THE GUARDIAN'S

Submission

to Select Committee on the Children and Young People (Safety and Support) Bill 2024

January 2025

Guardian for Children and Young People

Paying Respect & Acknowledgement

The Office of the Guardian for Children and Young People humbly and respectfully acknowledge the lands, waters, skies, histories, legacies, talents, creations, sciences, care, love, kindness, giving and generosity of the First Peoples of the lands that we live, work, walk and play upon.

Our office is based on the lands of the Kaurna people, we thank and express our gratitude to Kaurna for looking after this place so future generations can enjoy. We work right across the state called South Australia and we pay similar homage to those nations in which we visit.

Our promise is to work and walk with care in all we do - with our dedication to also supporting future generations.

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Guardian for Children and Young People Level 3, 111 Gawler Place, Tarntanya 5000

www.gcyp.sa.gov.au Ph. 08 8226 8570
gcyp@gcyp.sa.gov.au
GPO Box 2281
Tarntanya SA 5001
DX 115

Preliminary Notes

I make this submission in my capacities as Guardian for Children and Young People (the Guardian), Training Centre Visitor (TCV), Child and Young Person's Visitor (CYPV) and Youth Treatment Orders 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 matters, as well as monitoring the safety and wellbeing of individual children and young people.

[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/.

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Introduction

I am grateful for the opportunity to present this 'Select Committee' submission, for the consideration of the Legislative Council Select Committee on the Children and Young People (Safety and Support) Bill 2024.

The Children and Young People (Safety and Support) Bill 2024 (the Bill), if passed, will provide a new framework to guide and govern individual and systemic responses to safety and support needs for children and young people. It is one of the most important Bills put before Parliament in 2024, which has the potential to affect – for better, or for worse – the lives of all children, young people and families in South Australia.

Some of the proposed changes to existing frameworks are far-reaching, and some are smaller.

Some changes are likely to *reduce* government interventions or access to services for certain people's lives.

Some are likely to increase this contact with the statutory system.

Other changes are likely to shift interventions or services from one area of government to another.

When considering these impacts, it is important to remain mindful that each new or repealed provision or technical wording change – even the ones that appear small – are intentional. They are on the advice or request of a singular person or group of people, to achieve some kind of change.

There are a range of interests at play, a lot of money on the table, and varying levels of transparency regarding who has asked for what, and the reason for granting or denying those requests.

Children and young people will be most affected by each of the proposed changes, particularly those who are in out-of-home care or at risk of entering care. As those who will be most affected, it is essential that their rights and best interests are at the forefront of all decision making, both within the Bill and surrounding the Bills development/passage through Parliament.

In my role as the independent advocate and oversight body for children and young people in care, I hold significant responsibility to put forward fulsome information to guide government and parliamentary decision-making, as obtained through my observations, intelligence networks and direct access to children and young people's voices.

I have a responsibility to **predict** how various changes will be operationalised, **whose interests are served** and how to **maximise purposeful positive change** for children and young people in care.

In recent months, I have expressed my view to the Department for Child Protection and the Minister for Child Protection that some of the proposed changes in the Bill will likely work against children and young people's best interests. I am concerned to report that I have not received any real engagement with the substance of my concerns, nor have I received a formal response or an opportunity to meaningfully discuss amendments that may alleviate these very real issues.

I am not alone in my concerns, and I note that Committee members received a copy of the letter I sent on 25 November 2024, co-signed by myself, the Commissioner for Aboriginal Children and Young People and the Commissioner for Children and Young People. Associated letters of support were also submitted from Wakwakurna Kanyini, South Australian Aboriginal Community Controlled Network, South Australian Council of Social Services, Aboriginal Legal Rights Movement, Relationships Australia and Uniting Communities.

Those letters urged Legislative Council members to establish this Select Committee, for the purpose of considering and reporting upon issues with the Bill. It is significant to observe the consistency between concerns I hold, those expressed by the Commissioners, and the relevant peak bodies and members who supported the call for a Select Committee. While we each hold areas of particular focus and expertise, there is a unifying thread which has brought diverse stakeholders together on this matter: ***that is, a desire for this legislative reform process to be a meaningful exercise in advancing rights and wellbeing for children and young people. And, at the very least, not to cause harm.***

With the above matters in mind, I would like to take this opportunity to express my gratitude that the Legislative Council determined to establish this Select Committee.

This Select Committee is an important opportunity to inquire into and report upon both the areas where the Bill could be strengthened, as well as new provisions and amendments that should be abandoned. It is also an opportunity to reflect upon the process undertaken throughout consultation and negotiation. That process resulted in a Bill

progressing to the Legislative Council, against the advice and support of key oversight bodies and partners.

To assist the Select Committee's inquiries and reporting, my submission addresses my observations on the following matters:

- **How we got here:** Key pressures upon the child protection and family support system arising from the *Children and Young People (Safety) Act*, and how this impacts children and young people.
- **Where we are going:** The positive policy intentions underlying the reform direction of the Bill.
- **The process of consultation:** How the particular consultation approach taken has impacted quality of advice received and legislative drafting.
- **Concerns about what is missing:** Key corrective action required to mitigate issues arising from the implementation of the *Children and Young People Safety Act*, which has not been addressed in the Bill.
- **Concerns about what has been added in:** Feedback on proposed amendments, from both a principled and technical perspective.

Setting the Scene

How did we get here?

In my September 2024 submission[2] on the draft Bill, I observed that it was a long journey to reach a draft Bill to reform the *Children and Young People Safety Act 2017* (*CYPS Act*).

Following the announcement of the five-year legislative review in September 2022, consultation occurred throughout the remainder of 2022 and the Department for Child Protection's Review Report was released in March 2023. It was nearly 18 months before the draft Bill was released in August 2024. After such a significant wait to receive the draft Bill, it was surprising to note the short consultation period, with submissions closing in September 2024 and the Bill introduced to the House of Assembly the following month.

The legislative review of the *CYPS Act* was highly anticipated, as an opportunity to review and reconsider particular aspects of that Act. The *CYPS Act* made significant changes to the legislative framework guiding the child protection and family support system in South Australia. Commencing in two parts in 2018, the legislation was a key part of the Government's response to recommendations from:

- The 2016 *Child Protections System Royal Commission* conducted by the Hon. Margaret Nyland, and
- coronial inquests in the preceding years.[3]

Key principles underlying this reform included a greater focus on safety, permanence and stability for children and young people. This direction arose in response to reviews of tragic circumstances, which involved death and serious harm caused to children and young people living in homes where there were known safety concerns. It was particularly informed by the following advice:

- In April 2015, then State Coroner Mark Johns recommended that the Children's Protection Act 1993 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.'[4] This was addressed through amendment to the Children's Protection Act 1993, prior to the commencement of the *CYPS Act*.
- In August 2016, Commissioner Nyland reported that there was a culture of 'excessive optimism' in the child protection department in 2016:

> *Many assessments were plagued by naïve optimism about the potential for extremely disadvantaged and poorly functioning families to change. There was repeated evidence of practitioners failing to understand the difficulty for people to overcome addiction and substance abuse problems, violent behaviour and serious mental health conditions. Children often suffered the consequences of misguided efforts and were left in unsafe situations where they sustained further harm. The files demonstrated a clear preference for family maintenance and reunification: keeping families together at all costs.*[5]

In response to these observations and relevant recommendations, legislative changes introduced included:

- Removing the 'best interests' of the child as the paramount principle in decision-making, and replacing this with 'protection from harm'
- Removing references to the best interests of the child from guiding principles
- Changed thresholds for mandatory reporting, and for departmental responses such as assessment, investigation, and child removal
- Introducing a reverse onus of proof, for objectors to an application for Court Orders relating to children and young people in care

2 Office of the Guardian for Children and Young People, Children and Young People (Safety and Support) Bill 2024 Submission. September 2024

3 This includes, notably, the findings of the *Inquest into the Death of Chloe Lee Valentine: Finding of the State*, 9 April 2015. For more information about the commencement of the CYPS Act, see Government of South Australia, Department for Child Protection, *Review of the* Children and Young People (Safety) Act 2017 *Report* (2023).

4 *Inquest into the Death of Chloe Lee Valentine: Finding of the State*, 9 April 2015, [22.12].

5 Margaret Nyland, *The life they deserve: Child Protection Systems Royal Commission* (2016), pp 191-92.

- Bringing contact arrangements within the remit of the Chief Executive, and establishing the Contact Arrangements Review Panel.[6]

Nearly 10 years since these recommendations were made, it is reasonable to observe that there have been improvements and consequences arising from the reforms implemented between 2016 and 2018. The five-year legislative review was an important opportunity to identify strengths of the legislation, but also articulate and plan to address those aspects which have not operated as intended, and/or were misguided.

One of the particular challenges identified by the Department for Child Protection through the *CYPS Act Review* was the way in which the legislative settings of the *CYPS Act* have resulted in an 'upward trend' in child protection notifications.[7]

The increase in notifications was not an unpredicted result, but rather an intended outcome so that indicators of harm – particularly cumulative harm whereby discrete 'incidents' may never reach the threshold of a statutory child protection response – could be identified and responded to earlier.

While this increase in notifications was an intended outcome, significant challenges for responding to that increase include:

- it has not been accompanied by commensurate resourcing directed towards assessment and determining appropriate responses
- the supporting recommendation to divert families away from the statutory system – the Child and Family Assessment and Referral Network – has not been implemented as envisaged.[8]

Accompanied by legislative settings that were actively intended to encourage removal and permanency outcomes, this situation has resulted in rising numbers of children coming into care and transitioning to long-term orders – against national trends. In the context of a system that is facing chronic challenges in recruiting, assessing and retaining family-based carers, the significant growth in the out-of-home care population has translated to increased reliance on residential care placements. In a system under immense pressure to reduce expenditure on out-of-home care services, predictably, quality of care for children and young people suffers; through overloaded case workers, pressure to fill an extra bed in a residential care house even if it is not in the best interests of the young people living there; or pressure to reduce costs on anything that is not strictly 'essential'.[9]

This is the circumstance that is playing out in South Australia as we enter 2025, and understanding the role of the *CYPS Act* in the development of these circumstances is crucial to guide priority areas of reform. This process is not only about ongoing improvement but undertaking corrective action against key impacts of the reforms implemented between 2016 – 2018 which have steered the statutory arm of South Australia's child protection system in a dangerous direction.

It has to be understood that the Child Protection Systems Royal Commissions undertook a detailed examination of systems and made interconnected recommendations intended to improve safety and wellbeing for children and young people across the entire continuum of the child protection and family support system, including the out-of-home care system. Whilst I am not convinced the remedy to systemic concerns exist within all of those recommendations, but I acknowledge that they represented a complete package of reform.

The system approach to implementing those recommendations has been piecemeal, with clear preference for those elements which drive children, young people and families down a one-way road into statutory intervention. This has been heavily influenced by legislative settings.

The reform elements most neglected were those designed to better support families and prevent the need for statutory intervention, or support children and young people in care to grow well and thrive. This area sits heavily in the space of social and economic investment, and deep practice change.

My observation at this critical juncture is that, at the time that the *CYPS Act* was drafted and implemented, the policy platform for child protection and out-of-home care in South Australia was not set – or understood – well enough.

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[6] See the Second Reading Speech for more information: Hansard Daily: House of Assembly - Tuesday, February 14 2017.

[7] Government of South Australia, Department for Child Protection (DCP), Review of the Children and Young People (Safety) Act 2017: Discussion Paper (2022), p 6 ('CYP Safety Act Review Discussion Paper').

[8] This was a key finding identified by Kate Alexander in the *Trust in Culture* review (2022), pp 106 – 108.

[9] I discuss these conclusions, including supporting evidence, in my 2023 report, *Child Protection in South Australia from the Productivity Commission's Report on Government Services* 2023 (2023).

Time has told us the very scary story of what happens when we get legislative remedies wrong. This does not even begin to impress upon you what the very human impacts of this are for vulnerable children, young people, families and communities.

It is for this reason I am most grateful that our parliamentary system enables processes for further examination and consideration of impacts of legislative change. At the forefront of these processes should always be the very real impact on children, young people, families, communities, workforces; and, in essence, what we want our community to be and exemplify.

Where are we going?

The child protection and family support system has faced significant scrutiny since the commencement of the *CYPS Act* in 2018. The Bill, as introduced, has been informed not only by the Department for Child Protection's review process, but also:

- Kate Alexander Review
- Malcolm Hyde Review
- Fiona Arney Review
- Commissioner for Aboriginal Children and Young People's Inquiry
- Coronial inquest findings delivered between 2022 and 2023.[10]

A significant challenge for Government is that implementing these recommendations represents an extensive package of reform, but each is addressed from different lenses and expertise. They represent competing priorities, and, at times, there may be tension between recommendations.[11]

It is essential to get the balance right.

There are a range of strategic approaches to critically assessing the full package of recommendations and brokering agreement between stakeholders with competing views. Key levers for navigating this process include transparent and fulsome consultation, and a clear set of strategic reform priorities from which to assess projected impacts.

I am concerned that these levers are not being drawn upon adequately, and the results are demonstrated in the structure and content of the reform. I have been vocal about a serious lack of transparency in the consultation process for the Bill, particularly after the Review report was released in March 2023 (which I address in further detail below).

With respect to the strategic direction of the reform, I do believe this has been clearly communicated by government; and yet, I see significant areas of **inconsistency between vision and implementation.**

Since the legislative review commenced in September 2022, the Minister for Child Protection has expressed a strong vision and desire for transformative change; which recognises and responds to the ways in which South Australia's child protection and family support sector is based upon outdated and deeply flawed understanding of how children grow, how families live and how systems can and do respond to people who need help – and I agree with the Minister.

The Minister for Child Protection's second reading speech clearly expressed that intent, encapsulated in the below sentiments:

> *It is absolutely clear to me that the child protection and family support system must be reimagined. This is a system that was built decades ago to respond to single incidents of physical or sexual abuse. It must, of course, continue to do so. The reality is also that many families now face complex, interwoven and intergenerational circumstances and patterns of neglect, sometimes resulting in cumulative harm. Responses to single incidents, whilst always needed, do not also always address the breadth of challenges families meet.*
>
> *Our system is underpinned by hardworking dedicated professionals, but we cannot rely on their enduring good intentions alone. This analysis of our system does not attribute blame to any person, department, agency or anyone else but, rather, urges that*

[10] *Findings of the Coronial Inquest into the Death of Zhane Andrew Keith Chilcott*, 6 April 2023; *Findings of the Coronial Inquest into the Deaths of Amber Rose Rigney and Korey Lee Mitchell*, 22 April 2022.

[11] As an example, the Arney Report made recommendations after giving consideration to concerns raised from carers and carer advocacy groups regarding contact arrangements and approaches to reunification. This is an important perspective, but relevant recommendations to address cares' perspectives on what amounts to a traumatic access experience and/or rushed reunification processes (i.e., recommendation 20) may not be inclusive of the child or young person's perspectives on these matters, or the full surrounding circumstances and perspectives regarding the child or young person's best interests. There is a tension between these observations, and observations arising from the Commissioner for Aboriginal Children and Young People's Inquiry regarding departmental practices that inhibit contact arrangements for Aboriginal and Torres Strait Islander children and young people.

