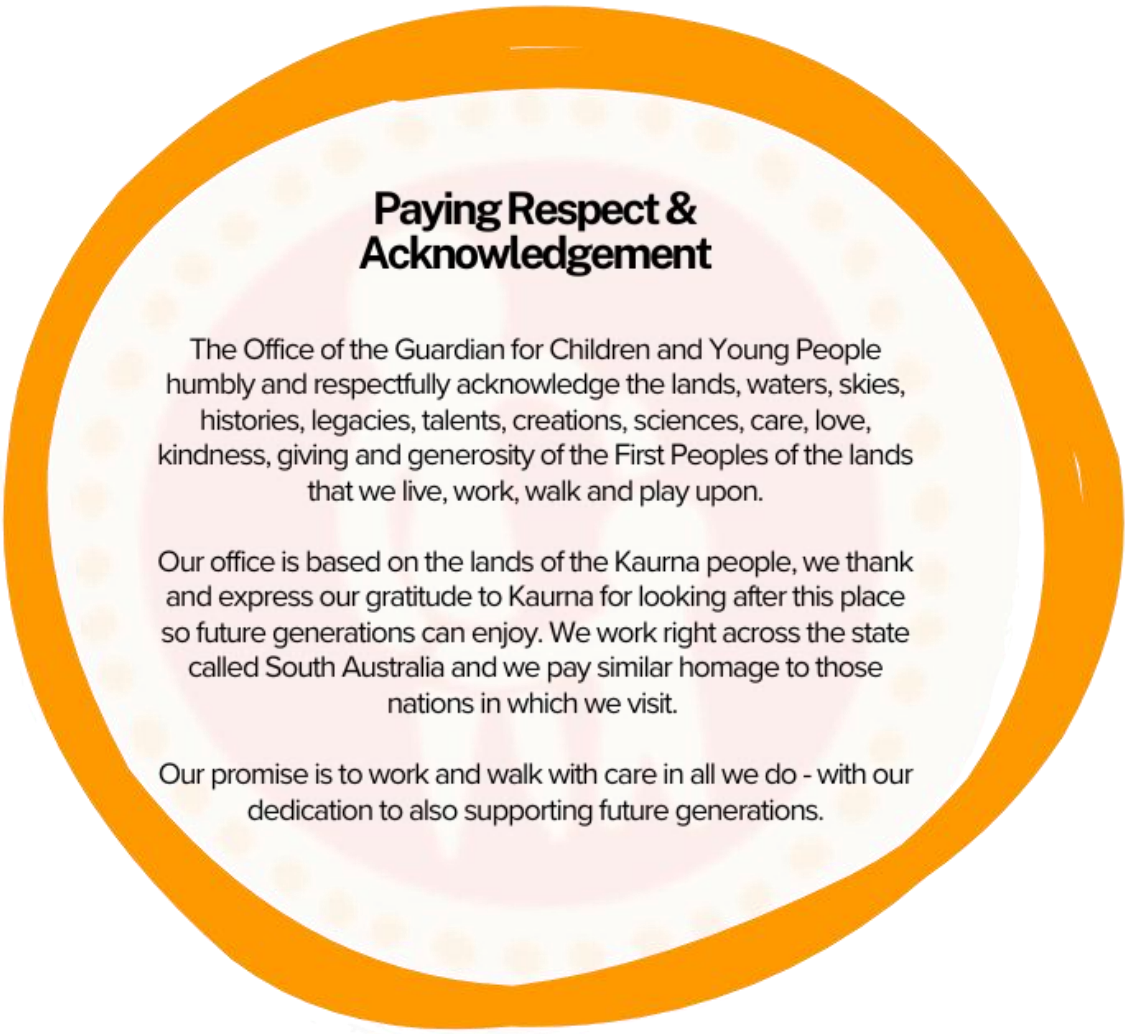
THE GUARDIAN AND TRAINING CENTRE VISITOR'S

Submission

Consultation on Draft Summary Offences (Prohibition of Publication of Certain Material) Amendment Bill 2024

