Guardian for Children and Young People
Training Centre Visitor

Hon Kyam Maher MLC
Attorney-General
GPO Box 464
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By email only to LLPSubmissions@sa.gov.au

Friday, 14 February 2025

Dear Attorney-General

Consultation on Statutes Amendment (Criminal Procedure and Evidence) Bill 2024

I write to provide my submission on the Statutes Amendment (Criminal Procedure and Evidence) Bill 2024, enclosed in correspondence I received from you 5 December 2024 (your ref: A2573660).

I provide this submission 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.

I note that the Bill contains criminal justice-related amendments to six Acts relating to the topics of Markuleski-type directions, discreditable conduct evidence, intervention orders, interlocutory appeals and serious offences.

My submission considers what these changes will mean for children and young people in care, and those in contact with the youth justice system, with a focus on ensuring that any resultant legislation upholds their respective rights.

I am supportive of work to continue incorporating recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse, I note that a number of changes are not connected to those recommendations. My submission raises matters that I believe require further consideration, regarding each of the proposed changes.

Thank you for your consideration of my submission. If you have any questions or would like to arrange a meeting, please feel free to contact my Principal Policy Advisor, Alicia Smith on Alicia.Smith2@sa.gov.au or 8226 8570.

With kind regards

Shona Reid

Guardian for Children and Young People
Training Centre Visitor
Child and Young Person's Visitor
Youth Treatment Orders Visitor

*Encl. GCYP Submission on Statutes Amendment (Criminal Procedure and Evidence) Bill 2024

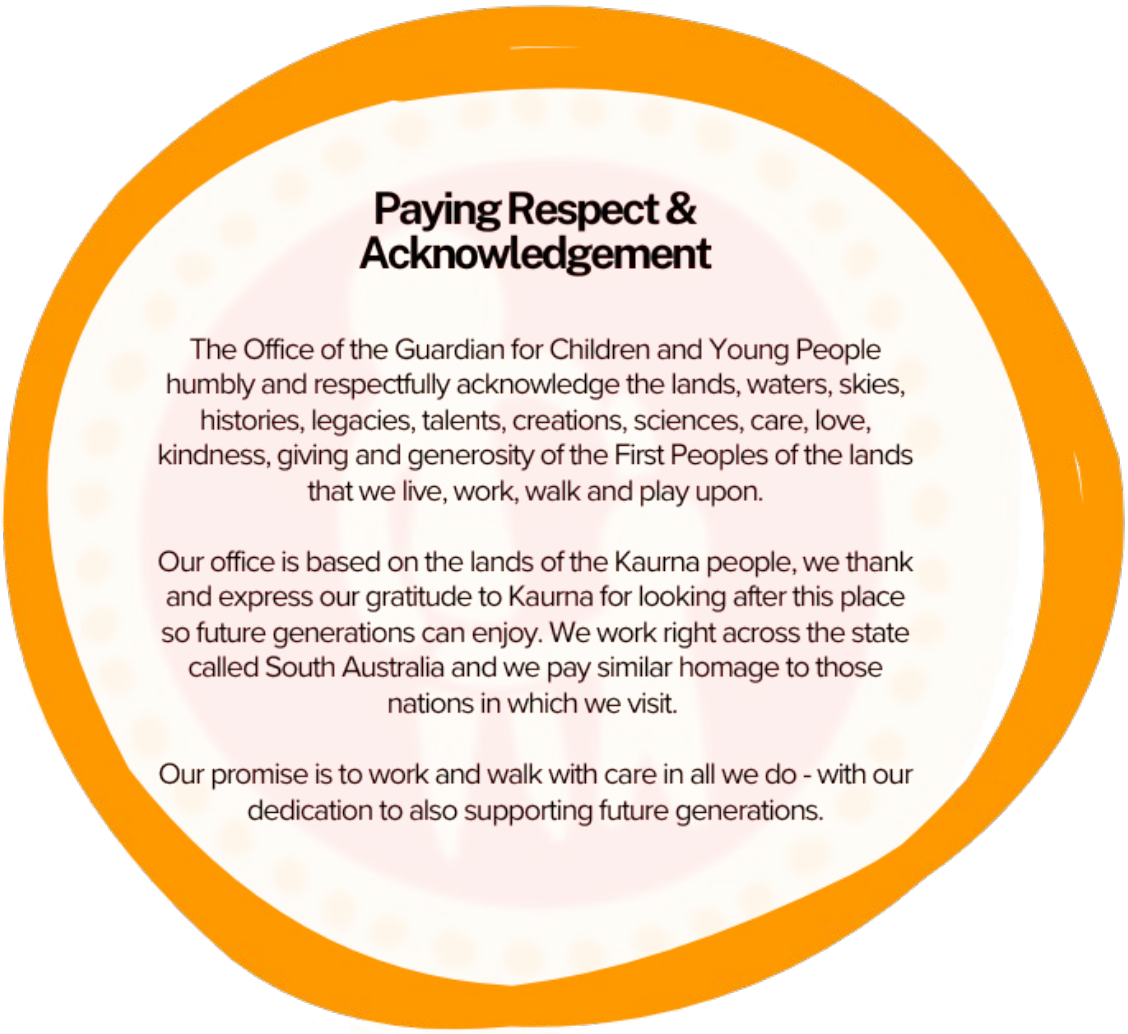
THE GUARDIAN AND TRAINING CENTRE VISITOR'S