> *together we recognise that structures built over time are not equipped to respond to the overwhelming need we confront, and that different collective responses are required.*[12]

I am supportive of this vision, to reimagine the child protection and family support system in a way that recognises that investigative and interventionist approaches will not address the need that sits within all of our communities. We have access to wide ranging government services, all of which have key roles in supporting children and young people and their families as they travel through systems and at their varied touchpoints along the way.

South Australia is not unique in this need for a reimagining or facing challenges in a journey of implementation. But we are at a significant disadvantage compared to most Australian jurisdictions, as a result of factors including:

- **consistently low expenditure on systems** responsible for intake, referral and delivery of family support services, coupled with **low proportional divestment of funding** to the Aboriginal and Torres Strait Islander community-controlled sector[13]
- a **jurisdictional lag in the introduction of best practice legislative and practice settings**, particularly regarding the Aboriginal and Torres Strait Islander Child Placement Principle and establishing alternative entry and exit pathways from the child protection and family support system which divert children and families away from a tertiary response[14]
- **unique challenges arising from legislative settings** introduced in the *Children and Young People (Safety) Act 2017* which may have been well intentioned but were contrary to best practice.[15]

These challenges are known to government, and relevant guiding principles for achieving systemic reform – within the context of these challenges – have been addressed. These principles are helpfully summarised and grouped in the *CYPS Act Review Report*, as follows:

- Embedding the Aboriginal and Torres Strait Islander Child Placement Principle to the standard of active efforts and enabling self-determination for Aboriginal and Torres Strait Islander people
- Getting the settings right, including principles to guide decision-making, thresholds for reporting and responding to risks to children's safety
- Keeping children at the centre, supporting their participation, timely decision-making and enabling access to support and services
- Supporting the department's non-government partners and its valued kinship and foster carers.

Applying these principles as the test for reform has strong potential to achieve the corrective action required, and continuous improvement in South Australia's child protection and family support system.

My substantive issue with the progress of the Bill is not the vision articulated; but, rather, the nuts and bolts of how this vision should be achieved and whether the current Bill is capable of achieving it.

As such, when assessing the impact of technical changes, I am guided by the likelihood of achieving – or disrupting – the above principles. I encourage the Select Committee to also consider evidence and submissions received in the context of the intention underlying the reform, as expressed through these principles.

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[12] Hansard Daily: House of Assembly - Wednesday, October 16 2024.

[13] See, e.g., OGCYP, *Child Protection in South Australia from the Productivity Commission's Report on Government Services 2023* (2023)

[14] See, e.g., Kate Alexander *Trust in Culture* (2022).

[15] As discussed in the preceding section.

The Consultation Process

I acknowledge that there is a significant gap between my assessment and observations of the consultation process for the Bill, and the way this process has been described by government.

I note that, in the second reading speech for the Bill, the Minister for Child Protection described the consultation process in the following terms:

> *Nearly 1,000 people engaged in the review via public forums in metro and regional locations, online surveys, written submissions and targeted discussions to generously share their expertise, experience, wisdom and insights into what was working and what could be improved. An extraordinary amount of feedback came from stakeholders: children and young people with experience of the system and their families, foster and kinship carers, government and non-government partners who work with and in the child protection or family support system, as well as the legal profession, peak organisations and crucial oversight bodies, such as the Guardian for Children and Young People, the Commissioner for Children and Young People and the Commissioner for Aboriginal Children and Young People.*
>
> *The review included targeted consultation with Aboriginal community members, leaders and representatives from Aboriginal organisations. In line with the commitment in the South Australian Closing the Gap Implementation Plan, the review team also held a series of workshops with the South Australian Aboriginal Community Controlled Organisation Network focused on amendments related to the Aboriginal and Torres Strait Islander Child Placement Principle. The* Bill *was publicly released in August via YourSAy, and public briefings with some stakeholders provided further written feedback which led to additional refinement to the* Bill *I introduce today.*[16]

I do not dispute that there was a significant level of engagement and responses received by the Review. I do not dispute that there was stakeholder, community and youth engagement sessions facilitated in late 2022 to early 2023. My primary concern is what happened – or did not happen – in the 18 months following the release of the Review Report in March 2023, up to the Bill being introduced to the House of Assembly in October 2024.

During that time, I was provided little information about the progress of the draft Bill and was not consulted at all about drafting considerations for various recommendations. As submissions were not made public, there was a notable lack of transparency regarding views of various stakeholders and matters under consideration.

While a summary of recommendations included as an appendix to the Review Report reflects many of the *headline changes*, there are also a **range of amendments which were not identified in the Review Report**. In the absence of being informed that such amendments were under consideration, there was no opportunity to proactively provide advice to the Department about relevant concerns during the drafting phase.

Despite assurances about a comprehensive consultation process, I can confidently say that the process was neither appropriate, nor adequate. As the independent oversight and advocacy body for children and young people in care, I am a key stakeholder in this space and I made two detailed, comprehensive submissions, and prepared a submission on behalf of people with care experience who provided feedback to me on the draft Bill. I did not receive a response to those submissions, reasons for recommendations not implemented or the opportunity to provide feedback as appropriate during the drafting stage. I was delivered a draft Bill, provided several weeks to prepare a submission, and none of the 17 recommendations made following that submission were acknowledged or implemented.

I am not so vain to think that if I make a recommendation, it should be accepted without question. But I would like to highlight that many of my recommendations are echoed by other expertise, entities and bodies, and are

[16] Hansard Daily: House of Assembly - Wednesday, October 16 2024

uncontroversial, backed by best practice research, and tested already in like jurisdictions. I have a considerable understanding of the policy and practice settings in South Australia, and my recommendations were aimed at operational and technical approaches to both achieving government policy objectives and avoiding unintended harms to children and young people. The lack of engagement I received in response to these observations and recommendations is a serious red flag, and I am not convinced that appropriate expertise, advice, or analysis was provided in the drafting of this Bill. In fact, the obvious avoidance to test new legislative provisions with stakeholders is a strong indication of insufficient practice expertise available to guide the operationalisation of policy objectives – from how various changes will affect judicial decision making, through to case management, through to day-to-day care needs.

The deliberations have occurred behind closed doors, and I am in a position of speculating on how particular decisions and drafting choices were made. But I do observe that there is a distinct absence of a practitioner lens or operational focus in the many key changes, and I can attest that my own expert advice was not relied upon appropriately. I do not believe I am alone in this matter; which begs the question, who was consulted during drafting? Who provided expert advice about operational impacts, and conducted risk assessments for unintended consequences? How was that advice received, responded to and mitigated?

Testing legislative change

Legislation is a cornerstone of governance, shaping societal norms and regulating individual and institutional behaviour. However, the effectiveness of legislation depends not only on its intent but also on its successful implementation. Testing new proposed legislation with those who are responsible for operationalising it is crucial for several reasons. This process ensures that laws are practical, enforceable, and capable of achieving their intended goals.

1. Identifying Practical Challenges

   Frontline staff often face practical realities that legislators may not fully anticipate during the drafting process. Testing legislation with these groups helps uncover potential challenges early.

   Example: A new child protection law may require caseworkers to conduct more frequent home visits. Without consulting these workers, lawmakers might overlook resource constraints such as staffing shortages, transportation issues, or time limitations.

   Benefit: Testing allows drafters to refine provisions to align with operational capacities, ensuring that laws are realistic and achievable.

2. Ensuring Clarity in Language and Interpretation

   Legislative language can sometimes be ambiguous or overly complex, making it difficult for those tasked with enforcement to interpret and apply the law consistently.

   Example: A law requiring assessment of "significant harm" as a criteria for notifying CARL, might be interpreted differently by mandated notifiers, caseworkers, legal teams, and judiciary.

   Benefit: Testing legislation with operational staff highlights areas where language needs to be clarified, reducing the risk of inconsistent application and legal disputes.

3. Aligning Resources with Legislative Requirements

   Proposed laws often impose new responsibilities on practitioners, requiring additional resources such as funding, training, or technology. Testing ensures that these needs are identified and addressed before implementation.

   Example: If a Bill mandates earlier intervention pathways for families before entering the statutory child protection system, operational staff might highlight the need for new initiative development, better information sharing guidelines, updated software for cross government communication, IT support, and training.

   Benefit: Testing ensures resource allocation matches the demands of the legislation, preventing gaps that could hinder its effectiveness.

4. Anticipating Unintended Consequences

   Even well-intentioned legislation can produce unintended consequences if operational implications are not fully understood. Testing allows for the identification and mitigation of such risks.

   Example: A law aimed at raising mandatory reporting thresholds in child protection might inadvertently lead to fewer reports of serious cases if frontline workers are unclear about the criteria.

   Benefit: Early testing helps lawmakers foresee potential negative outcomes and adjust the law

to minimise harm and ensure those in need of tertiary intervention and support receive it.

5. Building Stakeholder Buy-In

   Involving those who will operationalise legislation fosters collaboration and increases their investment in its success. Practitioners are more likely to embrace and effectively implement a law if they feel their insights and expertise were considered during its development.

   Example: Law enforcement officers consulted on potentially increased powers to forcible secure the safety of children and young people who are targeted by abusive predators may suggest practical enforcement strategies, increasing their confidence in the law's feasibility.

   Benefit: This collaborative approach strengthens relationships between policymakers and implementers, enhancing the law's chances of success.

6. Enhancing Training and Preparation

   Testing proposed legislation provides valuable insights into the training and support needs of those responsible for its implementation.

   Example: A new law requiring the provision of specialist powers to non-government workers might reveal a need for specialised training in child protection and risk identification.

   Benefit: Identifying these requirements early ensures that such persons are adequately prepared, reducing implementation delays, errors and harm.

7. Improving Efficiency and Reducing Costs

   Operational inefficiencies can lead to delays, increased costs, and frustration among stakeholders. Testing legislation allows for streamlining processes and identifying cost-effective approaches.

   Example: A law requiring frequent court reviews of child welfare cases might create significant backlogs if courts lack sufficient staff or scheduling capacity.

   Benefit: Testing identifies such bottlenecks, enabling adjustments that save time and resources.

8. Promoting Equity and Accessibility

   Testing legislation with a diverse group of practitioners ensures that it accounts for the needs of marginalised, overserved or underserved populations.

   Example: Rural and remote service providers consulted on a new public health approach to child protection might identify barriers faced by rural communities, such as limited access to early intervention services or preventive programs.

   Benefit: Addressing these concerns ensures the legislation is equitable and accessible to all, regardless of geographic or socio-economic factors.

9. Ensuring Legal and Ethical Compliance

   Practitioners often work within complex legal and ethical frameworks. Testing legislation helps ensure that new laws do not inadvertently conflict with existing standards or create ethical dilemmas.

   Example: Social workers might flag concerns about a law requiring them to disclose sensitive client information, which could conflict with confidentiality obligations.

   Benefit: Identifying such conflicts allows for legal and ethical alignment, safeguarding the rights of those affected by the law.

10. Strengthening Accountability

    Testing proposed legislation provides an opportunity to establish clear accountability mechanisms, ensuring that those responsible for implementation understand their roles and responsibilities.

    Example: Children and young people might provide feedback on how a new transition from care law could be monitored and reported upon effectively.

    Benefit: Clear accountability structures improve transparency and ensure that the law achieves its intended outcomes.

In my commentary as a response to the draft Bill and in my letter to the Legislative Council I have been clear in expressing the following view: in its current form, the draft Bill may be technically workable, but there are serious issues with operability. It lacks a cohesive approach to implementing stated policy objectives, creating tension between provisions and places parts of the system in conflict with other parts. Testing this draft Bill in the consultation phase with those involved in and affected by its operation – children and young people, departmental staff, service providers, other government officers, the judiciary, carer and parent sector and perhaps even oversight bodies – would have identified this inoperability. Ideally, it would have rectified these issues before the Bill got to Parliament.

'New Bill' not 'Amendments'

As a related matter, it is significant to note the way in which the Bill has been drafted and presented to Parliament. It was a deliberate choice to draft a new Bill, rather than make amendments to the existing Act. I cannot comment on why that choice was made, as this has not been addressed by the Minister or the Department. While there may be salient reasons for doing so, it is important to recognise a key challenge inherent in this decision. An amendment Bill makes it apparent wherever a change has been made, and consultation process can examine and provide clearly directed feedback on those changes. It can also be expected that the second reading speech will address why those changes are necessary, and there will be an opportunity for Parliamentary debate to further examine that rationale and lead to amendments introduced, if required.

With the introduction of a new Bill, the consultation and Parliamentary debate processes have an additional layer of work to do identifying what the changes are, so as to provide feedback and engage in debate. **This was not an easy task.**

Some changes were foreshadowed in the review report, and other changes were highlighted in the summary of changes. I was provided a briefing from the Minister for Child Protection which summarised headline changes. But my own review identified amendments to existing provisions which were highly significant, and not addressed in any of the following:

- The initial discussion papers
- The review report
- The summary of key changes, released with the draft Bill for consultation
- The Minister for Child Protection's second reading speech.

With the opportunity for further time to consider the Bill, I have now identified "additional–additional" changes which meet the description above. With more time, it is likely that I would again identify additional changes.

I am extremely concerned about those changes which do not appear in headline summaries, the second reading speech or public facing materials. These changes may appear non-consequential to those drafting or responding to requests from various stakeholders. But, from my experience as an advocate for children and young people in care, who dives deep into the operational interpretation of legislation, it is very clear to me that these changes are aimed at addressing systems inefficiencies and frustrations, and elevating the interests of key agencies and groups of people involved in child protection systems – that are **not in the best interests (including safety) of children and young people.**

As part of my submission, I have identified a number of amendments which I believe require further consultation, deliberation and consideration – and should be removed from the Bill and progressed separately to allow that process to occur. If the Department or the Minister wishes to continue with these amendments at a later date, this should be done through the transparent process of appropriate amendment Bills, which identify what changes are being made and the reasons why.

Positive steps in the Bill

Before elaborating my feedback on key issues with the Bill, I would like to acknowledge those aspects that I see as strongly positive.

I recognise the efforts taken in drafting this Bill, and the significant efforts that will be required to implement the changes envisioned. The workforce will be key to supporting children and young people through these changes and adopting and embracing new ways of working. I take this opportunity to acknowledge the impacts of reform and pay my respect to the continued energy applied towards not only direct service delivery, but improvement.