November 2024

Guardian
for Children and
Young People



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Training Centre Visitor, Level 3, 111 Gawler Place, Tarnatanya 5000

www.gcyp.sa.gov.au Ph. 08 8226 8570

gcyp@gcyp.sa.gov.au

GPO Box 2281

Tarntanya SA 5001

DX 115

Introduction

I provide this feedback in my capacities as South Australia's Guardian for Children and Young People, Child and Young Person's Visitor and Training Centre Visitor. In these roles, I am appointed to promote and protect the rights and best interests of children and young people under the guardianship or in the custody of the Chief Executive of the Department for Child Protection, and children and young people on remand or sentenced to detention at the Adelaide Youth Training Centre (AYTC).

The Draft *Summary Offences (Prohibition of Publication of Certain Material) Amendment Bill 2024* proposes to create a new offence to criminalise 'the glorification and promotion of criminal conduct on social media and other electronic communication platform, commonly known as "posting and boasting", in light of its potential contribution to youth offending.'[1]

To be clear from the outset, I do not support this proposed amendment to the *Summary Offences Act 1953*. Feedback in my submission that relates to particular drafting issues should be read in light of this fundamental and principled opposition.

We are currently witnessing a socially dangerous and irresponsible targeting and demonisation of children and young people across Australia. I see this draft bill as part of the continued attack on children and young people's rights, which is happening in jurisdictions across the country. This includes abandoned commitments (or, in South Australia's case, markedly continued silence) to raise the minimum age of criminal responsibility from the reprehensible age of 10 years old;[2] removal of the principle of 'detention as a last resort';[3] the reintroduction of archaic and barbaric practices such as the use of spit hoods;[4] and lack of meaningful progress towards preventing harmful isolation practices.

I consider these proposed 'post and boast' laws to be in the same vein, as yet another example of increased policing and criminalisation of children and young people. The proposed laws see us turning away from foundational protected principles of our criminal

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[1] The Hon Kyam Maher MLC, Minutes forming Enclosure to Guardian for Children and Young People, Consultation on Draft Summary Offences (Prohibition of Publication of Certain Material) Amendment Bill 2024, File ref: A2485720, email dated 30th October 2024.

[2] Legislative amendment to *Criminal Code 1983* (NT), amends section 38, 38A, 43AP and 43AQ to lower the age of criminal responsibility from 12 to 10 years of age, Passed in October 2024.

[3] Legislative amendment to *Youth Justice Act 1992* (QLD), Sections 13, 150 and schedule 1 omission of section 208 – Removal of detention as sentence of last resort. Passed in March 2024.

[4] Operational ban lifted for use of spit hoods in police watch houses in Northern Territory, October 2024. See: https://www.sbs.com.au/news/article/nt-childrens-commissioner-deeply-concerned-as-spit-hoods-to-be-reintroduced/xjcqo10fc

legal system, and further away from our moral and legal responsibility to care for and uphold the rights of children and young people.

With my broader principled objection noted, my submission also analyses – and raises concerns regarding – technical components of the proposed law, as drafted. This includes:

- Inconsistency with key legal rights for defendants in criminal proceedings
- A disproportionate and severe penalty for the offence
- Separation of powers implications regarding the executive power to 'prescribe' offences
- Foreseeable interpretation issues, regarding proving 'intent' and the notion of 'legitimate public purpose'
- Forecasted enforcement approaches and consequences.

In short, I urge Government not to proceed with these draft laws. However, in the political climate I have described above, I am realistic that my advice may be ignored. At the very least, I press upon Government the need to engage in significant redrafting and engagement with experts across our own state in building a process that steers towards the true intent of keeping children, young people and our communities safer here in South Australia.

Key objections to 'post and boast' laws

Where is the evidence?

It is a sad state of affairs when adults with power seek to target and 'catch out' children and young people, with laws that carry the threat of imprisonment. It is an even worse state of affairs when these laws are created without evidence to indicate that they will be effective into achieve intended aims.

