engaging with individuals and/or groups of people affected by a decision
- a complaints mechanism where there is an alleged breach of human rights by a public authority, via conciliation
- allowing matters to proceed to court when conciliation fails, the matter is unsuited to conciliation or the matter is urgent
- mechanisms for courts to indicate that legislation is not compatible with human rights, with a responsibility on the Attorney-General to bring such matters to the attention of Parliament.[20]

In considering the appropriate model for South Australia, it is important to acknowledge that the AHRC's model is intended to operate on a federal level, supporting the existing federal *Human Rights (Parliamentary Scrutiny) Act 2011*.

That Act requires that all new federal government bills and disallowable legislative instruments must be accompanied by a 'Statement of Compatibility'. The purpose of these statements is to assess compatibility of the legislation with the rights and freedoms recognised in the seven core international human rights treaties that Australia has ratified.[21] That Act also provides for the Parliamentary Joint Committee on Human Rights, with functions to examine legislative instruments for compatibility with human rights and inquire into matters related to human rights, as referred to it by the federal Attorney-General. The processes have a strong 'preventive' focus, requiring attention to rights before legislation is implemented and allowing public scrutiny when government intends to adopt laws that are incompatible with human rights.

On a state-based level, I submit that introducing similar protections and mechanisms to the *Human Rights (Parliamentary Scrutiny Act 2011)* in South Australia is an important supplement to those features outlined in the AHRC's model.

Specific provisions for children's rights

In addition to identifying the appropriate model of human rights protection, it is essential to promote equitable access to remedies through inclusion of rights that are important to different population groups.

The model proposed by the AHRC primarily incorporates rights from the original two core international rights treaties: the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). It also includes rights from the other five core rights treaties:

- International Convention on the Elimination of All Forms of Racial Discrimination

[20] A summary of the model is at ibid, pp 13-31.

[21] AHRC, *Parliamentary Joint Committee on Human Rights*, available at: <https://humanrights.gov.au/our-work/rights-and-freedoms/parliamentary-joint-committee-human-rights> (accessed March 2024).

- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities.[22]

Rights based on these treaties should be interpreted in light of other fundamental international instruments, including the *United Nations Declaration on the Rights of Indigenous Peoples* and the OPCAT.

Consistent with guidance from the Committee on the Rights of the Child, the AHRC note the especial importance of the following rights:

- **Articles 3** to have the child's best interests as a primary consideration in decisions concerning them,
- **Article 12**: 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.

The AHRC recommends embedding these rights through a procedural 'participation' protection that requires consultation with children and young people in decision-making that affects them (Article 12), and expressly protecting the child's right to have their best interests as a primary consideration (Article 3).

The AHRC also proposes to include the rights contained in **Article 37** of the CRC, which provide specific protections for children and young people in the criminal justice processes that are not otherwise encapsulated within the ICCPR and ICESCR.

I am supportive of the AHRC's proposal that a best practice Human Rights Act in the Australian context should, accordingly, include the following rights in **Table 1** below.

Table 1: Child-specific rights in AHRC's proposal for a Human Rights Act for Australia[23]

Category	Right description	CRC Article
Protection of children	• Every child has the right, without discrimination, to the protection that is needed by the child by reason of being a child. • Public authorities shall take into account the best interests of every child as a primary consideration in all actions concerning them. • Every child shall be registered immediately after birth and shall have a name. • Every child has the right to acquire a nationality.	2, 3, 7

[22] Information about the core human rights treaties is available at United Nations Office of the High Commissioner for Human Rights, *The Core International Human Rights Treaties*, 1 May 2006, available at: <https://www.ohchr.org/en/publications/reference-publications/core-international-human-rights-treaties>.

[23] The full list of proposed rights is at AHRC, *A Human Rights Act for Australia* (n 2), pp 18, 341-77.

Children in the criminal process	• A child charged with or convicted of a criminal offence must be segregated from adults charged with or convicted of a criminal offence. • A child charged with a criminal offence must be treated in a way that is appropriate for a person of the child's age who has not been convicted. • A child charged with a criminal offence must be brought to trial as quickly as possible. • A child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation. • A child who has been convicted of an offence must be treated in a way that is appropriate for a person of the child's age. • Children should only be imprisoned as a last resort and for the shortest necessary period of time.	37(b) and (c)

In addition to including those rights specific to children in the *criminal justice system*, I note the importance of addressing rights that are specific to children in the *child protection system* (which do not have equivalent articles in the ICCPR or ICESCR).

For children and young people in care, government administrative decision-making controls most aspects of their day-to-day lives, including their freedom of movement, schooling, food, clothing and where they live. As they have such heavy government intervention in their lives, children and young people in care require additional layers of protection to ensure that decisions are made with their involvement and in their best interests. In this context, I submit that the following rights in **Table 2** below – which are highly important for (and to) children and young people in OOHC – should be included in a Human Rights Act for South Australia.[24]

Table 2: Guardian's proposed rights for inclusion, specific to children and young people in care

Category	Right description	CRC Article
Identity	Children have the right to their own identity – an official record of who they are which includes their name, nationality and family relations. No one should take this away from them, but if this happens, governments must help children to quickly get their identity back.	8
Keeping families together	Children should not be separated from their parents unless they are not being properly looked after. Children whose parents don't live together should stay in contact with both parents unless this might harm the child.	9

[24] These rights were identified in the International Institute for Child Rights and Development's consultation with children and young people, for the Committee on the Rights of the Child 2021 Day of Discussion on Alternative Care: Kate Butler, Vanessa Currie, Katie Reid and Laura Wright, International Institute for Child Rights and Development, *Make our voices count: Children and young people's responses to a global survey for the Day of General Discussion 2021 on Children's Rights and Alternative Care* (2021).

Protection from violence	Governments must protect children from violence, abuse and being neglected by anyone who looks after them.	19
Children without families	Every child who cannot be looked after by their own family has the right to be looked after properly by people who respect the child's religion, culture, language and other aspects of their life.	20
Children with disabilities	Every child with a disability should enjoy the best possible life in society. Governments should remove all obstacles for children with disabilities to become independent and to participate actively in the community.	23
Health, water, food, environment	Children have the right to the best health care possible, clean water to drink, healthy good and a clean and safe environment to live in. All adults and children should have information about how to stay safe and healthy.	24
Review of a child's placement	Every child who has been placed somewhere away from home – for their care, protection or health – should have their situation checked regularly to see if everything is going well and if this is still the best place for the child to be.	25
Food, clothing and a safe home	Children have the right to food, clothing and a safe place to live so they can develop in the best possible way. The government should help families and children who cannot afford this.	27
Recovery and reintegration	Children have the right to get help if they have been hurt, neglected, treated badly or affected by war, so they can get back their health and dignity.	39

Conclusion

This submission responds to my deeply held concern that the children and young people who fall within my mandate – those who are in care and/or detention – are subject to some of the most serious human rights violations that occur in South Australia. A Human Rights Act for South Australia is both timely and essential to safeguard existing rights protections against legislative encroachment, and further progress rights protections towards international best practice.

This important legislation is a chance for South Australian communities to look at our values, the rights we think are important, and design the best way to protect those rights. It is also an exciting opportunity to legislate and establish systemic mechanisms that empower children and young people to better engage in democratic processes, as key stakeholders in rights discourse and implementation.

I feel great optimism about the potential strength of a Human Rights Act in South Australia to supplement and advance our legislative framework for protecting, respecting, and fulfilling human rights. I look forward to contributing to ongoing work towards establishing a potential model that meets the rights, needs and best interests of children and young people in care and detention.