The aspects which I am particularly supportive of include:

- The focus on improving interagency responsibility, buy-in and responses to children and young people in care, through the State strategy, the Minister's power to direct certain Chief Executives to meet and discuss interagency approaches, and the interagency practice review panel.
- The legislative expansion of the Aboriginal and Torres Strait Islander Child Placement Principle – to embed the six elements of Identity, Prevention, Partnership, Placement, Participation and Connection. With appropriate amendments, this has the potential to create a solid legislative basis for reducing the overrepresentation of Aboriginal children and young people in care, and increasing connection with family, community and Country for those who do grow up in care.
- A renewed focus on Family Group Conferencing, with particular obligations to offer these conferences to Aboriginal and Torres Strait Islander families. Enhancing efforts to address cultural dislocation, which is a key factor that contributes to poorer outcomes for Aboriginal children and young people in care.
- The recognition of the importance of sibling relationships, including in placement principles and contact arrangements. Specifically, maintaining sibling connections is explicitly highlighted. This is a critical aspect of emotional stability for children and young people in care.
- The obligation to include and respond to the voices of children and young people in a broader range of decision-making. Including, active participation of children and young people in their care plans ensures transparency and builds trust in the system.
- A greater focus on transition to adult support services, including detailed transition plans that must be created for young people approaching the age of 18 and prioritise access to housing, education, and employment support.
- The inclusion of the best interests' principle, to guide a more holistic approach to decision-making for children and young people. This offers a pathway to improve rights-based decision-making and a departmental culture with greater alignment to the *Convention on the Rights of the Child*.

Each of these amendments offer significant opportunities for improving children and young people's lives. While acknowledging this, I am not in a position where I support the passage of the Bill, without additional amendments. I am eager to better understand the Minister for Child Protection and Department for Child Protection's views on certain matters and anticipate that I may be able to reach compromise in supporting the substance of the Bill even without addressing all of the matters I have raised. As it currently stands though, I do not believe the weight of the positive changes outweighs the risk of harm to children and young people's rights and best interests.

I elaborate on these concerns in the following parts of my submission.

What is missing from the Bill?

While the Bill introduces promising reforms, it also has notable shortcomings that cannot be ignored. Stakeholders across South Australia, including child protection advocates, Aboriginal leaders, and carers, have voiced significant concerns.

At this stage of the process, I have already provided two submissions regarding the *CYPS Act* and the Bill, with this submission marking my third. In my first two submissions, I made recommendations regarding a number of potential reforms to better support children and young people in care (see Appendix 1 and Appendix 2). This included:

- mechanisms to prevent and respond to discrimination against children and young people in care
- addressing procedural gaps particularly related to the inclusion of children and young people's voice into process
- providing children and young people with access to legal representation and/or independent advocacy in legal and departmental processes; and
- introducing independent oversight for vulnerable children and young people living in alternative care, who are currently outside the mandate of my statutory functions or any other child-focused advocacy body.

While I maintain those recommendations, I accept that Government has determined not to incorporate them through the review, and I will continue my advocacy through alternative processes.

For the purpose of this submission, I have focused on 'what's missing' from the Bill in terms of the corrective action required to address issues arising from the legislative reform that occurred between 2016 and 2018.

In particular, I address three matters below:

- **Restoring the best interests** of children and young people as the paramount consideration in decision-making and operation of the legislation
- **Restoring the importance of family in children and young people's lives**, including through reunification principles, judicial review of contact arrangements and amending procedural matters related to applications for third-party orders
- Strengthening the articulation of and accountability for the **Aboriginal and Torres Strait Islander Child Placement Principle**.

Focusing on best interests

The distinction between 'safety' as a paramount principle and 'best interests of the child' in child protection legislation is not merely a semantic one—it has profound implications for both the philosophy of child welfare and its practical application. While ensuring safety is undeniably critical, elevating it as the sole paramount principle can create significant challenges. This issue becomes particularly complex when we examine its operational implications for South Australia, where child protection agencies are tasked with balancing competing rights and responsibilities.

I acknowledge the introduction of the 'best interests' principle into the Bill, with relevant considerations to guide a more holistic view of child wellbeing than currently articulated by the *CYPS Act*.

As addressed earlier in my submission, the prioritisation of safety and protection from harm – over and above other principles and considerations – has had profound consequences for the lives of children and young people and their families.

Reintroducing the concept of best interests into the legislation is a crucial step to bring the South Australian child protection and family support system back into alignment with contemporary best practice and other jurisdictions around the country and internationally. Most importantly, it is essential to achieving good decisions and outcomes for children and young people's lives.

In multiple publications – including my submission to the CYPS Review and to the draft Bill – I have provided a detailed rationale applying technical considerations for why the best interests of the child or young person should be considered paramount.

To put it simply, the *CYPS Act* is currently inconsistent with Article 3 of the *United Nations*

Convention on the Rights of the Child. This Article stipulates that children and young people have the right to have their best interests taken as a primary consideration in all actions that affect them.

The reason that international and national best practice guidance requires best interests as a paramount consideration is to promote rights-based decision-making, which puts the child at the centre.

The articulation of the best interest's principle is not about saying that a particular right or interest should be valued over another. It is about the fact that the *child's* interests should be at the centre of decision-making, over and above other's considerations. As expressed by the United Nations Committee on the Rights of the Child:

> *There is no hierarchy of rights in the Convention; all the rights provided for … are in the 'child's best interests'*[17]

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. The priority that should be given to certain interests is dependent upon the nature of the circumstances, giving due weight to the child or young person's voice and views.

Operational Challenges of 'Safety First' Framework

The uncomfortable fact is that there are always risks of harm for children and young people in any decision; from the most complex considerations around statutory child protection involvement, to whether a child or young person should go to the park on a given day. How those risks of harm are balanced in decision-making depends on so many factors. Significantly, it is a vastly different matter to assess and respond to a risk of harm arising from emotional abuse, against a risk of harm from participating in sport.

Yet, if we are to follow the path of strictly applying the paramount principle in the operation of the Act, it **does not just singularly apply to decisions about child protection intervention**; it applies to the **full gamut of functions and operations under the legislation**, including the Chief Executive's role in case planning for children and young people in care. If we were truly to apply the paramount principle of protection from harm to decisions about a child or young person's engagement in extracurricular activities, travel for holidays, or spending time with friends and family, then we would see absurd results in case management. Avoiding those absurd results **relies on organisational blindness** to the legislative settings of the *CYPS Act*.

It is my observation that by elevating safety above all else, legislation risks reducing child protection to a crisis-driven framework. While safety is foundational, it is only one part of what constitutes a child's overall well-being. Focusing on safety as the primary principle inherently can:

- lead to reactive interventions rather than proactive, preventative strategies. Caseworkers are pressured to respond to immediate risks, often at the expense of addressing broader family dynamics or long-term planning.
- marginalise critical aspects of a child's development, such as emotional bonds, mental health, and cultural identity. These factors, which are central to the best interest's framework, are often harder to measure and prioritise when safety dominates decision-making.
- face greater legal scrutiny, as other important factors (e.g., maintaining family connections, cultural identity) may be deprioritised. This can lead to disputes among biological parents, foster carers, and child protection agencies.
- lead to decisions that provide short-term solutions at the expense of long-term stability. Repeated disruptions—such as multiple foster placements—can harm a child's ability to form stable attachments and thrive emotionally
- result in decisions that fail to honour a child's cultural background, particularly for Aboriginal children. The loss of cultural identity can have devastating long-term effects on their sense of belonging and self-worth.
- deprioritise efforts to reunify families, even when it is in the child's best interests to remain connected to their biological family.

[17] 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].

Reinstating the best interests of the child as the paramount consideration does not detract from promoting and maintaining safety. This is well-established as a fundamental right and interest for children and young people, and also captured within duty of care obligations. But it allows South Australia to:

- reframe child protection policy and legislation to prioritise the best interests of the child as the paramount principle, with safety as a critical but integrated component. This ensures a more holistic approach to decision-making, empowering practitioners to consider long-term outcomes alongside immediate safety concerns.
- establish shared approaches and guidelines to help practitioners balance safety with other factors, such as emotional well-being, cultural identity, and family connections. This reduces ambiguity and promotes consistent decision-making.
- invest in early intervention and family support programs to address risks before they escalate into safety concerns. This reduces the need for reactive interventions, keeping families intact whenever possible.
- flexibility of decision-making that puts the child at the centre of decision-making and considers all relevant rights and within the context of the child or young person's own voice and participation.
- work collaboratively with communities, kinship and foster carers, and families to ensure that all perspectives are considered in policy and practice. This fosters trust and ensures culturally appropriate solutions.

While safety is undeniably a critical aspect of child protection, prioritising it as the sole paramount principle in legislation risks creating a narrow, reactive system that overlooks the broader needs of children. A best interest framework, integrated with a focus on safety, provides a more balanced approach that considers the holistic well-being of the child. By adopting this approach and addressing the operational challenges outlined above, South Australia can build a child protection system that better serves children, families, and communities.

Again, I highlight that I am not alone in calling for this legislative change. While the Report into the Review of the *CYPS Act (CYPS Act Review Report*) noted that many stakeholders told the review it was important to maintain safety as the paramount consideration in the Act, it is worth highlighting those stakeholders who instead recommended that best interests should be made the paramount consideration:

- Myself, as Guardian for Children and Young People, Training Centre Visitor, Child and Young Person's Visitor, Youth Treatment Orders Visitor and a member of Australia's OPCAT National Preventive Mechanism.
- The Commissioner for Aboriginal Children and Young People.
- The Commissioner for Children and Young People.
- The CREATE Foundation.
- The South Australian Council of Social Service.
- Child and Family Focus SA.
- the Law Society of South Australia.[18]

The above list of stakeholders includes organisations and bodies with a dedicated focus on children and young people's rights, as well as the peak body for Social Services. There has been no suitable explanation from government regarding why this expert advice has been disregarded on this matter.

Resolution

1. Remove Safety as the paramount consideration
2. Reframe the Bill to incorporate a Best Interest Framework which has the child and young person's best interest as the paramount consideration, with safety as critical but integrated component

The importance of family

A highly positive aspect of the Bill is the inclusion of guiding principles, clearly stating the desirability of the child or young person's family having primary responsibility for their upbringing, protection and development.

This is consistent with Article 9 of the *Convention on the Rights of the Child*, and guidance in past years from the Committee on the Rights of the Child. This

[18] Commissioner for Children and Young People, Submission to the Review of the Children and Young People (Safety) Act 2017 (2022), p 4; CREATE Foundation, Submission to the South Australian Government: Review of the Children and Young People (Safety) Act 2017 (2022), pp 4-5; The Law Society of South Australia, Review of the Children and Young People (Safety) Act 2017 (2022), p 3; South Australian Council of Social Service, Submission to the Department of Child Protection's Review of the Children and Young People (Safety) Act 2017 (2022), pp 5-6; Child and Family Focus SA, Child and Family Focus SA Submission to the 2022 Review of the Children and Young People (Safety) Act 2017 (2022), p 35.

includes the 2019 Concluding Observations on Australia's Country Report, whereby the Committee on the Rights of the Child expressed ongoing concern about the persistently high number of children and young people in out-of-home care in Australia, the overrepresentation of Aboriginal and Torres Strait islander children and young people, and different criteria being used across jurisdictions in making decisions on child removal and placement in care.[19]

Reducing the number of children and young people growing up in the out-of-home care system was also a key focus of discussion by international experts at the 2021 Committee on the Rights of the Child's *Day of General Discussion: Children's Rights and Alternative Care*. The key principles arising from that Day included:

- All families should have the support they need to provide safe, nurturing and loving environments for children
- Childcare and child protection systems should be overhauled to be focused on family-based care

Relevant recommendations for States included a focus on *preventing separation* through legislation, resourcing, system design and combatting discriminatory practices which affect First Nations people and those with disability, and a focus on *returning* children and young people to their families through targeted reunification services and approaches.

This is international best practice; and consistent with the national direction under the *Safe and Supported Framework*. The First Action Plans for that Framework guide the actions across all levels of government to prevent and respond to child abuse, and also form the primary strategy to achieve Target 12 of the National Agreement on Closing the Gap, to reduce the rate of overrepresentation of Aboriginal and Torres Strait Islander children in out-of-home care by 45% by 2031. The Introduction to the First Action Plan makes the following statement:

> *All governments agree that all children and young people in Australia have the right to grow up safe, connected and supported in their family, community and culture. They have the right to grow up in an environment that enables them to reach their full potential.*

The Safe and Supported Aboriginal and Torres Strait Islander Outcomes Framework specifically addresses outcomes related to family preservation and reunification, through the following sub-outcome:

> *Systems prioritise resourcing and strengthening families to stay safe together. Where children and young people have been removed, they and their families and communities are supported to maintain connections and achieve reunification through healing.*[20]

It is important to analyse these commitments – which the South Australian government shares, alongside national government – against the current legislative settings in the *CYPS Act*, and action taken to resolve misalignment in the Bill.

The *CYPS Act* implemented a deliberate policy decision to remove references to the importance of family from guiding principles, and to discourage 'excessive optimism' in reunification attempts and ongoing contact with family. Instead, the legislative settings place priority on permanence and stability with foster and kinship carers, including under long-term third-party guardianship arrangements. This was implemented through amendments including:

- **Removing guiding principles related to the importance of family:** The *Children's Protection Act 1993* included guiding principles and objects promoting the importance of family and recognising the desirability of keeping the child within their own family as an important consideration in determining their best interests. These provisions were removed in the *CYPS Act*, and replaced with a statement that, without derogating from any other provision of that Act, it is desirable to maintain connection with biological family. This legislative change was designed to challenge the concept that it is in fact desirable for a child or young person to be brought up within their own family.[21]
- **Introducing principles around permanence and stability:** The *CYPS Act* introduced 'principles of intervention', with the first one being to take decisions and actions in a timely manner 'and, in particular, should be made as early as possible in the case of young children in order to promote permanence and stability'. This change was guided by Commissioner Nyland's recommendation that practitioners should apply

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

[20] Safe and Supported: The National Framework for Protecting Australia's Children 2021–2031

[21] Margaret Nyland, *The life they deserve: Child Protection Systems Royal Commission* (2016), pp 191-92

for long-term guardianship as soon as possible after a young person enters care, if reunification is not a reasonable possibility.[22]

- **Reverse onus of proof:** Introducing a reverse onus of proof, for a person who is objecting to an application for Court Orders relating to children and young people in care. This was intended to promote permanency outcomes for children and young people in care, through making it easier for carers to apply and receive third-party guardianship orders.[23]
- **Removing judicial oversight of contact arrangements:** While the *Children's Protection Act 1993* assigned contact arrangements to the remit of the Court, the *CYPS Act* brought this within the Department for Child Protection, reviewable by the Contact Arrangements Review Panel (CARP). This process is established through executive government, via the Minister's powers to establish the CARP, and judicial review of decisions is explicitly excluded. The expressed purpose of this recommendation was to exclude families from the level of contact provided under the *Children's Protection Act 1993*.[24]
- **Principles guiding contact arrangements:** The *CYPS Act* introduced a guiding principle for the Chief Executive in making contact determinations, dependent on whether reunification is a likely outcome. If not, the Act requires that particular consideration is given to not undermine or compromise the ability of the child or young person to establish or maintain attachment relationships with their guardian or guardians. This prioritises relationships with carers, over and above relationships with birth family.