I am sorry to say that this is the situation I have observed with the proposed offence. Essentially, this laws threaten imprisonment to anyone who posts criminal conduct on social media for the purposes of encouraging, glorifying or promoting the conduct. The

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rationale for doing so is, to quote the Attorney-General: 'its *potential* [emphasis added] contribution to the occurrence of youth offending.'[5]

I hear these words, as I'm sure many do, as an attempt at social experimentation. Just in case this works, the government is willing to try it. But the consequence of this experiment is the further criminalisation of children and young people. And the evidence I have before me says it won't work.

In fact, I don't believe that there is any evidence to support this attempt, especially given the human rights implications at stake.

As always, I challenge the notion that it is necessary to further criminalise young people in order to curb offending behaviour. Doing so is inconsistent with credible expert evidence about children and young people's development and neurodevelopmental needs.[6] This is the evidence we *do* have. This is what should inform our actions. This is what should drive any youth justice reforms.

I urge government to rethink how we treat the children and young people who may be captured by these new laws. By now, we should have no doubt that a different way of thinking is required, alongside changed investment approaches, and restructuring community-based support networks and infrastructure.

And I have no doubt that the money and resources that would be spent on the enforcement and prosecution of 'post and boast' laws would be far better spent on evidence-based ways of reducing the alleged offending behaviours depicted in the relevant social media posts.

The South Australian Government has provided the community with no evidence that the proposed amendments would deter youth offending. Ironically, if passed, 'post and boast' laws will likely *increase* youth offending because of simple maths: creating and prosecuting a new offence means that there will be more offending attributed to young people and reported in the media.

Further, the process of removing offending content can be slow. This means that even when material is published in a manner that would offend 'post and boast' laws and the post is identified, it could take some time for the content to be removed. This means that

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[5] The Hon Kyam Maher MLC, Minutes forming Enclosure to Guardian for Children and Young People, Consultation on Draft Summary Offences (Prohibition of Publication of Certain Material) Amendment Bill 2024, File ref: A2485720, email dated 30th October 2024.

[6] 3 D Arrendondo, 'Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making' (2003) 14 Stanford Law & Policy Review 1, 13–28.

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the issue that these laws are supposedly concerned with – that is, the promotion of criminal conduct – would likely be unaffected for the period in which the material is still published.

Social media use…prohibited and punished?

I have to point out: this amendment has been proposed at the same time that the Government is progressing mechanisms to prohibit or limit social media access for children and young people under 16 years of age.[7]

This action is based on a purported need to safeguard and protect children from the negative impacts and consequences of social media. But it is important to highlight that the children and young people who would be criminalised under this proposed new offence are the very same who Government intends to 'protect' from using social media.

There is a deeply confused ideology underlying this scenario, regarding how we understand and treat children and young people's developing social skills and responsibility. The inherent disconnect is not lost on me, and I'm sure it will not be lost on South Australian communities:

- On the one hand, Government is saying that children should be protected from social media due to their maturity and stage of child and adolescent development,
- On the other hand, Government is attempting to criminalise children and young people for a particular type of social media use, which is *entirely consistent* with risk-taking behaviours characteristic to their stage of child and adolescent development.

If Government intends to regulate social media platforms in South Australia, then it is logical and reasonable to work with those platforms to prevent distribution of posts which 'glorify' or 'promote' criminal conduct. Relevant technology is already used – and constantly evolving – to remove inappropriate content from social media. Further, the eSafety Commissioner has broad powers that can compel the taking down of certain material related to this under the Online Safety Act. If the desire is for the material to be removed, then the government could support or promote the eSafety Commissioner's ability to do this rather than creating new offences that would most likely hinder the eSafety Commissioner's power by adding complex administrative red tape. Appropriate regulation and enforcement of publication is a much more effective solution than policing and prosecution of children.

[7] Legal examination into banning children's access to social media, Terms of Reference, Department of the Premier and Cabinet, Government of South Australia.
https://www.dpc.sa.gov.au/__data/assets/pdf_file/0019/1007830/Legal-examination-into-banning-childrens-access-to-social-media-Terms-of-Reference.pdf

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In the context of the above discussion, I would like to make it clear: I am entirely unconvinced that either the social media ban or the criminalisation of 'posting and boasting' is necessary or appropriate. But the hypocrisy and confusion underlying these concurrent policy positions must be called out, and resolved.