Submission

Statutes Amendment (Criminal Procedure and Evidence) Bill 2024

February 2025

Guardian
for Children and
Young People



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Contents

Introduction 6

Royal Commission – related amendments 7

Markuleski-type directions 7

What is the change? 7

What is the rationale for the change? 8

My position 9

Discreditable conduct evidence – relating to sexual interest in children 10

What is the change? 10

What is the rationale for the change? 11

What are the options for reform? 13

My position 14

Interlocutory appeals 16

What are the changes? 16

What is the rationale for the changes? 17

Potential impact of the changes 18

My position 20

Making it to trial 21

Other amendments 23

Intervention orders 23

What are the changes? 23

What is the rationale for the change? 24

My position 24

Serious repeat offences 24

What is the change? 24

What is the rationale for the change? 26

My position 27

Conclusion 29

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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.

This submission has been prepared in response to the Attorney-General's consultation on the draft Statutes Amendment (Criminal Procedure and Evidence) Bill 2024.

The drafting of this submission was not easy. In examining a Bill of this nature, I must take the rights of children and young people as complainants and the rights of children and young people as defendants into careful consideration. Law makers also need to be considering the rights of children and young people – and how the changes they enact will affect these rights. They also need to evidence that they have made these considerations.

Another complicating factor in developing this submission is that while the Bill is small, comprising only six pages, it has the potential for big impacts.

The Bill contains criminal justice-related amendments to six Acts relating to the topics of Markuleski-type directions, discreditable conduct evidence, intervention orders, interlocutory appeals and serious offences.

Some of the changes seek to strengthen the government's response to recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse's Criminal Justice Report (the Royal Commission); while some are seemingly unrelated. In this way the Bill is somewhat disjointed.

In my submission I describe each change and make observations about implications for children and young people in care and detention. I start with the changes connected to Royal Commission recommendations, and then address those which are related to criminal proceedings more broadly. While I am supportive of the changes relating to Markulseki-type directions, I hold concerns about the remaining substantive changes, as they carry potentially serious consequences for children and young people in care and detention.

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Royal Commission – related amendments

This Bill, to a degree, forms part of the government's ongoing response to the Royal Commission's Criminal Justice Report. SA's latest progress against the recommendations made in this report are contained in the government's RCIRCSA's 2024 recommendation status report.[1]

Of the 85 recommendations 76 have been marked as 'complete', 4 as 'planning', 2 as 'implementing' and 3 'for further consideration'.

Relevantly, recommendations 66 (relevant to discussion regarding Markuleski-type directions), 45 (relevant to discussion regarding discreditable conduct evidence), and 79 and 80 (relevant to discussion regarding interlocutory appeals) have all been marked as 'complete'. This raises two alternative questions:

Where these recommendations have truly been completed, can they be relied upon as a justification for the current amendments?

Or

Where these recommendations have not yet been implemented, why are they marked as complete?

Whichever the case may be, changes to laws must have a clear justification, with the impacts on all potential parties must be considered. In this section, I consider the potential implications of the proposed changes for children and young people in contact with the justice system – both as complaints and defendants.

Markuleski-type directions

What is the change?

The proposed amendments to the Evidence Act 1929 contained in clause 5 of the Bill seek to extend the prohibition of Markuleski-type directions to criminal trials involving a single charged offence.

Markuleski direction:

Under a common law rule, the trial judge in cases involving multiple charges should direct the jury that if there is any reasonable doubt concerning the truthfulness or reliability of a

[1] SA Government, RCIRCSA 2024 recommendation status (September 2024).

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complainant's evidence in relation to one count, that doubt must be taken into account when considering the credibility of the complainant's evidence in relation to other counts.[2]

Currently, the Evidence Act 1929 reads:

> **29B – Prohibited direction in relation to doubts regarding truthfulness or reliability of victim's evidence**
>
> (1) In a trial in which more than one offence is charged, the trial judge must not direct the jury that if the jury doubts the truthfulness or reliability of the victim's evidence in relation to a charge, that doubt must be taken into account in assessing the truthfulness or reliability of the victim's evidence generally or in relation to other charges.
>
> (2) Any rule of common law under which a trial judge is required or permitted to give the jury a direction referred to in subsection (1) is abolished.

Where the changes are made subsection (1) would be deleted and substituted with:

> (1) In a trial (whether for a single offence or [emphasis added] in which more than 1 offence is charged), a trial judge must not direct the jury that if the jury doubts the truthfulness or reliability of the victim's evidence, that doubt must be taken into account in assessing the truthfulness or reliability of the victim's evidence generally or in relation to other charges.