A key part of legislative review is considering whether laws are in alignment with contemporary standards. With the greatest respect to the intent behind Commissioner Nyland's recommendations, it is important to state that the measures implemented in the Bill are contrary to best practice. They were not in alignment with contemporary standards in 2016 and, since that time, best practice has moved even further against that direction.[25]

Nearly 10 years later, these recommendations must be contextualised by an understanding of how they have impacted children and young people and families, contributed to ongoing growth in the number of children and young people living in out-of-home care and residential care, and the broader social consequences of a generation of children and young people growing up in care under these legislative settings. As a matter of ongoing public policy, this position cannot be reconciled with South Australia's commitment to the *Safe and Supported* framework and Closing the Gap. We must accept this, and now redress this.

As highlighted above, a key basis for these initiatives was to promote permanence and stability, through encouraging practitioners to apply for long-term guardianship as soon as possible after a young person enters care, if reunification is not a reasonable possibility; and creating accessibility for carers to apply to be long-term guardians as soon as possible afterwards.[26]

It is indeed essential to give proper consideration to ensuring that children and young people have a sense of stability in their lives, meaningful opportunities to form attachments with carers, and feel secure that valued living arrangements can be long-term, if they so choose (and provided it is in their best interests).

But promoting permanency and stability for children and young people cannot be achieved solely through applying quickly for long-term guardianship orders when children come into care. If family preservation or reunification is in fact a reasonable possibility, permanency and stability is best achieved through directing departmental resources and efforts towards achieving this outcome. Significantly, the NSW approach to permanency planning – which formed the basis for relevant Nyland recommendations – came under consideration after the commencement of the *CYPS Act*, in 2019. In the *Independent review into Aboriginal out-of-home care in NSW* conducted by Professor Megan Davis, it was observed that:

> *Children should be safe, and it is important, in order to promote this safety, that Aboriginal families are provided with clear, achievable and strengths-based goals, accompanied by culturally sensitive and holistic casework,* ***to make restoration the primary goal of permanency planning after children enter care****. While restoration will not be achieved in all cases, strengths-based and supportive approaches to restoration are more likely to achieve this outcome for children who*

[22] Ibid, recommendation 70.

[23] Hansard Daily: House of Assembly - Tuesday, February 14 2017

[24] Margaret Nyland, *The life they deserve: Child Protection Systems Royal Commission* (2016), pp 222-225.

[25] See, for example, the discussion above regarding international commentary and Australia's Safe and Supported framework.

[26] Nyland (n 19), recommendation 70.

> *enter care and will give families the best chance of staying together….Placing children in OOHC should generally be a **temporary measure** while parents are supported to make changes that will enable them to safely care for children at home.[27] (emphasis added)*

To support these goals, Professor Davis made recommendations to fundamentally amend the New South Wales legislative framework guiding family preservation and reunification, as well as developing a specific strategy to promote reunification of Aboriginal children to their parents.[28] These recommendations were accepted by the New South Wales government, and reportedly remain in progress.[29]

At the time of the Nyland report, NSW was an outlier in its approach to permanency and stability. This is being addressed in that jurisdiction, and the direction should similarly be reversed in South Australia.

This is reflected in recommendations made through Commissioner Lawrie's inquiry into the removal and placement of Aboriginal and Torres Strait Islander children and young people, with the *Holding onto our Future* report released in 2024. The report strongly criticised reliance on Euro-centric conceptions of attachment over and above Aboriginal and Torres Strait Islander child-rearing practices and included legislative recommendations to rebalance approaches to family contact and long-term guardianship.

The Bill is an opportunity to address these issues, consistent with stated policy intention to divert children and young people away from statutory child protection responses and reduce the overrepresentation of Aboriginal and Torres Strait Islander children and young people in care.

I have observed relevant positive measures in the Bill in this space, including:

- reintroducing guiding principles which are referable to children and young people's rights under the *Convention on the Rights of the Child* to not be separated from their family, wherever possible,
- introducing the 'prevention' principle of the Aboriginal and Torres Strait Islander Child Placement Principle, to the standard of active efforts
- the renewed focus on Family Group Conferencing, and introducing principles of Aboriginal Family Led Decision making
- introducing additional considerations relating to reunification for Aboriginal and Torres Strait Islander children and young people
- rewording the reunification test in contact arrangements so that, if reunification is unlikely, particular consideration must be given instead to the need for the child or young person to maintain a connection with their family and culture
- limiting the scope of the reverse onus, from all applications relating to court orders for a child or young person in care, to only those related to third-party orders
- requiring the Chief Executive to assess the likelihood of reunification prior to applying for certain orders

However, outstanding issues introduced through the *CYPS Act* remain, as discussed in the following sections.

Applications for third-party orders:

The Bill proposes to continue the applicability of the reverse onus to third-party orders and excludes these orders from the explicit requirement to assess likelihood of reunification prior to applying for orders.

The Bill has also bestowed an additional right upon applicants for third-party orders, through deeming that they are now automatically parties to the proceedings – rather than this being determined on a discretionary basis by the Court, based on the child or young person's best interests. Further, the Bill proposes that the only person entitled to internal review of the determination as to whether a proposed guardian is suitable to be the guardian of a child or young person is that proposed guardian; with neither the child or young person, or their parents or other family being entitled to review of that decision.

These arrangements continue to prioritise attachments and relationships with approved carers – over those with other family and community members – through providing easier pathways for carers who want to become long-term guardians.

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[27] Professor Megan Davis, *Family is Culture: Independent review into Aboriginal out-of-home care in NSW* (2019), p 349.

[28] Ibid, recommendations 106 and 107.

[29] NSW Government, *Family is Culture: Progress Report* (2021), p 57.

While there is no doubt that third-party orders can promote children and young people's best interests in certain situations, there are also circumstances where they do not.[30] This area of practice should be subject to elevated levels of scrutiny. It is not apparent why the process should be made again easier for approved carers.

Resolution

3. Delete clause 125, which places the onus of proof on the objector in proceedings related to third-party orders.
4. Remove the words 'except a specified person guardianship order made under section 124' from sub-clause 99(6)(a), which exempts consideration of likelihood of reunification for applications for third-party orders.
5. Remove subclause 100(1)(d) and insert a subclause that substantially reproduces s 51(3) of the *CYPS Act* with respect to applications for third-party orders, to make orders related to parties in proceedings discretionary and after considering the best interests of the child or young person.
6. Expand the list in Schedule 1 of persons who may apply for an internal review of item 1 – a determination as to whether a proposed guardian is suitable to be the guardian of a child or young person – to include at least the following:
    a. The child or young person
    b. A parent of the child or young person.

Contact arrangements

I have previously recommended that contact arrangements should be brought back within the scope of judicial review, and I note that this is broadly consistent with the findings of the Commissioner for Aboriginal Children and Young People's inquiry into the placement and removal of Aboriginal and Torres Strait Islander children and young people.

In its response to Commissioner Lawrie's report, Government indicated that it did not support the recommendation to transfer the power regarding contact arrangements from the Chief Executive to the Youth Court, and to abolish the CARP. The response addressed the rationale for maintaining the Chief Executive's power to make contact determinations, to retain flexibility and maintain the capacity for timely and responsive decision-making closing to the child. No rationale was provided for maintaining CARP; however, Government has noted that improvements will be made to the CARP process.

With respect, this does not address fundamental issues regarding access to justice for children, young people and families. Judicial review is a fundamental part of administrative decision-making settings, based in separation of powers between executive government and the judiciary. It is inappropriate to maintain an arrangement whereby such important decision-making in a child or young person's life is outside the scope of judicial review and oversight.

Maintaining this exclusion is also inconsistent with best practice guidance from SNAICC regarding implementation of the Connection element of the Aboriginal and Torres Strait Islander Child Placement Principle – which requires opportunities for family contact to be adjudicated by courts, rather than internal departmental processes or administrative arrangements.[31] Reflecting a commitment to embedding the Aboriginal and Torres Strait Islander Child Placement Principle must go beyond statement of principles. It also requires addressing legislation, policy and practices that either enable or curb system capacity to achieve connection for children and young people with family and community. This theme is discussed in greater detail in the following section.

Resolution

7. Include contact determinations made by the Chief Executive under clause 139 of the Bill, as a decision subject to internal review as set out in Schedule 1 of the Bill.

The Aboriginal and Torres Strait Islander Child Placement Principle

Embedding all five elements[32] of the Aboriginal and Torres Strait Islander Child Placement Principle to

[30] For example, my submission to the Review noted matters I have become involved in where there is a failure to abide by long-term care plans including regarding sibling contact and connections, and few or no avenues for children or young people to seek redress or advocacy.

[31] SNIACC, *A guide to implementation*, p 68.

[32] And the additional precursor element, of Identification.

the standard of active efforts is one of the stated policy aims of the Bill. This aligns with all Australian governments' commitments under the *Aboriginal and Torres Strait Islander First Action Plan* under the *Safe and Supported Framework*, and the South Australian Government's *Closing the Gap* implementation plan.

Key levers for meaningfully embedding the Principle into South Australia's legislative framework include:

- Articulating relevant statements of principle for Prevention, Participation, Partnership, Placement and Connection, and defining active efforts
- Making legislative changes to impose discrete and actionable obligations on government agencies, in alignment with best practice to promote the intent of these principles. The most authoritative sources of that best practice are relevant resources published by SNAICC, and the advice of the Safe and Supported Aboriginal and Torres Strait Islander Leadership Group
- Accountability and reporting mechanisms, to measure progress, outcomes and take timely corrective action as required.

The key strength of the Bill is in the first of the above points; clearly articulating the statement of principles.

The inclusion of the following provisions which will support interpretation and application are also a positive step:

- legislating a requirement for cultural support planning in case plans
- specifically requiring active efforts to support reunification, and undertake family scoping
- articulating principles of family-led decision-making
- specifically articulating key cultural rights as relevant to the best interests of Aboriginal children and young people
- including a guiding principle recognising that nurturing connections to family, community, culture and Country is foundational in ensuring that Aboriginal and Torres Strait Islander children and young people are protected from harm
- introducing an obligation on the Chief Executive to offer to convene a family group conference for an Aboriginal or Torres Strait islander child or young person in particular circumstances
- provisions to enable the progressive delegation of legislative authority to Recognised Aboriginal Entities
- a new scheme for the involvement of Respected Persons in Court proceedings to support Aboriginal children and young people.

These provisions are much needed. But, from a practical implementation perspective, there remain serious issues regarding the strength of legislative obligations, and accountability for reporting.

Caveats

The Commissioner for Aboriginal Children and Young People has publicly expressed serious concerns that the extent of caveats imposed upon initiatives – including those which are intended to implement recommendations from the *Holding onto our Future* report – undermine their efficacy and potential to drive change. I too share this concern, as addressed in my submission on the draft Bill.

I understand that the Commissioner's evidence will address these matters in detail. To assist the Select Committee, I have focused on my key objections to particular drafting approaches.

Paramount consideration

The Bill expresses that the Aboriginal and Torres Strait Islander Child Placement Principle is subject to the paramount consideration of protection from harm. This frames the Aboriginal and Torres Strait Islander Child Placement Principle as oppositional to safety and maintains a hierarchy of considerations with 'safety' at the top, and the Aboriginal and Torres Strait Islander Child Placement Principle sitting underneath.

Such a model is based on a misunderstanding of the effect and foundations of the Aboriginal and Torres Strait Islander Child Placement Principle and treats it as a mechanism to 'displace safety' for the purpose of maintaining family relationships and connection to culture. This is **entirely incorrect**. The Aboriginal and Torres Strait Islander Child Placement Principle is a framework for achieving holistic safety and wellbeing outcomes, based on an understanding that family and culture are protective factors in Aboriginal children and young people's lives, and that positive, lifelong wellbeing outcomes for Aboriginal children and young people are best achieved through prioritising Aboriginal child protection practices and frameworks.

If this misunderstanding appears in the settings of the legislation, then it is inevitable that it will flow through to practice and hamper meaningful change. Indeed, this would play in active part in furthering disconnection with culture and family; and breathe life into falsehoods about Aboriginal family and cultural child rearing as a practice that harms or hurts children. This was a tool used in the initial stages of Australian settlement as part of the 'White Australia' protectionist era and has no place in legislation.

Shoulds and musts

Clause 44 of the Bill articulates the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle – prevention, partnership, placement, participation and connection.

That clause sets a low standard for these principles.

- For prevention, Aboriginal and Torres Strait Islander children and young people ***should*** be provided access to culturally safe services.
- For partnership, Aboriginal and Torres Strait Islander people ***should*** be supported to participate in decision-making and policy development.
- For placement, Aboriginal and Torres Strait Islander children and young people ***should*** be placed with their family, or a member of their community.
- For participation, decisions that affect Aboriginal and Torres Strait Islander children and young people ***should*** engage Aboriginal and Torres Strait Islander family-led decision-making.
- For connection, Aboriginal and Torres Strait Islander children and young people ***should*** be supported to develop and mating connection with family, community, culture, Country and language.
- If an Aboriginal or Torres Strait Islander child or young person is placed under the guardianship or care of a non-Aboriginal person, the Court ***should*** be satisfied that the person has demonstrated commitment to supporting connection.
- When considering an Aboriginal or Torres Strait Islander child or young person's best interests, regard ***should*** be given to the Aboriginal and Torres Strait Islander Child Placement Principle.

There was a deliberate drafting decision to express obligations related to the Aboriginal and Torres Strait Islander Child Placement Principle as what relevant agencies and decision-makers 'should' do, not what they 'must' do.

The result is a lack of firm commitment to these principles, and little actionable obligation placed upon individuals who work with Aboriginal and Torres Strait Islander children, young people and families. This undermines the scope for meaningful impact and signals the level of value placed on the Principle, and willingness to engage in partnership.

Remedies for breach

Clause 44(6) of the Bill provides that a failure to comply with the Aboriginal and Torres Strait Islander Child Placement Principle to the standard of active efforts does not, of itself, affect the validity of a decision under the Act. This is a drafting decision that appears in numerous places throughout the Bill – to introduce rights but qualify the outcomes that can be reached through internal review or judicial review processes.

The Minister for Child Protection's second reading speech addressed concerns from stakeholders that this undermined accountability for implementing the Aboriginal and Torres Strait Islander Child Placement Principle, and responded that this is not the intention of the clause; but, rather, to ensure that a decision or order is not automatically invalidated or precluded if the Principle is not implemented 'completely or as thoroughly as intended'.

The Minister noted that it is 'important that we do not let form override substance when we are talking about the most precious community members' and elaborated:

> *This is really important because sometimes it might be that a decision or order has been made that is still the best decision, ensuring that the safety and best interests of the child or young person are met even when, for example, an aspect of the placement principle could have been implemented more thoroughly than it was. If it turns out that an order was invalid because of noncompliance, this could potentially mean a child needs to be returned to an unsafe environment because of that invalidity. It may be in a number of cases that the exact same decision or order would have been made if the placement principle had been perfectly complied with.*[33]

With respect to the Minister, this is not an answer to the concerns raised by me, Commissioner Lawrie and other stakeholders. I liken this response to scaremongering and something derived to challenge further discourse on this matter.