Guiding principles of the youth justice system

The youth justice system in South Australia is regulated by companion pieces of legislation[8] that set the tone for how young people and the broader community should expect the South Australian Government to enact youth justice reforms.

In my role as Training Centre Visitor, I often have to remind Government that a central object and guiding principle of the *Youth Justice Administration Act* is to:

> *'promote the* ***rehabilitation*** *of youths by providing them with the care, correction and guidance necessary for their development into responsible members of the community and the proper realisation of their potential'*.[9] (emphasis added)

Let us also remember that a key object and statutory policy of the *Young Offenders Act* is:

> *'to secure for youth who offend against the criminal law the care, correction and guidance necessary for their development into responsible and useful members of the community and the proper realisation of their potential'*.[10]

The proposed laws and appear aimed at generally deterring children and young people from either engaging in relevant criminal offences or posting about conduct. This is highly inconsistent with a rehabilitative approach, to help guide children and young people when they make mistakes.

Another central object and statutory policy of the *Young Offenders Act 1993* (SA) is that the focus of sentencing a young person is on the deterrent effect on the youth *personally*,[11] not general deterrence. This is a key difference from criminal justice principles in the adult jurisdiction. In fact, it is only when the young person is being dealt with as an adult that the court may consider the general deterrent effect on other young people.

In a political climate that responds with great urgency to demands for increased community safety, I must again highlight that we have no evidence that the conduct targeted by the proposed law is connected with increased offending. As such, I urge the Government to prioritise rehabilitation, care, correction and guidance – instead of punishing children and

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[8] The *Young Offenders Act 1993* (SA) and the *Youth Justice Administration Act 2016* (SA).

[9] S 3(1)(e) *Youth Justice Administration Act 2016* (SA).

[10] S 3(1) *Young Offenders Act 1993* (SA).

[11] S 2(a) ***Young Offenders Act 1993*** **(SA).**

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young people, through laws that move us further away from these guiding principles which form the legislative backbone of the youth justice system.

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Technical objections: the drafted offence

Disproportionate and severe penalties

The proposed offence, as drafted, carries a maximum penalty of two years imprisonment (or detention, for children and young people). This is a disproportionate and severe consequence, for the act of posting a video or other content.

In this context, it's important to point out that the person who posted the content may be charged, even if they were not actually involved in the alleged criminal conduct depicted in the video – and even if no one is prosecuted for that substantive offending.

This is especially concerning, given the proposed offence has significant potential to apply to content depicting relatively minor or innocuous behaviour.

Although we hear rhetoric about 'post and boast' laws being intended to target the glorification about 'serious offences', we need to be real about what's actually covered by these proposed laws. As drafted, this offence captures publishing material which depicts 'conduct constituting, or apparently constituting, a prescribed offence',[12] being an offence involving:

- driving or operating a vehicle or vessel;
- the use of, or the threat of using, violence;
- the use of, or the threat of using, a weapon;
- interference with, damage to, or destruction of, property;
- theft or an offence of which theft is an element;
- criminal trespass or an offence of which trespass is an element
- an offence, or offence of a class, declared by the regulations to be a prescribed offence.

This list includes behaviour which is serious, and may cause harm to people in South Australian communities. But it also includes behaviour which I believe most would describe

[12] Draft *Summary Offence (Prohibition of Publication of Certain material) Amendment Bill 2024* (SA).

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as relatively innocuous…which may cause parents, families and carers worry, but would most often not be criminalised in children and young people.

As an example: a teenager who posts a video of their friend riding a bike while drinking alcohol could be captured by the proposed post and boast laws.[13] Using this example does not mean that it is ok for a teenager to be riding a bike while intoxicated. But this event is a fairly common weekend occurrence all over the country. And I struggle to believe that posting such a video is conduct which anyone in our community believes should be separately criminalised.

The application of police intelligence gathering and discretion may be unlikely to result in charges for such a situation. But we have to be real about the consequences of legislating new offences, and it is a huge risk to rely on individual discretion when it comes to children and young people's lives and futures.