What is the rationale for the change?

The current provision – s 29B – was introduced as a response to recommendation 66 of the Royal Commission's Criminal Justice Report:[3]

> The New South Wales Government, the Queensland Government and the government of any other state or territory in which Markuleski directions are required should consider introducing legislation to abolish any requirement for such directions.

Section 29B goes beyond this recommendation; abolishing the requirement to give a Markuleski direction, but also prohibiting judges from giving such a direction. While this is consistent with the approach taken by Queensland in the Evidence Act 1977 (Qld), it is more restrictive than the approach taken by other jurisdictions.

The proposed amendment seeks to ensure this prohibition also applies to circumstances beyond the scope of the common law requirement to give a Markuleski direction, to clarify it also applies to where a defendant is being tried for a single offence. This covers offences that encapsulate a pattern of abuse, including the offence of sexual abuse of a child, under section 50 of the Criminal Law Consolidation Act.

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[2] Attorney-General (SA), Minute to Guardian for Children and Young People: Statutes Amendment (Criminal Procedure and Evidence) Bill 2024 (5 December 2024).

[3] Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report (2017).

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In the explanatory minute accompanying the draft Bill, the Attorney-General explained the reason for the change, to clarify the law following the Court of Appeal's decision in Anderson (a pseudonym) v The King [2023] SASCA 36 (Anderson). The minute states:

> "Anderson concerned an appeal against a conviction in relation to one count of maintaining an unlawful sexual relationship with a child,[4] contrary to s 50 of the Criminal Law Consolidation Act 1935. The appellant argued on appeal that s 29B of the Evidence Act did not apply because the trial involved only one offence.
>
> The Court in Anderson held that s 29B of the Evidence Act does not prohibit the giving of a Markuleski-type direction in cases where a defendant is charged with a single offence, even if that charge relates to a protracted period of sexual abuse. The Court further stated that a direction of this nature was not mandatory, and in the circumstances the failure to give the direction did not give rise to a miscarriage of justice. Nonetheless, the judgment of the Court of Appeal has shed light on a gap in the current provisions which were intended to abolish jury directions of this nature."[5]

The Court in Anderson confirmed that Markuleski-type directions are not mandatory in these circumstances; however, without the legislative change proposed in the Bill, they remain permissible.

My position

I am supportive of legislative change to ensure consistency of the application of this prohibition, so that children and young people who are complainants in sexual abuse proceedings are not disadvantaged by charging decisions whether to lay multiple charges regarding discrete offences, or the offence under s 50 of the Criminal Law Consolidation Act.

While I note that this removes the discretion of the judiciary to make relevant directions, this does not prevent juries as finders of fact from drawing conclusions about the reliability of children's evidence. There is still much work to be done in the area of challenging common misconceptions and myths about child sexual abuse and how this affects jury decision-making.

In addition to legislative change, I also highlight the importance of community education about children's evidence, and about listening to, and believing children and young people.

All too often I have witnessed children and young people's voices and experiences diminished, dismissed, and overlooked. This is certainly true for children and young people in care who have been subject to sexual abuse and exploitation.

For these children and young people, giving evidence can affect them in several ways – for example it can heighten anxiety and re-traumatise them, causing them to engage in risky behaviours such as self-harming, running away from placements, or offending. Conversely,

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[4] This offence has now been renamed to 'Sexual Abuse of a Child'.

[5] Attorney-General (SA), Minute to Guardian for Children and Young People: Statutes Amendment (Criminal Procedure and Evidence) Bill 2024 (5 December 2024).

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it can also be empowering, with children and young people knowing that they are doing the right thing and that they are making a difference. Needless to say, it is a very individual experience, and children and young people must be supported prior to, during, and after engaging in the court process. They must know that their voices and experiences are being heard and given due weight.

Removing scope for judicial directions about unreliability is an important step. Beyond what the legislation says, it is also essential to give priority to community and professional education that furthers understanding about children's evidence, and promotes the importance of listening to, and believing children and young people.

Discreditable conduct evidence – relating to sexual interest in children

What is the change?

Clause 6 of the Bill proposes amendments to the Evidence Act 1929 to include a rebuttal presumption that evidence relating to a defendant's sexual interest in children has strong probative value for the purposes of the test of admissibility of evidence under s 34P. It is proposed to do this through introducing a new provision, 34PA.