The risk identified by the Minister – that a child could be returned to an unsafe environment due to invalidity of a decision – is a stretch at best, and arguably a risk that could eventuate when imposing any procedural obligation upon the Chief Executive,

[33] Hansard Daily: House of Assembly - Wednesday, October 16 2024

child protection officers and/or other persons or agencies.

The very nature of making laws is that it opens up remedies when a person acts unlawfully. That is a fundamental part of accountability. There are a range of outcomes that may result from a finding that a person has acted unlawfully, and courts and tribunals have significant discretion to determine appropriate remedies. This includes affirming the initial decision despite procedural issues, reverting the decision back to relevant decision-makers, court orders that replace the initial decision and, in some circumstances, financial remedies.

This is a standard consequence of imposing a legislative obligation upon a person and is not specific to the Aboriginal and Torres Strait Islander Child Placement Principle. Every time that this caveat appears in the legislation, it represents a deliberate decision to include it in that place and not others. **A deliberate decision has been made** in this instance, to say that the outcomes to be achieved through implementing the Aboriginal and Torres Strait Islander Child Placement Principle are not 'worth' the risk of opening up access to remedies. This decision speaks volumes about the efforts that government is willing to invest in achieving best interests for Aboriginal children and young people. It speaks volumes about the value government places on connection to kinship, culture and Country.

In this context, it is important to note that there are alternative risk mitigation measures open in the legislative drafting process; including to ensure that the best interests of the child, inclusive of the Aboriginal and Torres Strait Islander Child Placement Principle, is the paramount consideration in decision-making. Such a principle would capture decision-making about appropriate remedies, in response to any findings that certain conduct was contrary to law.

In my submission on the draft Bill, I reflected that those recommendations from Commissioner Lawrie's inquiry which have been implemented are ones that impose largely 'aspirational' obligations on the DCP, with a lack of enforceability and accountability attached – and which largely align with existing departmental policy documents. The unfortunate reality is that many of the policies already look good; it is adherence and consequence that is lacking.

Even with consideration of the Minister for Child Protection's second reading speech, I maintain that there is an appearance of appeasement in the changes implemented through Part 4. I question alignment between these provisions, and Government's stated policy intentions and national commitments already signed and obligated too.

Reporting

The draft Bill proposes to remove the only reporting obligation regarding Aboriginal and Torres Strait Islander children and young people.

Currently, section 156(1) of the *CYPS Act* requires the Chief Executive to report annually on the following information regarding Aboriginal and Torres Strait Islander children and young people:

- the extent to which case planning in relation to such children and young people includes the development of cultural maintenance plans with input from local Aboriginal and Torres Strait Islander communities and organisations;
- the extent to which agreements made in case planning relating to supporting the cultural needs of such children and young people are being met (being support such as transport to cultural events, respect for religious laws, attendance at funerals, providing appropriate food and access to religious celebrations);
- the extent to which such children and young people have access to a case worker, community, relative or other person from the same Aboriginal or Torres Strait Islander community as the child or young person.

Since the *CYPS Act* commenced, there have been **ongoing issues with reporting capability** to meet these requirements, due to a failure to invest in the systems enhancements to enable data capture and reporting.

Conveniently, I note that reporting against these requirements has been omitted from the Bill – **which would no doubt remove the legacy 'legislative breach'.** I would issue a word of caution to interested readers that removing legislative compliance for the sake of system convenience is a slippery slope to poor practice and often precipitates predictable harm.

Instead, there is a generalised obligation for the Minister for Child Protection to report annually on the operation of provisions specific to Aboriginal and Torres Strait Islander children and young people, in accordance with requirements and information set out by the regulations.

I acknowledge that the regulations may set out highly relevant and substantial information requirements in the Minister's annual report; but I do not have those regulations available to me to comment on. Instead, I see:

- removal of a reporting responsibility that the DCP has been unable to meet for six years

- replaced by a generalised description of relevant reporting, allocated instead to the Minister
- against requirements that can be set from time-to-time through regulation making processes.

I note that, far from letting the DCP off-the-hook for these reporting issues, Commissioner Lawrie's final report recommended legislating a sixth element to the Aboriginal and Torres Strait Islander Child Placement Principle of 'Performance' to meet the need for cultural oversight and accountability in the provision of child protection services. As articulated by Commissioner Lawrie:

> *The implementation of Performance to the standard of Active Efforts is demonstrated by accurate reporting and compliance of all elements, including comprehensive measures embedded within practice and case management systems.*[34]

While I hope that the legislated amendments are intended to enable the Performance element through regulations, there is no public-facing information that indicates as such. The only public-facing information is removing current accountability requirements. This is concerning.

Resolution

8. Re-initiate consultation on Part 4 with key stakeholders including Aboriginal and Torres Strait Islander children and young people, community leaders, the Commissioner for Aboriginal Children and Young People, Wakwakurna Kanyini and SAACCON and the Guardian for Children and Young People,

[34] Commissioner for Aboriginal Children and Young People, *Holding on to Our Future*, recommendation 2.

What has been added into the Bill?

To this point, my submission has focused on missed opportunities in the legislative review, to progress much needed reform and undo the effects of changes implemented in the *CYPS Act* which are not in children and young people's best interests.

This part of my submission provides feedback on *what is new* in the Bill, from a technical perspective and which speaks to likely operational impacts.

I am well placed to provide this feedback. I oversight out-of-home care in South Australia. My office handles hundreds of advocacy matters each year, which involve hearing directly from children and young people about their experiences, engaging with families and carers, and working with practitioners and officers across a wide array of government and non-government agencies. My concerns about how various changes will or could be operationalised are well-informed and based in these observations.

My feedback addresses changes that form part of the 'headline' package of reform, being new initiatives that are addressed in the Review Report, the Department's summary of changes in the Bill and the Minister for Child Protection's second reading speech. Significantly, it also addresses changes that are not in public-facing materials, but which I have identified through detailed review of the Bill.

Much of this feedback has already been provided through my September 2024 submission on the draft Bill, and I note that no action was taken on that feedback. With further time for review, I have identified areas of additional feedback.

Headline changes

'Whole of government' approaches

The Bill attempts to introduce a 'public health' approach through introducing the following mechanisms:

- the introduction of a State strategy for the Safety and Support of Children and Young People
- a power for the Minister to direct prescribed State authorities to meet for the purpose of discussing an interagency response to prevent harm to a specific child or young person, or group of children and young people.

As expressed by the Minister for Child Protection,

> *The* Bill *introduces a requirement for a whole-of-state strategy for the safety and support of children and young people. We have repeatedly heard the need for government to take this opportunity to get the settings in place across government, and indeed across community, that best facilitate a system where collective responsibility for the wellbeing of children and families is held.*
>
> *The* Bill *includes a framework for implementing a public health approach to child protection and family support, widely recognised as the preferred approach, that expands the focus away from a narrow cohort of children requiring statutory intervention toward a framework through which we address the needs of all families in our community.*
>
> *Establishing the state strategy will promote collaboration and coordination across relevant government agencies and other entities in the provision of supports and services to children and their families in ways that have them at the centre and provide an organising framework for the whole of government, whole of community and whole of sector, through which we can individually and collectively deliver on our responsibility for children's safety and wellbeing.*[35]

These provisions are part of the policy direction to divert children and young people away from the statutory child protection system, through promoting accountability for child and young person wellbeing and accessibility of family support services across government.

I am supportive of the changes in principle – it fits within a Best Interest as Paramount Consideration

[35] Hansard Daily: House of Assembly - Wednesday, October 16 2024.

Framework, with the understanding that success will require changed investment approach from government and buy-in from relevant agencies. This will primarily be a matter for the implementation stage.

With respect to the provisions as drafted, I note that those agencies listed in the Bill are the Department for Health, Education and Human Services, with an opportunity to prescribe additional agencies through regulations.

Finalising this list will be a matter for regulations, but I would like to note at this stage that important key stakeholders are missing from this list; including Housing, SAPOL and relevant justice partners through the Attorney-General's Department (e.g., prosecution, witness and victims services).

Between these missing state authorities lie some of the most persistently challenging issues to resolve in supporting children and young people in care, through:

- involvement in criminal justice processes – whether as a victim or an alleged offender
- housing insecurity at times of critical social developmental phases – with many young people exiting care facing homelessness.

Based on available information, I cannot see any reasonable basis to exclude these stakeholders and recommend expanding the scope of the prescribed bodies, either directly through the Bill or associated regulations.

Resolution

9. Include Housing, SAPOL and relevant justice partners through the Attorney-General's Department in the scope of the prescribed bodies, either directly through the Bill or associated regulations.

Voices of children and young people in care

The key change in the Bill which is stated to elevate and strengthen the voices of children and young people in care is a generalised 'voice' provision, which requires those involved in the operation and administration of the legislation to take reasonable steps to ensure the voice of a child or young person is heard in the course of making a 'prescribed decision' that affects the child or young person.

In my 2022 submission, I noted that the *CYPS Act* already contains broad statements of respect for children and young people's voices, through Parliamentary declarations, a requirement to take the children and young people's need to have their views considered in decision-making, and a general 'principle of intervention' that children and young people should be given the opportunity to express their views with due weight given to those views in accordance with their developmental capacity and the circumstances.

These principles are important, but as a matter of reality they **conflict with the day-to-day experience of children and young people in care** – who often report to my office concerns and frustrations about not being included, informed or shown appropriate respect in decision-making.

I note that those general principles have now been strengthened, and I am supportive of that step. Although I must continue to highlight the importance of concrete legislative requirements, policy guidance and operational oversight to ensure that this is translated into practice.

Children and young people are acutely aware that their views are not always adequately considered by the adults in the room. To supplement general principles, I recommended a legislative obligation to ensure children and young people are provided an opportunity to personally present their views at key decision-making forums and processes; namely, Annual Reviews, Internal Reviews and CARP reviews.

I am pleased to see that a provision has been included regarding internal reviews; however, no equivalent guarantee has been inserted regarding an opportunity to provide in-person submissions at annual reviews or CARP reviews. At the same time, I am concerned that with respect to annual reviews:

- the removal of an existing provision, which requires the annual review panel to notify the child of their annual review, and give them a reasonable opportunity to make submissions (including in the absence of a person who has care of them)
- at the same time, a new provision has been introduced to guarantee the opportunity for in-person attendance and submissions at annual reviews from carers with whom a child or young person is placed.

I understand the new clause 13 may be intended to 'catch' this process, through imposing an obligation to take reasonable steps to ensure children and young people's voices are heard in the course of decision-making affecting them. However, the discretion allowed by that provision falls far short of a guaranteed opportunity for in-person attendance and submissions. It is insufficient to meet the intent of my recommendation: which is to improve opportunities for in-person attendance at annual reviews.

I recognise that this may have resulted from drafting advice that it was no longer necessary to include specific attendance and participation provisions, following the introduction of a provision of more general application through clause 13.

But this general provision imposes a lesser participation right than was previously included. So, **children and young people are worse off under this change**, with respect to their annual review process.

At the same time, the introduction of 'voice' protections for carers now creates a significant imbalance in rights related to annual reviews.

While carers are currently entitled to make submissions to an annual review, there is no guarantee of an opportunity to do so in-person. The protection for children and young people to be heard in the absence of their carer was very deliberate. But under the new arrangements in the Bill, clause 141(5) is likely to result in a default position of carers being invited to annual reviews – and without a corresponding obligation for children and young people.

There is a provision that can exclude a carer if the panel determines that it would not be in the best interests of the child or young person for the carer to attend. However, I am concerned about the effectiveness of this protection – noting that these situations often arise where there is some level of concern regarding carers influencing the child or young person's expression of their views (whether through intimidation, the child's individual manifestations of trauma, or otherwise), speaking for children and young people or otherwise attempting to prevent them from providing their independent views.

In these situations, the nature of the carer's behaviour and relationship can make it difficult to establish enough evidence (within the bounds of procedural fairness) to make an assessment that their personal attendance would not be in the best interests of the child or young person. Adults often have the upper hand in advocating for themselves, including relying on legislative provisions to place pressure on decision-making processes.

In raising these points, I do not doubt that there is also a significant power imbalance between carers and the Department, which underlies a desire to include this legislative guarantee. However, I do not believe this legislative guarantee is the best mechanism to respond to carers interests in this matter; due to the risk that it will in fact prejudice the interests of children and young people.

At no stage should a child's best interests be subjugated by the interest of another party – but these changes do enable this to happen. As responsible practitioners and law makers we must remain vigilant in this respect.

A topic that is deeply tied to children and young people's ability to express their views, and have those views acted upon, is their access to independent advocacy.

While the Bill has included its general 'voice' provision (as discussed above), I am disappointed to note that there has been little responsiveness to my recommendations regarding improving advocacy avenues for children and young people in care. This, ironically, undermines the impact of requiring adults to take reasonable steps to listen to children.

I sought to ensure children and young people should be guaranteed access to an advocate in

1. SACAT proceedings,
2. internal reviews
3. CARP reviews.

While all three of these processes are administrative in nature and should be conducted with less formality than court proceedings, children and young people 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 and feel safe to express their views. This is essential to redress power imbalances for children and young people, and ensure they are both aware of their rights, have support to access them and assistance where required in expressing their views.

The draft CYPSS Bill has included a relevant obligation for SACAT proceedings; but not for internal reviews or CARP reviews. The basis for this differentiation is unclear – particularly when it comes to CARP, noting that these decisions are not subject to any further review. This means that a young person who disagrees with a decision about contact with their family or other important people in their lives is not guaranteed an opportunity to seek advice and support from an advocate – legal or otherwise – before a final and binding decision is made. In my view, this is highly inappropriate and detrimental to the best interests of children and young people in care.

Given Internal Reviews and CARP Reviews are administered by DCP, I observe (once again) that perhaps the omission of 'right to an advocate' for children and young people is a systems convenience at the expense of children and young people's rights to natural justice.

Resolution

10. Create legislative obligation to ensure children and young people are provided an opportunity to personally present their views at key decision-making forums and processes; namely, Annual Reviews, Internal Reviews and CARP reviews.
11. Require the annual review panel to notify the child of their annual review, and give them a reasonable opportunity to make submissions (including in the absence of a person who has care of them)
12. Remove guaranteed opportunity for in-person attendance and submissions at annual reviews from carers with whom a child or young person is placed. Rather maintain current status for carers to make submissions as appropriate.

Statements of commitment

The Bill introduces the Statement of Commitment to Foster and Kinship Carers into legislation.

This Statement sets out how carers can expect to be treated by the department, and values-based commitments. This includes informing, consulting with and supporting carers, and working together in partnership. It also includes responsibilities upon carers in line with legislated requirements, regarding maintaining children and young people's health, wellbeing, connection to culture and families.