In this context, it is important to contextualise the proposed maximum penalty of two years imprisonment, with offences which carry an equivalent – or lesser – penalty.

Table 1: Penalty comparison to existing offences

Example offences with the same penalty	Example offences with a lower penalty
• Assault (s 20 *Criminal Law Consolidation Act 1935*) • Handling firearms when under the influence of intoxicating liquor or drug (s 42 of the *Firearms Act 2015*) • Indecent filming (s 26D *Summary Offences Act 1953*)	• Humiliating or degrading filming (s 26B *Summary Offences Act 1953*) • Carrying a knife in a school without lawful excuse (s 21E *Summary Offences Act 1953*) • Threatening to distribute an invasive image of a person 17 years or older (s 26DA *Summary Offences Act 1953*) • Careless driving (s 45 *Road Traffic Act 1961*) • Driving under the influence of intoxicating liquor or a drug so as to be incapable of exercising effective control of a vehicle (s 47 *Road Traffic Act 1961*).

When legislating offences and maximum penalties, we have to think not only about the social ill or harms which are being targeted. We have to think about the appropriate legal

[13] "Vehicle" is defined as including a bicycle under the *Road Traffic Act 1961*(SA), and it is an offence to drive a vehicle under the influence: s 47 Road Traffic Act 1961 (SA).

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and moral responsibility of the person who would be prosecuted, and the potential for expansion, 'slippage' and misuse. A maximum penalty of two years imprisonment, coupled with a broad range of potential target conduct, is a recipe for disproportionate and severe policing and prosecution consequences.

Future expansion?

It is highly disturbing to note that the list of prescribed offences includes the following:

> *An offence, or offence of a class, declared by the regulations to be a prescribed offence.*

This allows wide scope for criminal offences to be established through regulations,[14] which is highly irregular and inconsistent with a central principle in our system of government – the separation of powers.

This foundational principle, which divides power between the Parliament, the Executive, and the Judiciary, provides the checks and balances that are critical to our modern democracy. Since regulations are considered secondary legislation, they are typically able to be made by Ministers, government agencies or particular persons (such as the Commissioner of Police). Significantly, it does not require a new law to be passed by Parliament. As such, by proposing that the regulations be able to expand the scope of prescribed offences, Parliament is providing significant powers to the Executive, to expand the scope of a criminal offence.

This opens the door too wide, and I am deeply concerned that Government (or future Governments) could make regulations in a way that targets particular groups of people, or significantly limits freedom of expression. For example, if the regulations incorporated the obstruction of public places offences in s 58 of the *Summary Offences Act* 1953, it could become illegal to post videos in support of protests or environmental activism.

Leaving this power to the regulations is entirely inappropriate. If there is to be an expansion of captured offences in the future, this must be done through the proper legislative processes – including appropriate opportunity for individuals and organisations to express feedback and concerns.

Who is being targeted?

The vast amount of content uploaded daily on social media means that broad monitoring and enforcement would be difficult. In this context, I am concerned about those children

[14] Draft *Summary Offence (Prohibition of Publication of Certain material) Amendment Bill 2024* (SA).

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and young people who are more likely to be the subject of police surveillance, and less likely to receive the benefits of discretion.

Across multiple publications and forums, I raise the voices and experiences of children and young people in residential care, who often talk about having a target on their back when it comes to police involvement. Minor property damage, or instances when they are angry and may yell or swear or say threatening words to carers, often result in police attendance. The reality is that these challenging nights, fights or conversations are far less likely to result in parents calling police on their children, as an intervention tool. But, when navigating residential care houses as both a child or young person's home and a workplace for carers (or asset for organisations), there is a much lower threshold for police intervention.

> *"there's a couple of assaults actually on the carers but I don't know why they charged that as assault. I didn't even assault but they count it as it because I was chucking water over the carers with a hose, just mucking around having fun, you know, but they took it too far."*
>
> - Young person in residential care[15]

The more police contact a young person has, the more 'known' that young person becomes to police and the less likely that discretion will be applied in policing decisions. Just as young people in residential care receive a more criminalised response to property damage and fights with carers, there is a risk that they will also receive a more criminalised response to their social media activity. For example, the drafted offence would technically also capture a circumstance where a teenager posts a video of another young person living in their residential care house deliberately causing minor property damage, such as breaking a glass or chipping a wall.[16] The way in which children and young people in residential care are currently policed, I worry that such examples could be used against them and result in increased criminalisation.