In the explanatory minute accompanying the draft Bill the Attorney-General summarises the changes:

> Pursuant to s 34P of the Evidence Act, evidence tending to suggest that a defendant has engaged in discreditable conduct other than the conduct constituting the offence (discreditable conduct evidence) cannot be admitted for the purpose of suggesting that the defendant is more likely to have committed the charged offence because they have engaged in discreditable conduct. However, discreditable conduct evidence can be used if the judge is satisfied that:
>
> - the probative value of the evidence outweighs any prejudicial effect on the defendant; and
> - where the evidence relied on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue, that it has strong probative value having regard to the particular issue or issues arising at trial.
>
> Clause 6 of the Bill inserts new s 34PA of the Evidence Act, which provides that in criminal proceedings involving child sexual offences, the following discreditable conduct evidence is presumed to have strong probative value:
>
> (a) evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest); and
>
> (b) evidence about the defendant acting on a sexual interest the defendant has or had in children.

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Under the new provision, the court may determine that discreditable conduct evidence of a kind described in that subsection does not have strong probative value if it is satisfied that there are sufficient grounds to do so. Certain matters must not be considered in reaching this decision, unless the court considers there are exceptional circumstances. This includes matters related to differences between the alleged sexual offence and the 'discreditable conduct evidence', such as in offence type or personal characteristics of the victim. It also includes the time elapsed between the alleged offence and the 'discreditable conduct evidence'.

The presumption will apply whether or not the sexual interest or act to which the discreditable conduct evidence relates was directed at a complainant in the proceeding, any other child or children generally.

What is the rationale for the change?

The Attorney General states that the proposed amendment implements recommendation 45 of the Royal Commission's Criminal Justice Report:

> Tendency or coincidence evidence about the defendant in a child sexual offence prosecution should be admissible:
>
> a. if the court thinks that the evidence will, either by itself or having regard to the other evidence, be 'relevant to an important evidentiary issue' in the proceeding, with each of the following kinds of evidence defined to be 'relevant to an important evidentiary issue' in a child sexual offence proceeding:
>
> i. evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding
>
> ii. evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole
>
> b. unless, on the application of the defendant, the court thinks, having regard to the particular circumstances of the proceeding, that both:
>
> i. admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant
>
> ii. if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk.

These changes seek to address issues in how the criminal justice system deals with allegations against an individual, related to sexual offending against more than one child. As observed by the Royal Commission:

> [C]hild sexual abuse offences, including institutional child sexual abuse offences, are generally committed in private and with no eyewitnesses. In many cases, there will be no medical or scientific evidence capable of confirming the abuse. Unless the perpetrator has

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> retained recorded images of the abuse – which sometimes happens – or admits the abuse, it is likely that the only direct evidence of abuse will come from the complainant.
>
> Where the only evidence of the abuse is the complainant's evidence, it can be difficult for the jury to be satisfied beyond reasonable doubt that the alleged offence occurred. There may be evidence that confirms some of the surrounding circumstances or evidence of first complaint, but the jury is effectively considering the account of one person against the account of another.
>
> We have heard of many cases where a single offender has offended against multiple victims. Particularly in institutional contexts, a perpetrator may have access to a number of vulnerable children. In these cases, there may be evidence available from other complainants or witnesses who allege that the accused also sexually abused them. The question is whether that 'other evidence' should be admitted in the trial.[6]

The Royal Commission examined the history of case and statute law related to 'tendency or coincidence' evidence – or 'discreditable conduct evidence' in South Australia – which governs whether such evidence is admissible. There was particular examination of case law surrounding the level of similarity in offending type or details required, in order for evidence of a 'tendency' to be admissible in court. The Royal Commission's Criminal Justice Report described this as 'one of the most significant issues affecting criminal justice in child sexual abuse cases' and concluded that:

> Fundamentally, we consider that the law in this area has become unnecessarily complicated and unfairly protective of the accused. The common law and various statutory provisions have developed to exclude relevant evidence, and the tests for admissibility have developed in ways that give the accused unwarranted protection against the possibility of conviction, resulting in injustice to complainants and the community.[7]

I agree wholeheartedly, and am highly supportive of the Royal Commission's Recommendation 45 as a way to rebalance the rights of people accused and complainants in criminal proceedings relating to child sexual abuse.

This recommendation aims to ensure that juries in trials for child sexual offences can consider highly relevant evidence of multiple complainants and circumstances establishing a tendency to commit sexual offences against children. This rebalancing of rights has the potential to increase successful prosecution rates, in an area where victims and survivors are so often unable to meaningfully access justice.

In proposing reform to implement the recommendation, the Attorney General's minute explains that the method chosen has been 'modelled on s 97A of the Uniform Evidence Law, which has been adopted by the majority of other Australian states and territories'.[8]

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[6] Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report (2017), p. 411.

[7] Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report (2017), p. 591.

[8] Of the jurisdictions that have adopted the Uniform Evidence Law – three have introduced s97A (New South Wales, the Australian Capital Territory and Tasmania), and three have not yet done so (Victoria, Northern

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While uniformity is an important goal, it does not necessarily follow that this provision is good law, and suitable to meet the intent of the Royal Commission's recommendations. It also does not mean that South Australia should follow without full consideration of the impacts of such provisions.