It will come as no surprise that I do not believe it is appropriate to include a Statement of Commitment to carers, within legislation in place to protect the best interests and wellbeing of children and young people.

Power is a significant theme that arises throughout my advocacy matters, with children and young people most often being those with the least power in the room. That power imbalance is felt across relationships with a wide array of adults; parents, family members, DCP and other government workers, and family-based carers.

I am sure that the intention is for carers to see their roles represented in the Act and be able to point to concrete expectations regarding their own treatment. It is not surprising that this would be important to carers; but I have to ask the question, why this piece of legislation?

Statutory charters of rights – which the Statement of Commitment is analogous to – are primarily embedded where legislation either intends to confer benefits upon a particular group of people, or adversely impacts the rights of a group of people.

The Bill now also includes the development of a statement of commitment to parents and families.

Working with legislation that requires simultaneous consideration of children's rights, foster carers' rights, and parental rights presents significant operational challenges. Each stakeholder has distinct, and at times conflicting, rights and interests.

To be blunt, this is an operational nightmare.

These complexities create dilemmas for practitioners tasked with balancing these priorities while adhering to legislative requirements. Below, I outline the operational difficulties

- Conflicting and potentially competing priorities; where multiple rights must be considered in a legislative framework. Practitioners must navigate these competing rights, often in high-pressure and often emotive situations with limited resources or information.

  Risks to children: interrupts the primacy of children being at the centre of all decision making
- Ambiguity in "Best Interest of the Child"; in which each stakeholder may have differing opinions on what that best interest is. This ambiguity can lead to inconsistent interpretation, making it difficult for practitioners and even judicial systems to determine the right course of action.

  Risks to children: the most convincing, articulate or most powerful stakeholder has their opinion heard over that of the child or the child's best interests.
- Resource and time constraints; the balancing of the rights of each stakeholder requires thorough assessments, planning and consultation. Resource (time) constraints compromise the ability to fulfill legislations intent, leading to rushed or suboptimal decisions.

  Risks to children: that children miss out on the care, attention and services because resources are directed to attending to the rights of other stakeholders.
- Emotional and psychological complexity; child protection and out-of-home care related matters often involve high levels of emotion, making it difficult to balance the rights of all parties objectively. Practitioners must navigate these emotional dynamics while maintaining professionalism and neutrality.

  Risks to children: that children are exposed to the emotional responses of stakeholders leading to feeling torn between their biological family and

carers, creating additional emotional stress and mental health concerns.

- **Legal and ethical dilemmas**; where legal requirements conflict with ethical considerations such as the voice of the child and their feelings versus rights of parents/carers. Such dilemmas can cause moral distress for practitioners and lead to inconsistent decision making.

  Risks to children: that children develop disorganised understanding of their rights and the rights of adults. This impacts their understanding of not only their rights in care, but also interactions between themselves and adults.

- **Lack of coordination among stakeholders**; where multiple stakeholders may get caught in a cycle of focussing on their rights, leading to misunderstandings, miscommunications or conflicting recommendations. Practitioners will need to navigate potential poor coordination, inefficiencies and ineffective interventions.

  Risks to children: that children's needs and decisions relating to children's needs may be delayed as a result of poor coordination and possible increased tension between stakeholders.

Balancing the rights of children, biological parents, and carers is a complex task faced by jurisdictions worldwide. Achieving this balance requires clarity, collaboration, and a commitment to equity, ensuring that every child receives the care and support they deserve. Particularly, it requires an unwavering commitment within the legislation that the child's best interest and rights are not superseded by the interests of other stakeholders (governments, practitioners, parents or carers).

The Bill in is current state does not do this, and leaves children vulnerable to rights violations. The need for parents and carers to have their own instruments is something I as the Guardian support, but I do not support it being placed and housed within the same legislation that is dedicated to have a sole focus on children.

Create an appropriate piece of legislation if required. But the simplest solutions are to do what most other comparable national and international jurisdictions have done: simply state the commitment and uphold it, without legislative instruments.

In my consultations with care leavers, I was reminded that of all those affected by the Bill, carers have the greatest power, with the option to discontinue their relationship when and how they choose. I will again be explicitly clear, so there is no confusion. It is of course essential to ensure that carers and parents are supported – to provide stability in care arrangements and connections that are valued by children and young people, and so that the positive impacts of that support can flow through to the lives of children and young people. But we have to all understand that carers and indeed parents do not hold the same position of vulnerability as children and young people under the Bill. It is unclear why they should have a statutory statement or charter to protect and assist in enforcing their interests in the lives of children and young people in care.

Again, if legislation is required to implement rights and support needs of other community members, then the most appropriate mechanism is legislation established for that purpose. This helps to prevent the statement being used in interpretative disputes, or disputes about decisions under the Act, in a way that may conflict with children and young people's rights.

Embedding statements of rights, values and commitments for carers within child-focused legislation runs the risk of putting those rights, values and commitments in opposition or competition to those held by children and young people.

This is a particular risk in light of issues regarding the enforceability of the Charter of Rights for Children and Young People in Care, as addressed in my previous submissions. People exercising responsibility and performing functions under the legislation must perform functions consistently with the Charter, to the extent that it is consistent with the paramount principle – protection from harm. While it does not create legally enforceable rights and entitlements, the existence of the Charter encourages rights-based approach; influences legislative interpretation; and may be relevant in review of decisions by SACAT.

When reviewing the way in which the Statements of Commitment are intended to be embedded, it is important to highlight that the obligations placed upon people engaged in the administration, operation or enforcement of the Act are expressed in the same terms: namely, that they must perform their functions so as to give effect to the Statements, to the extent that it is consistent with the paramount principle of protection from harm.

Significantly, this does not require that it must comply with the best interest principle; and I note that the inclusion of the paramount principle without also expressly naming the best interest principle is an expression choice which may be used in interpreting the legislation. Nor is the provision expressed to be subject to the Charter, which may create issues in resolving interpretative disputes where there is conflict between the Statement and a child or young person's Charter rights.

For the reasons highlighted above, I hold serious concerns that the inclusion of the Statements of Commitment in the legislation is detrimental to the rights and best interests of children and young people in care.

Resolution

13. That the Statements of commitment for carers, parents and families are removed from the Bill.
14. That, if required, other instruments are development to recognise and provide a framework for acknowledging respectful working relationships and partnerships with parents, families and carers.

Quality of Care Reports

A key feature of the Bill is the excision of the 'care concern' process from the Chief Executive's required responses to child protection reports. The Bill instead renames this process and places it into legislatively enshrined 'Quality of Care Report Guidelines'.[36]

To provide context on the relevant framework, clause 73 requires that the Chief Executive must assess child protection reports, and clause 74 requires that the Chief Executive must take certain actions upon completing that assessment.

Clause 74 largely replicates existing actions required; however, it removes quality of care reports from that procedure and instead requires that action is taken in accordance with the Quality-of-Care Report Guidelines. These Guidelines are created and published by the Chief Executive, and must set out:

- the process by which a quality-of-care report is to be assessed
- the actions which must be taken in response to a quality-of-care report
- the ways in which procedural fairness is to be afforded in relation to a quality-of-care report
- the process by which decisions relating to quality-of-care reports can be reviewed (including the persons who may seek such a review); and
- any other information required by the regulations.

These proposed legislative changes are connected to the Department for Child Protection's 'care concern' reforms. While the reform is independent of the findings and recommendations of the Independent Inquiry into Foster and Kinship Care, led by Fiona Arney, the current 'Phase Two' is informed by those findings and recommendations.

As published in the Arney Report, the Department has described the care concern reform in the following terms:

> *Phase 1 commenced with an analysis of the current state of DCP's care concern management process, identified areas of risk, and examined system functionality. Utilising this information an interim care concern management model was developed, and in December 2019, the model, Manual of Practice chapter – Raising and responding to care concerns and supporting documentation were implemented to address areas of immediate risk.*
>
> *The aim of Phase 2 is to develop and implement a new all-inclusive approach for managing care concerns. One of the guiding principles of the Project will be to design a model, system and tool(s) that enables timely assessment and response to care concerns to ensure the safety of vulnerable children and young people in care. 89As part of Phase 2, DCP is reviewing:*
>
> - *Workforce profile*
> - *Screening*
> - *Assessment*
> - *Abuse types*
> - *Grounds for substantiation – including reviewing current application of the balance of probabilities threshold*
> - *Categories (minor, moderate and serious)*
> - *Development and implementation of an independent internal review process*
> - *Ability for formal escalation/de-escalation pathways*
> - *Ensuring a systemic response in supporting carers*
> - *Working to embed procedural fairness principles*
> - *Ensuring timely decision making*
> - *Language with the explicit intent of moving away from deficit language*
>
> *As part of the Care Concern Reform Project, there will be extensive consultation with stakeholders including carers and carer advocacy groups. DCP is committed to a process that is timely, fair and respectful of carers and the critical role they play.*

Recommendation 6 of the Arney Report was to amend the *CYPS Act* to prescribe the care concern investigation process, including to:

[36] See Clause 74 of the Bill.

- establish a clear and reasonable threshold for what is a care concern
- embed principles of natural justice and procedural fairness into the care concern investigation process
- prescribe the process by which care concerns are investigated, and the duties owed to Carers during investigations
- ensure that unsubstantiated care concerns are not recorded on carer files, and
- enable a review or appeals process for care concern outcomes.

I have previously expressed, and continue to hold, concerns about separating this process into delegated legislation. The Department for Child Protection's Manual of Practice operationalises how legislation regarding responses to child protection reports should be applied in practice. This establishes separate responses for different categories of reports – including where those reports relate to a parent or guardian of the child or young person, and where they relate to approved carers.

Parents, families and carers have a variety of legal avenues and complaints pathways available where they disagree with a decision or believe that they have been treated unfairly by the Department for Child Protection. It is not apparent to me why there should be a distinction in the legislation, whereby the Chief Executive's responses to reports relate to parents, families and other community members are set in legislation, and actions and responses related to approved carers are set out in standards that are set and can be amended from time to time by the Chief Executive.

If procedural matters are to be introduced into legislation, there should be consistency in the broad approach (albeit relevant differences in those processes may be appropriate). This is important to mitigate against unintended consequences of affording different legislative statuses to child protection reports made about different people.

In analysing what may be the intention of introducing these guidelines into the Bill, I am mindful that there has been significant carer advocacy in recent months (and years) which is focused on reducing experiences of invasive interventions or scrutiny in the *lives of carers*.

While I understand those concerns, I believe we must remain mindful of who we are protecting through this legislation, and the vulnerability that children and young people experience in both family-based and non-family-based care arrangements. In particular, that children and young people in care are often particularly vulnerable to abuse, neglect and maltreatment, for reasons such as trauma histories; the high proportion of children and young people in care with disability and neurodiversity; the targeted exploitation of children and young people in care; and increased risk of exposure to unstable and institutional care arrangements.

If processes for investigating child protection reports for children and young people in care are taken out of legislation, this creates an avenue for community pressure upon the DCP to amend those processes from time-to-time, without the accountability of requiring a Parliamentary legislative amendment process.

Indeed, this risk is evident in the process required prior to publishing these new guidelines; namely, the Bill states that the DCP must consult with carers and carer representative bodies. But concerningly, there are **no requirements to consult with children and young people** in care, or with advocacy bodies for children and young people in care.

This does not place children and young people at the centre of decision-making, or prioritise their safety, views and experiences.

Resolution

15. Remove the Quality-of-Care report process from the Bill, to ensure that the same legislative standard applies to all child protection reports.
16. Continue work to address recommendations relating to procedural fairness and other related matters for carers through the Care Concern Reform project.

'Other' changes

Changed eligibility for leaving care supports

Transition from care and post-18 supports is one of the key topics consistently raised by young people when they contact my office. Common issues raised include:

- 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.

These concerns were echoed in my recent consultation with people with care experience. In particular, strong views were expressed about the way that leaving care processes – and broader care experiences – set young people up to fail.

This is why I recommended legislative amendments to guarantee greater supports for young people leaving care, highlighting the importance of have a safe and stable place to live, and greater supports for young people transitioning from residential care.

I am highly disappointed that **no meaningful changes** have been made to guarantee assistance for care leavers if they require it and ensure that they are protected from homelessness up to the age of 21 years. This flies in the face of social sciences research and economic modelling. The only possible rationale is a short-term, political-cycle response to cost.

I challenge government to review this decision and **dig deeper to do right by the children and young people** who government has removed from their families and taken on **responsibility as their legal guardian.** In doing so, the government must reflect on and draw from the experiences of all too many young people who have been **left in the lurch** when making the transition from care.

Not only has government failed to introduce meaningful change to support young people leaving care – but I am highly worried that many young people exiting care may be worse off under the Bill.

Changes that have been introduced regarding care leavers include:

- explicitly enabling payments to carers to support eligible care leavers up to 25 years
- specifying the matters to be considered in a leaving care plan, including access to personal information
- changing the eligibility age range for assistance for care leavers from 17-25 years to 16-24 years
- removing the Minister's discretion to provide assistance to a care leaver who has been in care for less than six months
- transferring responsibility to offer and take reasonable steps to provide assistance to care leavers from the Minister to the Chief Executive
- removing the obligation to prepare a leaving care plan for children and young people on short-term guardianship or custody orders.

The DCP's public facing summary of key changes only covers the first two points and unfortunately fails to mention those provisions which are adverse to care leavers rights. This is not transparent to the young people they hold guardianship over.

I raised this issue in my submission to the draft Bill, and I received no response – to either provide a rationale, take corrective action, or suggest that it is a drafting error. So, I am forced to conclude that this is a purposeful act of disguising these changes and not fully disclosing to young people in their care – or young people exiting care. I find to be contemptuous, and only fuels the narrative regarding the lack of trust between children and young people and the department. I would, of course, be happy to be corrected and provided assurances that this was a simple oversight.

I recognise that enabling carer payments can support young people to stay in valued living arrangements after the age of 18 years and am supportive of making this option explicit in the legislation. I do note that **this is already an option** under the *CYPS Act*, and the proposed amendments **do not create an enforceable right to such payments**. In fact, the key change is to reduce the age the payments may be made by 12 months.

While I am also supportive of listing those matters that should be considered in a leaving care plan, I am concerned that my recommendation to remove the caveat which prevents leaving care plans from creating legally enforceable rights and entitlements has not been incorporated. This leaves young people with a serious power imbalance when participating in the planning process and setting up their lives as a young adult.

I have observed and receive calls from young people in these arrangements where, although out of my advocacy mandate, they disclose such power imbalances, rights breaches and with withdrawal of promises, leaving them again vulnerable, alone and fearful of their future.

I maintain this recommendation; in the context of the Bill, which would involve deleting subclauses 169(11), and 170(5).