It is also important to be mindful about two key SAPOL operations, which are designed to target young people alleged to be involved in group offending, with specific focus on particular cultural backgrounds: Operation Mandrake (which largely focuses on Aboriginal young people) and Operation Meld (which largely focuses on African-Australian young people).

Where targeted police operations are established, this comes with pressure – formal or otherwise – to meet arrest and prosecution indicators. Children and young people who are captured within scope of formal police operations are at increased risk of surveillance, and increased risk of overcharging practices.

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[15] OGCYP, *Six Month Snapshot of the South Australian Dual Involved Project: Children and young people in South Australia's child protection and youth justice systems* (2021), 24.

[16] This could be considered an offence involving damage or destruction of property.

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This bears out in South Australia's youth detention population: on an average day in 2022-23, more than 50% of young people detained were Aboriginal, and more than 12% of young people detained were African-Australian.[17] In fact, only 1 in 4 young people on an average day were neither Aboriginal nor from a culturally and linguistically diverse background. This indicates a highly racialised policing and criminal justice response to children and young people in South Australia.

In the context of targeted police operations, there is a shift in the likelihood that relatively innocuous social media content could lead to criminal charges.

For example, a social media post depicting a young person riding their bike while apparently intoxicated is unlikely to be picked up by police for the majority of high school students. But, where police are in fact monitoring particular young people's social media accounts due to a history of or suspicion of offending, the circumstances are very different. And the ease of prosecuting posting of content – in comparison to prosecuting substantive offences – may well become an attractive and efficient policing response for SAPOL's targeted operations.

Ultimately, South Australian statistics indicate that Aboriginal young people, and young people from migrant communities, are most likely to be impacted by this response. As such, I am unable to reconcile how the proposed offending can be interpreted as consistent with South Australia's *Closing the Gap Implementation Plan* or the *South Australian Multicultural Charter*.

Issues of proof

Eroding the presumption of innocence

There are serious consequences of framing the offence to include material 'apparently constituting' a prescribed offence.

Instead of the prosecution proving that what's depicted in the material was actually a criminal offence, instead the onus is on the defendant to prove that the conduct did not constitute a prescribed offence.[18] Shifting that onus to the defendant is a very serious undermining of a key legal principle – the presumption of innocence.

There are serious legal, ethical and practical implications that need to be considered when proposed criminal offences create a reverse onus of proof in this way. These include:

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[17] With 1 in 2 being Aboriginal young people, and 1 in 8 before African-Australian young people. This data is based on my office's analysis of daily population data provided by the Department of Human Services (unpublished).

[18] Draft *Summary Offence (Prohibition of Publication of Certain material) Amendment Bill 2024* (SA).

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- Increased likelihood that more people will be charged with the offence and prosecuted, due to the relative ease of prosecution.

- The serious social (including future employment consequences) that come from even being charged with an offence, regardless of whether it is proved or results in a conviction.

- Impacts upon key common law rights – including the right to silence, and against self-incrimination – by effectively compelling a defendant to testify or otherwise evidence that the conduct depicted in the relevant media was not in fact criminal conduct.

I do not believe – and I doubt that the public would believe – that there is a reasonable or proportionate reason for displacing this fundamental human right to the presumption of innocence. This is particularly so, in light of the disproportionate and severe penalty clause attached to the proposed offence (as discussed in the preceding section).

The creation of a reverse onus causes me deep concern about the intention behind the offence. I am worried that it may be geared towards increasing successful prosecution rates for targeted groups of young people, through easing SAPOL administrative and investigative burdens.

Shifting this burden back onto vulnerable children and young people – who do not have all of the resources that the Government of South Australia holds – is socially dangerous and irresponsible.

If Government intends to proceed with these laws, the very minimum standard should be that the prosecution must prove the material published depicted an actual criminal offence.