As stated above, I am wholeheartedly in support of Royal Commission recommendation 45, and the intent underlying this recommendation. But I must express my concerns about the proposed new provision, s 34PA. There are significant differences between the terms of that provision, and the terms and intent of the Royal Commission's recommendation.

I acknowledge that those differences are consistent with the Model Bill to Amend Uniform Law Test for Admissibility of Tendency and Coincidence Evidence in Criminal Trials, as (then) Uniform Evidence Law Council of Attorneys-General members agreed to implement in 2019.[9]

I believe that those differences were well-intentioned to provide further protections for children and young people. But I am concerned that there are unintended consequences for victims and survivors of child sexual abuse, which may not have been fully considered or addressed in the drafting process.

What are the options for reform?

Before elaborating on these concerns, it is important to outline the context behind the Model Bill to Amend Uniform Law Test for Admissibility of Tendency and Coincidence Evidence in Criminal Trials.

As part of forming relevant recommendations, the Royal Commission in 2016 prepared and consulted upon its own Model Bill for tendency and coincidence evidence reform. That Model Bill drew on the approach in England and Wales, which requires that tendency or coincidence evidence be 'relevant to an important evidentiary issue' in the case.

The Royal Commission concluded that, to address issues specific to case law in Australia, evidence relevant to an important evidentiary issue should be defined to include evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding.

At its core, the intention was to allow juries to consider evidence that a defendant had committed or allegedly committed a child sexual offence on another occasion. But the question of how to do this became complex, particularly following a High Court decision handed down in 2017 (at the time that the Royal Commission were drafting the Criminal Justice Report).

Territory, and the Commonwealth): see s 97A in Evidence Act 1995 (NSW), Evidence Act 2011 (ACT), Evidence Act 2001 (Tas); and s 97 in Evidence Act 2008 (Vic), Evidence Act (National Uniform Legislation) Act 2001 (NT), Evidence Act 1995 (Cth). Western Australia is also considering adopting the Uniform Evidence Law, including a similar provision (clause 114) in the Evidence Bill 2024 (WA) which is currently before their parliament.

[9] Council of Attorneys-General, Communique, 29 November 2019, Adelaide (2019), p 2.

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The High Court's decision in Hughes v The Queen [2017] HCA 20 resolved certain issues considered in evidence presented during the Royal Commission; however, Commissioners concluded that further reform was still required. This formed the background for recommendation 45, as it appeared in the Criminal Justice Report.

In late 2017, the Council of Attorneys-General (CAG) established the Admissibility of Tendency and Coincidence Evidence Working Group, as a response to relevant Royal Commission recommendations. The Secretariat of the Working Group – the NSW Department of Justice – prepared a scoping paper which consulted with NSW (and several Tasmanian and Commonwealth) stakeholders on the Model Bill.

The Scoping Paper noted that NSW stakeholders expressed concern that implementing the Royal Commission's Model Bill in NSW would create inconsistencies and additional layers of complexity in applying evidence law. Significantly, some NSW stakeholders raised that the Model Bill may not work as intended, to address key gaps in interpretative issues following the Hughes decision. Considering these views, the Scoping Report observed:

> [I]t is … not clear from Hughes whether the majority would admit tendency evidence where the tendency relied on is a tendency to act on a sexual interest in children. … [This aspect] of the operation of the test for admissibility could be clarified by legislative reform.

A subsequent NSW Department of Justice Options Paper put forward an option to clarify of the test in line with this outstanding question from Hughes, through stating that the following evidence should be presumed to have strong probative value:

(a) evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest); and

(b) evidence about the defendant acting on a sexual interest the defendant has or had in children.

This Option was ultimately reflected in the Model Bill agreed upon by CAG in 2019, and implemented in NSW.

My position

This brings me to my key concern with the proposed s 34PA, reflective of section 97A of the Uniform Evidence Law.

In an attempt to address outstanding issues specific to the decision in Hughes, the Uniform Evidence Law provision has created a broad scope of tendency and coincidence evidence that is now admissible in proceedings for child sexual abuse.

This extends beyond evidence of sexual offences committed or alleged to have been committed against children, to evidence of sexual interest.

This difference is highly important because, from a technical perspective, it may also capture:

- Consensual sexual relationships with a 17-year-old child, which do not amount to a criminal offence.

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- Developmentally appropriate sexual behaviour between children and young people under the age of 17 years.
- Harmful sexual behaviour between children and young people, including young children under the age of criminal responsibility.

Evidence of these matters technically fits within the scope of 'sexual interest in children' – but it should not be treated as relevant evidence for a jury to consider whether a person has committed a child sexual offence.

In particular, I am worried that the proposed changes open the door for prosecutors to introduce evidence about a defendant's history of exhibiting harmful sexual behaviours as a child. Doing so would have a disproportionate impact on children and young people with out-of-home care or youth detention experiences, who have highly scrutinised and documented lives and who have often been exposed to significant trauma, including child sexual abuse. Comparatively children and young people not living in out-of-home care and youth detention may exhibit similar harmful sexual behaviours as a child, however, would not have such regimented documentation of this due to not living under institutional or statutory care.