I also noted with concern three changes to the legislation which appear to be adverse to the rights and interests of care leavers:

- Under the CYPSS Bill, the requirement to prepare a leaving care plan setting out steps to assist the child or young person in their transition from care will now only apply to young people on long-term guardianship orders (i.e., orders until they attain 18 years of age). This is a departure from the *CYPS Act*, which requires a transition from care plan for all young people in care, to assist in making their transition from care.
- The CYPSS Bill changes the age range for an 'eligible care leaver' to receive government assistance (now from the Chief Executive, rather than the Minister) – from ages 17-25 under the *CYPS Act* to ages 16-24 under the CYPSS Bill. While this additional year at the lower end is incredibly important for children and young people leaving care at age 16, it is not clear why

the age range has been reduced to exclude those who are aged 25.

- The CYPSS Bill removed the Minister's discretion to provide assistance where the care leaver was in care for less than six months.

I am not supportive of these changes, which limit existing rights that children and young people in care currently hold. There is little transparency regarding why these changes have been implemented.

While it may be beneficial for transition planning and supports to begin earlier (noting that this already occurs in practice), it is concerning that eligibility to receive offers of assistance will cut off a year earlier and that there is no messaging from the DCP as to why this change has been made.

A very low number of children leave care at 16. I see this change as one made to disguise a cost saving measure by maintaining supports for the same span of years, while reducing the burden on the government for care leavers at the age of 25.

This concern was echoed by people with care experiences who have provided their views on when transition planning should start, and how long young people leaving care should be able to access assistance and supports.

During consultation, people with care experience also expressed their views on transition planning being a 'tick-box' exercise, or a referral process, rather than providing meaningful and impactful supports and assistance. They also spoke about the importance of ensuring choice in service provider – and appropriate resourcing. They also spoke about how they feel when they observe families (that is not intertwined into the care system) transition their children into independent living and adulthood. They shared that they simply don't have that much needed attention and support, the permission to 'stuff up', to come home, to raid their parents' pantry when they run out of cash for the week, the support to apply for work or study, the help to set up gas and electricity accounts, the ability to have someone do driving lessons with them.

Resolution

17. As a minimum requirement, replicate the eligibility criteria for leaving care supports under the CYPS Act.

Missing from care provisions

A matter that I have identified through detailed review of the legislation but could not see reflected in any publications relating to the review, is changed responses to children and young people who are missing from care – or away from their placement 'without lawful authority'. This includes the following changes:

- Increase in penalties for the existing offences relating to 'harbouring' or 'concealing' a child or young person who is absent from a State care placement without lawful authority, or the 'unlawful taking' of a child or young person in care – with the maximum penalty for a first offence increasing from 12 months to 3 years imprisonment
- Providing child protection officers with the power to use force to enter premises, places, vehicles or vessel without a warrant, if the child protection officer believes on reasonable grounds that a child or young person who is absent from a State care placement is located within the premises, place, vehicle or vessel
- Expanded power for the Court to issue a warrant to apprehend a child or young person and return them to the custody or guardianship of the Chief Executive.

With respect to the second point, it is important to note that these powers already exist where there are safety concerns or risk of harm; what's new is that the child's absence from a State care placement without lawful authority has become relevant grounds, in and of itself, and **without establishing those safety concerns or risk of harm**.

With respect to the third, child protection officers can already remove children and young people from unsafe situations. This provision represents a planned intervention that looks frighteningly like a police arrest approach to children and young people who are choosing to be away from their placement.

These provisions have a *complicated* impact on the lives of children and young people in care. In some circumstances, children and young people who are missing may be at significant risk of harm. They may be with family, or with other people in the community, who are predatory or exposing them to health and safety risks. They may be held against their will, and subject to physical, sexual and/or emotional abuse.

But I need to stress, that it is not as simple as this.

As noted in my Child and Young Person Visitor Annual Report 2022-23[37] there are complex factors that cause children and young people to run away from their placements. These include 'pull' factors that draw them away, such as being able to see their loved ones, siblings and friends; and 'push' factors that drive them away, such as fraught dynamics with the young people they live with and them feeling that their house environments not being safe for them.

These push and pull factors are frequently the subject of my individual and systemic advocacy for children and young people in residential care; and it is a high number of children and young people who are affected. In 2022-23, more than 1 in 4 young people that my advocates and I visited in residential care were reported as missing persons in the months prior to the visit.

Those I spoke to in my recent care experience consultation highlighted the need to draw a clear distinction between those circumstances where children and young people are running to sources of safety; versus being lured to harm.

Where children and young people are self-placing – particularly with parents, or other family – in response to these 'push' and 'pull' factors relating to their safety and security in their approved placement, there are serious risks associated with criminalising those adults in their life. This can be a disincentive to self-help behaviours through leaving unsafe placements or connecting with support networks while missing from care; and may isolate them from support networks who are afraid of police being called. It is also important to consider the impacts on people who are already subject to increased risk of criminalisation and heavy-handed – or 'risk-adverse' – child protection responses, including parents with their own care backgrounds, Aboriginal families, and migrant and refugee families.

Noting the risks involved, greater delineation is required within the legislation to ensure the intent of such provisions is met, and that protective persons are not caught up and criminalised. I would also reiterate, where there are risks of harm or children and young people in fact suffer harm, there are already existing child protection and criminal justice levers which apply to these situations.

I would also like to add, that if there are reasons for increasing penalties and the powers of child protection officers and the Court in these areas, this should be subject to a fulsome and transparent consultation process; not as 'hidden' amendments in the context of broader child protection legislative change, which is what I observe here.

Resolution

18. Mirror existing penalty provisions in the CYPS Act, for the offences established under clauses 167 and 168.
19. Remove Clause 29(4)(b)(ii)(B).
20. Remove Clause 127 from the Bill.

Removing safety thresholds for temporary placements

Clause 132 of the Bill maintains an existing provision that permits 'temporary placements'. These are a short-term care option for no longer than three months, intended for urgent circumstances.

Currently, under the *CYPS Act* and Regulations, the Chief Executive is permitted to place a child or young person with a person who is not an approved carer as a temporary placement, if the following criteria are met:

- the placement is a matter of urgency
- it is not reasonably practicable to place the child or young person with an approved carer, or it is preferable to place them with a non-approved carer
- the risk of harm to the child or young person if they are not placed in a temporary placement exceeds the risk of harm if the child or young person is placed with a non-approved carer.

This position remains the same under the Bill, but with a new exception: the first two requirements do not apply in relation to a temporary placement with a member of the child or young person's family, or a person known to the child or young person or their family.

While the safety criterion still applies, this is a significant expansion of the permissible use of temporary placements.

It is important to note that assessment and screening for temporary carers is not equivalent to a full carer assessment. As such, there is a risk that children and young people may be placed in an

[37] Child and Young Person's Visitor, *Annual Report 2022-23*, pp. 52-53.

environment that would otherwise be deemed unsuitable.

Indeed, through my role monitoring allegations of sexual abuse for children and young people in care, I have observed situations where children and young people in temporary placements experienced significant harm. If a full carer assessment was undertaken, then this may have identified relevant risks resulting in the carers being assessed as unsuitable and children and young people not being placed there.

While temporary placements play an important role in meeting urgent care needs for children and young people, there is a careful balance required in assessing the appropriate place and scope for temporary placements in the child protection system.

It seems a bizarre and strange approach to remove a criterion that it be preferable to place the child or young person with a family member or someone known to the child or their family, over placing the child with an approved carer. This suggests that the placement could be made if the temporary placement is not in fact preferable; a situation which seems very much at odds with a child or young person's best interests.

I am also concerned about what the removal of the 'urgency' criterion signals regarding intended future use of temporary placements. This represents a significant shift away from current purpose.

While the *CYPS Act* states that temporary placements cannot exceed three months, information the Department for Child Protection provided for the 2022-23 reporting year indicated that:

- 1,663 temporary placements were made in 2022-23
- 1,117 were extended beyond three months
- The longest period that children and young people remained in a temporary placement was 358 days (out of 365 days for the financial year).[38]

In the context where over two thirds of placements are extended beyond the 'temporary' three-month period specified in the legislation, the changes to this threshold are highly significant.

Neither the Minister for Child Protection nor the Department for Child Protection have provided any indication of the rationale for these changes. In the absence of considering the intent behind this amendment, and any risk mitigation strategies, I do not support the amendment.

Resolution

21. Pending consideration of any further information regarding rationale – remove Clause 132(3) from the Bill.

Expanding appointments of child protection officers

Under the *CYPS Act*, child protection officers are constituted by the Chief Executive, police officers and an employee of the Department authorised by the Chief Executive by instrument in writing as a child protection officer.

Clause 28 of the Bill expands the definition of child protection officers to include the following persons:

- an Aboriginal or Torres Strait Islander person authorised by the Chief Executive by instrument in writing as a child protection officer;
- any other person authorised by the Chief Executive by instrument in writing as a child protection officer in accordance with any requirements set out in the regulations.

There may be good reasons to expand the list of persons who may perform the functions of child protection officers, but careful consideration needs to be given to appropriate qualifications and/or other requirements. Consideration also needs to be given to the *purpose* for expanding scope.

If, for example, this provision is intended to transfer child protection officer powers from police officers to police security officers for resourcing reasons, I would be highly concerned by such a move.

In contrast, if the provision is intended to enable investment in provision of services from community-controlled organisations, then I would be broadly supportive of such a change – subject to the details.

The powers afforded to child protection officers are significant, including use of force to enter premises and remove children and young people.

Existing persons who may perform the functions in addition to the Chief Executive are required to be public sector employees – namely, police officers and authorised DCP staff. The above list expands that scope beyond public sector employees,

[38] Guardian for Children and Young People, *Guardian for Children and Young People Annual Report 2022-23* (2023), pp. 59-60.

without addressing what corresponding obligations or relevant limitations upon exercise of powers may be appropriate. It is particularly significant to note that there are no additional considerations provided governing the Chief Executive's decision to authorise an Aboriginal or Torres Strait Islander person to be a child protection officer, or scope for relevant requirements to be set out in the regulations.

Neither the Minister for Child Protection nor the Department for Child Protection have provided any indication of the rationale for these changes. In the absence of considering the intent behind this amendment, and any risk mitigation strategies, I do not support the amendment.

Resolution

22. Pending consideration of any further information regarding rationale – remove Clause 28(1)(d) and 28(1)(e) from the Bill.

Limitations on orders that may be made by Court

Clause 114 of the Bill has introduced a new limitation upon orders that may be made by Court; specifically, that the Court is not authorised to make orders:

- relating to the placement (including removing a child or young person from a particular placement) of a child or young person who is in the custody, or under the guardianship, of the Chief Executive
- an order making contact arrangements (however described) in respect of a child or young person (including by varying or revoking arrangements made by the Chief Executive).

Both placement and contact arrangements decisions are currently within the remit of the Chief Executive's powers and are not separately listed as an Order that may be made by the Court.

The reasons for including this limitation are not transparent; but I can only presume are a response to circumstances where the Court has made relevant orders.

Neither the Minister for Child Protection nor the Department for Child Protection have provided any indication of the rationale for these changes. In the absence of considering the intent behind this amendment – and views of relevant judicial members – I do not support the amendment.

Resolution

23. Pending consideration of any further information regarding rationale – remove Clause 114 from the Bill.

Temporary instruments of guardianship

The *CYPS Act* includes a process requiring the Chief Executive to be notified if a person is found guilty of a 'qualifying offence'. If the Chief Executive becomes aware that a child or young person is residing with one of their parents, and that parent has been found guilty of a qualifying offence, then the Chief Executive must issue an instrument of guardianship.

Currently, qualifying offences are homicide and offences against the person causing or endangering serious harm, where the victim was a child or young person, and the offender was a parent *or guardian* of the child or young person.

The Bill introduces additional qualifying offences, being sexual offences and the offence of choking or strangulation. I am supportive of this change.

However, at the same time, it limits the definition of a qualifying offence to circumstances where the offender was a parent of the child (removing the words 'or guardian'). A new definition is inserted which clarifies that, for the purpose of the provisions, parent does not include a step-parent or a person acting *in loco parentis*.

This significantly alters the scope of applicability, of these provisions. The rationale for why a parent should be excluded from the scheme if they were found guilty of a homicide against their step-child rather than their biological child is not apparent and requires explanation.

Neither the Minister for Child Protection nor the Department for Child Protection have provided any indication of the rationale for these changes. In the absence of considering the intent behind this amendment, and any risk mitigation strategies, I do not support the amendment.

Resolution

24. Pending consideration of any further information regarding rationale – remove the definition of *parent* from Clause 85 of the Bill.

Payment of monies

While a child or young person is under the custody or guardianship of the Chief Executive, there are circumstances where the Chief Executive may receive money on behalf of a child or young person.

Under the *CYPS Act*, that money must be held by the Public Trustee on behalf of the child or young person or deposited in an ADI account in the name of the child or young person. Once the Chief Executive ceases to have direct responsibility for the child or young person, that money is payable to the child or young person. This may occur because the young person turns 18, or relevant court orders otherwise expire.

Under section 161 of the *CYPS Act*, any money held on behalf of a child or young person pursuant to this section is payable to that child or young person.

The Bill amends this provision to specify that money may only be received on behalf of a child or young person when they are under the guardianship of the Chief Executive, and changes how monies are payable when the Chief Executive ceases to have guardianship of the child or young person, as follows:

- in the case where the child or young person is under 18 years of age—the person under whose guardianship the child or young person is or will be placed;
- in the case where an administrator has been appointed in relation to the child or young person under the Guardianship and Administration Act 1993—the person determined by the administrator;
- in any other case—the child or young person.

Simply put, monies are now payable to a child or young person's guardian, rather than the child or young person themselves. There is no discretionary test, or consideration for the child or young person's views. It applies whether the child or young person is returning to their parent or guardian, subject to a third-party order, or under adult guardianship arrangements.

On the face of these changes, I am highly concerned that there is the potential to significantly undermine the child or young person's future financial independence and creates vulnerability to financial exploitation by adults and/or guardians.

Neither the Minister for Child Protection nor the Department for Child Protection have provided any indication of the rationale for these changes. In the absence of considering the intent behind this amendment, and any risk mitigation strategies, I do not support the amendment.

Resolution

25. Pending consideration of any further information regarding rationale – amend clause 213 to ensure that money held on behalf of a child or young person is payable to that child or young person on the Chief Executive ceasing guardianship.

Access to information

Under the *CYPS Act*, if a person (over the age of 18) applies for their records from the Department for Child Protection, there are certain circumstances where the Department is not required to provide those records and may instead give access to a medical practitioner nominated by the person, or another person nominated and approved by the Department.

Currently, this is limited to if the records contain medical information and the Department is of the opinion that disclosure of the information may have an adverse effect on the physical or mental health, or the emotional state, of the child or young person. The Bill amends the scope of this provision through removing the word 'medical'; which means the provision applies to any information.

Neither the Minister for Child Protection nor the Department for Child Protection have provided any indication of the rationale for these changes.

I am not necessarily against the changes; however, I would need to consider further information to understand the intention. It is essential to consult with children, young people and those with care experience regarding their views on this matter.