Interpretation issues: 'Proving' intent

I also highlight the likelihood of significant interpretation issues around proving that a person who publishes relevant material has the necessary 'intent'.

As a standard principle, it is necessary for the prosecution to establish the 'mental' or 'fault' element of a criminal offence. For the proposed law, that fault element is encapsulated in the newly proposed s21AA (1)(b)[19], being that the person publishes the material or the purposes of *'encouraging, glorifying or promoting the conduct*' or '*increasing the person's notoriety, or another person's notoriety, because of their involvement in the conduct.*'

[19] Draft *Summary Offence (Prohibition of Publication of Certain material) Amendment Bill 2024* (SA).

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From a practical perspective, that will require consideration of associated text accompanying publication, contextual information, evidence obtained through police interviews, or evidence directly provided from the defendant or other witnesses.

I query what will be treated as sufficient proof regarding that intent. While all criminal offences deal with the difficulty of establishing a person's motivations, these new and untested laws face significant challenges surrounding the generational gap between those whose motive is being judged, and the people doing the judging. Those who have power in that equation are the adults in the room, who use social media in a very different way to the children and young people who are being targeted by these offences.

I am concerned that the proposed amendments are essentially asking adults to make assumptions of the young people's behaviour on social media or online platforms, and judge this behaviour against adult standards about the use of social media.

Legitimate public purpose – according to who?

The purpose for publishing the material is central to the question of intent, and the draft offence includes a relevant defence: that a person does not contravene the offence if the publication of the material was for a 'legitimate public purpose'.[20]

The publication of material will only be taken to be for a legitimate public purpose if the publication was in the public interest having regard to whether the publication was for purpose of:

- educating or information the public
- making or publishing a fair and accurate report of any event or matter of public interest
- for the purpose of a work of artistic merit
- connected to law enforcement or public safety
- for a medical, legal or scientific purpose. and
- any other factor prescribed by the regulations.[21]

As a new offence, it will take time for interpretative guidance to develop through the judiciary, surrounding what is and isn't a legitimate public purpose.

For example, questions may arise around whether this defence applies if a post was for both a legitimate public purpose, as well as able to be conceived as "encouraging, glorifying or promoting the conduct"? Take the example of private individuals capturing and posting

[20] Draft *Summary Offence (Prohibition of Publication of Certain material) Amendment Bill 2024* (SA).

[21] Draft *Summary Offence (Prohibition of Publication of Certain material) Amendment Bill 2024* (SA).

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potential police misconduct, such as alleged inappropriate use of force in an arrest, when the person being arrested is resisting.

The person being arrested may be apparently committing a prescribed offence, using violence or threat of violence. If accompanying text for a social media both indicates a legitimate public purpose – eg, transparency regarding police arrests and conduct – while also 'glorifying' the act of resisting arrest, how would this be resolved from an interpretative perspective?

These interpretative issues are likely to arise quickly if these laws proceed. However, they are also likely to arise silently, through plea negotiations or trial outcomes that people do not have the legal resources to challenge through higher courts. If Government intends to proceed with these laws, greater attention should be directed towards mitigating such interpretation risks.

Conclusion

I emphasise again – these laws just do not make sense.

If the Government wishes to curb alleged 'youth offending', then we know what *does* make sense: youth justice reforms that are evidence-based and give credence to the solutions posed by the people who are most impacted.

We need immediate investment in holistic diversionary services and initiatives for children and young people (including their families).

And most importantly, we need a Government that supports children and young people within the community as a priority over heavy-handed criminogenic responses that are ineffective at improving community safety.

The potential consequences of introducing this drafted offence are serious, and the potential gain for South Australian communities is not apparent. Indeed, where it can be proven that criminal offending has been filmed/photographed and posted in a manner encouraging the offence, there are already accessorial liability options for prosecuting individuals involved.

So, I have to ask, why introduce these laws?

In reviewing the draft bill, it appears that a desire to lessen investigative and prosecutorial burdens upon the State may have strongly influenced drafting. Doing so is inconsistent with key principles of our criminal justice system, and an unacceptable encroachment on civil liberties.

I urge Government not to proceed with the draft offence.

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