It would be highly concerning to introduce legislation which made it more likely that prosecutors could introduce evidence of harmful sexual behaviours in childhood as relevant to determining whether the defendant committed a child sexual offence.

Such evidence is simply not relevant for that purpose. If the evidence is before juries for consideration, there is a strong risk that the probative value of the evidence would be misunderstood.

As highlighted in the Royal Commission's Final Report, there are ongoing misconceptions and myths that exist surrounding children and young people who exhibit harmful sexual behaviours. This includes misunderstandings of children and young people's motivations, and overestimating the prevalence of children's harmful sexual behaviours continuing into adulthood.[10]

Opening the door to introduce this evidence in trials for child sexual offences would be antithetical to the work of the Royal Commission in recommending law reform to undo the impacts of decades of myth, misconceptions and inaccurate assumptions about child sexual abuse. I also believe it would be entirely against the intent of this reform.[11] But the drafting of this provision generates a real and substantial risk of this result.

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[10] See Royal Commission's Final Report, Ch 10, Children with harmful sexual behaviours, from p 77.

[11] Indeed, this is reflected in the second reading speech when the same amendments were made in New South Wales, as the first jurisdiction to adopt the model Uniform Evidence Law amendments: "the threshold of exceptional circumstances in relation to the consideration of these matters was chosen intentionally… [so that] courts do not determine that the presumption is rebutted on the basis of the sorts of myths or misconceptions about the probative value of tendency evidence': NSW, Parliamentary Debates, Legislative Assembly, 25 February 2020 (Mark Speakman, Attorney General) ('Evidence Amendment (Tendency and Coincidence Bill 2020 Second Reading Speech').

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In making these statements, I recognise that a number of jurisdictions already have this provision in place. In the statutory review of relevant amendments in New South Wales in 2022, the Law Society of NSW made a submission which touched on concerns about how the amendments could be interpreted, relating to consensual relationships for young people above the age of consent.[12] The Statutory Review Report identified that there had not yet been appellate consideration of the amendments at that time, and noted that submissions were focused on how the amendments could be interpreted – not how they had been interpreted.[13]

The fact that the relevant amendments have not received appellate consideration at this time does not alleviate my concerns about the issues I have raised above. The problem is that this provision of the Model Uniform Evidence law is open to being interpreted in the ways I have described above. South Australia is in a position to anticipate such issues and consider amendments to tighten the provisions, prior to issues arising.

Indeed, South Australia has a real opportunity to not enact provisions simply because 'everybody else is doing it' but to have considered discussion with relevant stakeholders and to come up with best-practice amendments that not only uphold the rights of complainants, but do not prejudice defendants who have significant trauma histories.

Noting the serious implications of this provision, I am surprised that consultation is proceeding through targeted consultation, rather than a public YourSay process.

Prior to proceeding with this amendment, I recommend that government consider alternative drafting options to address the concerns discussed above – in addition to those raised by other stakeholders – followed by a fulsome public consultation process.

Interlocutory appeals

What are the changes?

The Bill contains changes to the Criminal Procedure Act 1921, Magistrates Court Act 1991, and the Youth Court Act 1993 to clarify the right of the prosecution to appeal against interlocutory judgement in all South Australian courts.

Table 1: Summary of changes – interlocutory appeals

Legislation	Change

[12] Law Society of New South Wales, Letter to the Department of Communities and Justice – Statutory review of the Evidence Amendment (Tendency and Coincidence) Act 2020, (14 July 2020).

[13] NSW Attorney-General, Report on the Statutory Review of the Evidence Amendment (Tendency and Coincidence) Act 2020, (September 2022).

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Criminal Procedure Act 1921	• Clarifying the meaning of 'interlocutory judgement' to include 'an order of ruling to the admissibility or giving or evidence' • Removal of the phrase '...and, if correct, is likely to lead to abandonment of the prosecution' as one of the criteria for appeal against interlocutory judgement
Magistrates Court Act 1991	• Removal of the phrase '...and, if correct, is likely to lead to abandonment of the prosecution' as one of the criteria for appeal against interlocutory judgement
Youth Court Act 1993	• Insertion of definitions of 'judgment' and 'interlocutory judgement' • Insertion of new provisions providing an appeal against an interlocutory judgement

What is the rationale for the changes?

The changes have some alignment with recommendation 79 of the Royal Commission's Criminal Justice Report:

> State and territory governments should introduce legislation, where necessary, to expand the Director of Public Prosecution's right to bring an interlocutory appeal in prosecutions involving child sexual abuse offences so that the appeal right:
>
> a. applies to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case
>
> b. is not subject to a requirement for leave
>
> c. extends to 'no case' rulings at trial.