Resolution

26. Pending consideration of any further information regarding rationale – reinsert the word 'medical' into Clause 169(10) and 171(8).

Consent orders

Under the *CYPS Act*, the Court may make certain order with the consent of parties to the proceeding, without consideration of matters it would otherwise be required to.

This supports administrative ease, by removing the need for fulsome proceedings where decisions are agreed to by relevant parties.

The Bill expands the scope of such orders to circumstances where there is consent of 'such of

the parties to the proceeding who *participate* in the proceedings.

I imagine that this may be intended to capture circumstances where one or more of the children or young people's parents have not engaged – or disengaged – from court proceedings.

The primary beneficiary of this provision is Government, through reduced costs associated with proceedings. There is of course a benefit to the child or young person where decisions can be made expeditiously, but I am hesitant to support a provision that aims to take away the need to consider their best interests.

This is particularly concerning noting that it does not only apply to parents, but also would include circumstances where a child or young person is a party to the proceeding but not participating. This would appear to permit the Court to otherwise not consider mattes which are highly relevant to a child or young person's circumstances, based on the fact that the adults are all in agreement.

Neither the Minister for Child Protection nor the Department for Child Protection have provided any indication of the rationale for these changes. In the absence of considering the intent behind this amendment, I do not support the amendment.

Resolution

27. Pending consideration of any further information regarding rationale – delete the words 'such of the parties to the proceeding who participate in the proceedings' from Clause 116(1) and replace with the words 'parties to the proceedings'.

Other changes outside my mandate

The below changes are outside the scope of my mandate noting that they relate primarily to decisions during the assessment stage prior to a child or young person coming into care. As such, I am not best placed to speak to potential consequences. However, they are highly significant, and the Committee should be aware that these amendments have not been highlighted in public-facing materials. Relevant stakeholders may not have had the opportunity to consider and provide important feedback.

- **No action required:** Clause 74 of the Bill introduces new circumstances where the Chief Executive is not required to take action after completing an assessment of a child protection report (not being a quality-of-care report). This includes if the Chief Executive is satisfied that it is not reasonably practicable for further action to be taken in respect of the matter, or if the nature of the harm or potential harm to which the matter relates is such that it would not be expected to have a significant adverse impact on the child or young person's safety or wellbeing.
- **Mental health assessments:** Under the *CYPS Act*, parents, guardians or other persons may be required to undergo certain assessments, including parenting capacity assessment and drug and alcohol assessment. The Bill expands this to include an approved mental health assessment.
- **Drug and alcohol testing:** Under the *CYPS Act*, parents, guardians or other persons may be required to undergo drug and alcohol testing, and be directed to undertake a relevant rehabilitation program, if they have been directed by the Chief Executive to undergo an approved drug and alcohol assessment in the preceding five years. The Bill expands both measures to any person who the Chief Executive reasonably suspects is putting a child or young person at risk of harm as a result of the person's use of alcohol or other drug (or both) – without requiring that they have been assessed.

Conclusion

The Bill, as it stands, represents both hope and challenges. On one hand, it attempts to adopt a forward-thinking reform that align with modern child protection principles and addresses systemic gaps. On the other, it raises concerns about whether it fully delivers on its promise to serve all children and families equitably and effectively.

If I were to sum up my observations, the lack of engagement/ consultation, poor inclusion of expertise advice (especially operational) and children's voices on how the system 'treats them' has severe consequences for the drafting of this Bill, and the policy platform that sit behind it.

It is almost unheard of that an entire sector has principled objections to the question of 'what the paramount consideration should be' – where the obvious answer is, of course, the best Interests of the child – and unified concerns about the operability of an act.

Yet there is a surprising departmental blindness to these issues, that cannot be ignored. With the pressures and vulnerability this Bill will expose the department too (and indeed its workforce), I am genuinely surprised with the lack of movement and consideration from the department in protecting its most precious resources (staff) and its moral/ethical obligation to children and young people.

Whilst I have taken a 'mini' dive into some of the concerns I hold about the Bill, overall, there are big systemic issues that remain unaddressed. It simply does not tackle deeper systemic matters that currently undermine the effectiveness of the child protection system. This includes:

- Chronic underfunding of support services for families and children.
- High caseloads for child protection workers, leading to burnout and reduced quality of care.
- Inadequate support for kinship and foster carers, who are critical to the system's success.

The challenge before us is to refine this legislation so that it truly delivers on its promise to protect and support all children in South Australia.

We have opportunities for improvement, let us take them:

- Reaffirm the foundational Best Interest Framework (which is inclusive of safety), to reset the driver for safety and support of children and young people in South Australia.
- Ensure children are at the centre of all decision making and it is their rights this Bill has been established for.
- Strengthening commitments to Aboriginal self-determination by embedding enforceable obligations and targets.
- Ensuring mandatory reporting reforms do not compromise the best interests of children.
- Improving transparency through independent oversight and robust accountability measures.
- Increasing funding and resources for support services to address systemic shortcomings.

The Bill represented an opportunity to reimagine our child protection system and build a brighter future for South Australia's children. However, it is our duty to ensure that this legislation does not fall short of its potential.

I have participated in this process utilising the fullest capacity I have as Guardian to meaningfully inform and bring about the 're-imagination' of this extraordinarily complex and delicate system. I have had to keep asking myself a very fundamental question, a question that I hope the Committee will ask of itself and of other stakeholders – is this Bill one that will help or hurt our children and young people?

Appendix 1: Summary of Guardian Recommendations to the Review

	NO.	RECOMMENDATION
SUBSTANTIALLY IMPLEMENTED	2.	Embed Aboriginal and Torres Strait Islander Child Placement Principle to the standard of active efforts.
	3.	Make it explicitly clear that the Aboriginal and Torres Strait Islander Child Placement Principle must be taken into consideration in determining Aboriginal children and young people's best interests
	4.	Clarify case plan for Aboriginal and Torres Strait Islander children and young people must include a cultural plan
	11.	Restrict publishing identifying information for children and young people in care – with appropriate exceptions to allow children and young people to make decisions (in accordance with age and maturity) about telling their story
	14.	Include a requirement that case plans for children and young people with disability must include a disability care plan + include access to disability services as a form of assistance the Minister can provide for care leavers
	17.	Clarify classes of people who can apply for an internal review, to ensure significant people to the child have this right – e.g., siblings, parents, relevant professionals etc.
	25.	Introduce statutory obligation to provide a copy of the Charter of Rights to all children and young people in care – as well as info about the Charter and contact details for OGCYP
PARTIALLY INCORPORATED	1.	Best interests of the child as the paramount consideration in decision-making
	5.	Consult with ACCOs and community regarding improving cultural safety for Aboriginal and Torres Strait Islander children and young people in Youth Court and SACAT proceedings
	6.	Legislate to ensure children and young people have an opportunity to personally present views (unless not capable, or not in their best interests) at (1) Annual reviews; (2) Internal reviews; and (3) CARP reviews
	7.	Introduce requirement for children and young people to be represented by an advocate (unless the child or young person has made an informed and independent decision not to be) in (1) SACAT proceedings; (2) internal reviews; and (3) CARP reviews.
	13.	Introduce obligations on state authorities to prioritise assistance to children and young people in care, on request from the CE DCP
	19. & 20.	Sibling relationships must be taken into account when determining best interests + introduce a placement principle for siblings (*i.e., placed with siblings wherever possible)*
NOT INCORPORATED	8.	Children and young people in all forms of alternative care (including third-party orders, and voluntary out-of-home care) should have access to independent advocacy and oversight from the Guardian (with appropriate funding to OGCYP)
	9.	Introduce a funding commitment clause for the Child and Young Person's Visitor
	10.	Associated amendment to the *Equal Opportunity Act*, to make care status a protected attribute
	12.	Clarify that *Consent to Medical Treatment and Palliative Care Act 1995* still applies to children and young people regarding child protection assessments
	15.	Maintain the mandatory reporting threshold
	16.	Enshrine the R20 arrangement in legislation
	18.	Include an obligation to identify eligibility for compensation payments as part of case planning
	21.	Make CARP decisions reviewable by SACAT
	22.	*Guaranteed* assistance for all young people leaving care until the age of 25 – including supported placement as a *guarantee* for all CYP until 21
	23. & 24.	Remove limitation that Charter does not create legally enforceable rights or entitlements
	26.	Establish a Standing Committee of Parliament for ongoing oversight of the State's responsibilities to respect and promote the rights of the child

Appendix 2: Summary of Guardian Recommendations on the CYPSS Bill

NO.	RECOMMENDATION
1	I urge amendment to the draft Bill to make best interests' principle the paramount consideration in decision-making.
2	I recommend that Government releases a public response to the Commissioner for Aboriginal Children and Young People's Inquiry into the Application of the Aboriginal and Torres Strait Islander Child Placement Principle, prior to progressing relevant legislative amendments.
3	a) Legislate to ensure children and young people have a reasonable opportunity to personally present their views at (1) Annual reviews; and (2) CARP reviews b) Remove subclause 141(5) from the Bill.
4	I urge reconsideration of my recommendation that the right to an advocate be extended to internal reviews and CARP proceedings.
5	I urge reconsideration of my recommendation that children and young people in all forms of alternative care should have access to independent advocacy and oversight by the Guardian for Children and Young People. This advocacy function must be funded.
6	I maintain my recommendation to introduce a funding commitment clause for the Child and Young Person's Visitor.
7	I maintain my recommendation to including care status as a protected attribute under equal opportunity law in South Australia.
8	I recommend robust practice guidance to ensure the boundaries of the restriction on identifying public information are well understood by departmental staff, carers and those who work with children and young people in care through government and non-government services.
9	Prescribed authorities under clause 18 should include Housing, SAPOL and relevant justice partners through the Attorney-General's Department.
10	I recommend that DCP gives further consideration to efficiency, resourcing, relying on NGO services for 'soft' self-referrals and discharging obligations through funded NGO services.
11	I recommend further consideration regarding the increased penalty for harbouring or concealing – including further consultation to capture delineation between persons who are concealing for the purpose of harm, and those who seek to enact protective behaviours.
12	I recommend removing the draft provision establishing the Quality-of-Care Report Guidelines. If this recommendation is not accepted, the draft provision must be amended to require consultation with children and young people in care, and advocacy bodies for children and young people in care.
13	I recommend substantially reproducing the reporting requirement in section 156(1)(e) of the *CYPS Act*, within the CYPSS Bill.
14	I urge reconsideration of my recommendation for contact determinations to be decisions reviewable by SACAT.
15	a) I urge reconsideration of my recommendation to guarantee assistance to care leavers, including supported accommodation to 21 years. b) With respect to the age at which care leavers are eligible to receive assistance, I recommend at the very least ensuring that the upper age limit remains the same, inclusive of 25 years of age. However, I also recommend consideration of suggestions made by those involved in my consultation, to remove the upper age limit altogether and enable supports as required throughout adulthood. c) I recommend removing the following changes, which I believe are adverse to care leavers rights and interests: • Removing the Minister's discretion to provide assistance to a care leaver who has been in care for less than six months • Removing the obligation to prepare a leaving care plan for children and young people on short-term guardianship or custody orders.
16	I recommend removing caveats which stipulate that express rights and protections for children and young people do not create legally enforceable rights or entitlements, throughout the CYPSS Bill.
17	I recommend removing the Statement of Commitment from the CYPSS Bill. If there is a need for such a statement an alternative to the CYPSS Bill should be explored.

Appendix 3: Summary of Guardian Recommendations to the Select Committee

NO.	RECOMMENDATION
1	Remove Safety as the paramount consideration
2	Reframe the Bill to incorporate a Best Interest Framework which has the child and young person's best interest as the paramount consideration, with safety as critical but integrated component
3	Delete clause 125, which places the onus of proof on the objector in proceedings related to third-party orders.
4	Remove the words 'except a specified person guardianship order made under section 124' from sub-clause 99(6)(a), which exempts consideration of likelihood of reunification for applications for third-party orders.
5	Remove subclause 100(1)(d) and insert a subclause that substantially reproduces s 51(3) of the *CYPS Act* with respect to applications for third-party orders, to make orders related to parties in proceedings discretionary and after considering the best interests of the child or young person.
6	Expand the list in Schedule 1 of persons who may apply for an internal review of item 1 – a determination as to whether a proposed guardian is suitable to be the guardian of a child or young person – to include at least the following: • The child or young person • A parent of the child or young person.
7	Include contact determinations made by the Chief Executive under clause 139 of the Bill, as a decision subject to internal review as set out in Schedule 1 of the Bill.
8	Re-initiate consultation on Part 4 with key stakeholders including Aboriginal and Torres Strait Islander children and young people, community leaders, the Guardian for Children and Young People, the Commissioner for Aboriginal Children and Young People, Wakwakurna Kanyini and SAACCON.
9	Include Housing, SAPOL and relevant justice partners through the Attorney-General's Department in the scope of the prescribed bodies, either directly through the Bill or associated regulations.
10	Create legislative obligation to ensure children and young people are provided an opportunity to personally present their views at key decision-making forums and processes; namely, Annual Reviews, Internal Reviews and CARP reviews.
11	Require the annual review panel to notify the child of their annual review, and give them a reasonable opportunity to make submissions (including in the absence of a person who has care of them)
12	Remove guaranteed opportunity for in-person attendance and submissions at annual reviews from carers with whom a child or young person is placed. Rather maintain current status for carers to make submissions as appropriate.
13	That the Statements of commitment for carers, parents and families are removed from the Bill.
14	That, if required, other instruments are development to recognise and provide a framework for acknowledging respectful working relationships and partnerships with parents, families and carers.
15	Remove the Quality-of-Care report process from the Bill, to ensure that the same legislative standard applies to all child protection reports.
16	Continue work to address recommendations relating to procedural fairness and other related matters for carers through the Care Concern Reform project.
17	As a minimum requirement, replicate the eligibility criteria for leaving care supports under the CYPS Act.
18	Mirror existing penalty provisions in the CYPS Act, for the offences established under clauses 167 and 168.
19	Remove Clause 29(4)(b)(ii)(B).
20	Remove Clause 127 from the Bill.
21	Pending consideration of any further information regarding rationale – remove Clause 132(3) from the Bill.
22	Pending consideration of any further information regarding rationale – remove Clause 28(1)(d) and 28(1)(e) from the Bill.
23	Pending consideration of any further information regarding rationale – remove Clause 114 from the Bill.
24	Pending consideration of any further information regarding rationale – remove the definition of *parent* from Clause 85 of the Bill.
25	Pending consideration of any further information regarding rationale – amend clause 213 to ensure that money held on behalf of a child or young person is payable to that child or young person on the Chief Executive ceasing guardianship.
26	Pending consideration of any further information regarding rationale – reinsert the word 'medical' into Clause 169(10) & 171(8).
27	Pending consideration of any further information regarding rationale – delete the words 'such of the parties to the proceeding who participate in the proceedings' from Clause 116(1) and replace with the words 'parties to the proceedings.

Guardian
for Children and
Young People