And it is also worth noting, recommendation 80:

> State and territory governments should work with their appellate court and the Director of Public Prosecutions to ensure that the court is sufficiently well resourced to hear and determine interlocutory appeals in prosecutions involving child sexual abuse offences in a timely manner.

The Royal Commission's reasoning for these recommendations was that interlocutory appeals may be particularly important where a judge makes an order that has a significant impact on the prosecution's case – and that at times this is necessary to correct errors of law, or to protect the chances of the prosecution's success.

At the time only New South Wales, Victoria, the Australian Capital Territory, and the Commonwealth provided a general right of appeal by the prosecution against interlocutory decisions.

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The Royal Commission was satisfied that the provisions in these jurisdictions were working well and should be replicated. In its deliberations the Royal Commission considered whether an appeal should be subject to a requirement for leave. It noted that the New South Wales DPP's interlocutory appeal rights were not subject to a requirement for leave, and that this was working well due to the New South Wales DPP's use of 'appropriate restraint'.[14]

The Royal Commission's recommendations were made in the context of prosecutions involving child sexual abuse, however the initial action taken – insertion of sections 157(1)(e) and 157(3) in the Criminal Procedure Act 1921 – applied to all criminal trials.

For this reason, I am not satisfied that the Royal Commission's recommendations can be referred to as the primary reason for the broader changes. Indeed, the impact upon children and young people is much broader.

The Attorney-General's minute also indicated these proposed amendments seek to 'provide greater consistency … between criminal jurisdictions'.[15] This includes ensuring applicability to the youth justice system.

I believe this rationale requires further consideration, particularly as it relates to the Youth Court Act 1993. I set out some of the potential impacts for children and young people below.

Potential impact of the changes

Delays in legal proceedings

One of the greatest risks to children and young people posed by these changes is a potential delay in legal proceedings.

This impact was also foreseen by the Royal Commission with recommendation 80. The government has not provided any detail relating to how this recommendation is being progressed.

It is widely accepted that prolonged proceedings do not align with the best interests of children and young people. Indeed, it is a core principle underpinning the United Nations' Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules'):

> *'Each case shall from the outset be handled expeditiously, without any unnecessary delay.'*[16]

If the prosecution regularly appeals interlocutory judgments, including rulings on evidence admissibility, it could lead to extended delays in the trial process. For children and young people, prolonged legal proceedings can exacerbate stress, anxiety, and confusion. These delays could also mean longer periods of uncertainty for children and young people,

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[14] Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report (2017), p. 104.

[15] Attorney-General (SA), Minute to Guardian for Children and Young People: Statutes Amendment (Criminal Procedure and Evidence) Bill 2024 (5 December 2024).

[16] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 20.1.

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potentially leading to negative impacts on their mental health, educational continuity, and social wellbeing.

Delays and repeated appeals could undermine the child's right to a timely and fair trial, which is essential for rehabilitation and reintegration.

The impacts are even more acute for children and young people on remand where delays to legal proceedings can:

- have adverse effects on their **mental health and wellbeing**
- disrupt **education**
- increase **stigmatisation**
- have negative impacts on **family and community relationships**
- increase likelihood of **future contact** with the criminal justice system.

Therefore, and in line with the Royal Commission's recommendations, the Youth Court must be sufficiently well resourced to hear and determine interlocutory appeals in a timely manner.

What is the potential impact of the changes? – Complexity and fairness

While acknowledging the importance of consistency across all South Australian courts – the Youth Court does not, and should not, operate in the same way as other criminal courts.

Children and young people are different from adults. While historically, children and young people were treated the same as adults in the criminal justice system, the system has evolved to recognise that this should not be the case. This is demonstrated in the Beijing Rules which place emphasis on the establishment of:

'a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed to meet the varying needs of juvenile offenders, while protecting their basic rights.'

We are currently seeing an increasingly alarming trend of actions taken around the nation to treat children and young people the same as adults from governments:

'This is Adult Crime, Adult Time…'[17]

And similar sentiment being shared within the South Australian community:

'…And, you know, I think it's time for the Premier to take a stance and, uh, get tough, on youth crime here in South Australia and put pressure on judiciary to hand out proper sentences and not, let these children off who are repeat offenders as well…"[18]

[17] Queensland Government, Media Statement: A Fresh Start for Queensland: Making Queensland Safer Laws to restore community safety (2024).

[18] Talk-Back Caller 9 January 2025, FIVEAA Evenings at 8:50pm.

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This narrative is both harmful to children and young people, and the broader community. It is inconsistent with the evidence and best practice in relation to youth offending, effective rehabilitation, and community safety.[19]

Indeed, we know that one of the worst responses to children and young people in crisis is to isolate them from their families, friends, communities, and support networks; deprive them of their liberty; and restrict or deny them access to appropriate education, health, mental health, and rehabilitative supports.[20]

It is our responsibility to better support children and young people and to better educate the community.

The proposed changes to the Youth Court Act 1993 have the potential to create more complexity for proceedings involving children and young people, including:

- multiple rounds of **legal challenges**
- risks of **inequality in legal resources** for mounting and challenging multiple appeals
- increased **difficulty understanding** legal processes and the implications of appeals
- the **reversal of favourable rulings** for children and young people
- increased **uncertainty** about outcomes of cases.

These issues must be adequately considered and addressed prior to the introduction of the Bill. Including but not limited to, updates to relevant practice guidance.

My position

While I am reticent to support the proposed amendments in their current form, I wholeheartedly support ensuring those who have been subject to child sexual abuse have access to justice.

Therefore, I would provide support where the changes were put forth as intended by the Royal Commission – applying specifically to cases of child sexual abuse – and where recommendation 80 was also fully implemented.

[19] Richards, K. What makes juvenile offenders different from adult offenders? Trends & issues in crime and criminal justice no. 409. Canberra: Australian Institute of Criminology. https://doi.org/10.52922/ti274705 (2011).

[20] Australian Medical Association, Submission to the Australian Human Rights Commission: National Children's Commissioner's youth justice and child wellbeing reform consultation (2023).

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Making it to trial

The proposed changes to the Evidence Act 1929 relating to Markuleski-type directions and discreditable conduct evidence both seek to strengthen court process for complainants of child sexual abuse. However, in my experience, it remains the disturbing reality that relatively few cases make it to prosecution in the first place. While legislative change is important, it must be enlivened by sound policy and practice frameworks. This needs to be an area of focus for the government – particularly for the Office of the Director of Public Prosecutions (ODPP), South Australia Police (SAPOL), and for the Department of Child Protection (DCP).

Many children and young people in care who I advocate for have been let down by the systems designed to protect them. Some have experienced sexual abuse from people who are meant to protect them, others have been taken advantage of by people who have preyed on their vulnerabilities. But what I see in these children and young people is strength. I commend every child and young person who had endured this type of pain, and who have bravely spoken up about it.

And I hold serious concerns about circumstances where the systems that are meant to support justice for these children and young people, have failed to do so due to practice and resourcing gaps.

As I stated earlier, whilst the proposed legislative changes might strengthen the prospect of prosecution in some cases, it's important to note that relatively few matters make it to prosecution in the first place. Sometimes there may be justifiable reasons for this, for example I have observed that:

- some children and young people may not perceive that they have been exploited or abused; or may not be willing to engage with SAPOL or to continue to engage with SAPOL.
- many cases do not progress on the grounds that there is no reasonable prospect of conviction or lack of corroborative evidence.
- there are cases that do not progress due to concerns about the impact on the child or young person.

I also note, that in the case of the latter, one potential positive outcome of discontinuing proceedings is that this may allow for the child or young person to re-initiate proceedings in the future, if and when, they are ready.

But sometimes there are non-justifiable reasons, arising from systemic issues across government agencies including policing, prosecution and child protection.

I have observed:

- investigations and prosecutions being discontinued due to procedural and administrative errors
- a lack of coordination and communication between these agencies

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- responsibility for progressing certain matters handballed between agencies (in some instances over the course of years)
- a lack of care and compassion for children and young people who have been subject to the most heinous of crimes
- children and young people who were once willing to engage, have their trust broken – again and again
- the harm done to children and young people.

These are areas where real change needs to occur. All implementation of legislative amendments to support Royal Commission recommendations must be supported by meaningful systemic changes to ensure children and young people can access justice, and to prevent the circumstances where child sexual abuse occurs. This requires efforts at all stages of intervention, investigation, and prosecution.

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Other amendments

Alongside changes to implement the Royal Commission's recommendations, the draft Bill includes unrelated provisions relating to intervention orders and serious repeat offenders. This brings into question whether there is a cohesive framework underpinning the Bill – or whether some of the changes are simply opportunistic.

I believe it is inappropriate to combine amendments borne out of the Royal Commission's recommendations, with unrelated amendments.

There is strong stakeholder support for the implementation of Royal Commission recommendations, and combining these amendments has the potential to mislead community and stakeholders about the intent and evidence-base for the reform. This generates a risk that stakeholders may not fully engage with all amendments prior to them becoming law.

While the Bill is small, it is complex and covers wide-ranging topics. In this section I discuss the changes relating to intervention orders and serious repeat offences.

Intervention orders

What are the changes?

Clauses 3 and 8 of the Bill propose amendments to the Criminal Procedure Act 1921 and the Intervention Orders (Prevention of Abuse) Act 2009 to allow the Director of Public Prosecutions to seek an intervention order when related matters have been committed for trial or sentence in the District and Supreme Courts.

Clause 3 would insert a new section into the Criminal Procedure Act 1921:

> 127A – Intervention Orders
>
> (1) If a defendant is committed to superior court for trial or sentence of an indictable offence, the District Court or the Supreme Court may exercise the powers of the Magistrates Court to issue against the defendant an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009 as if an application had been made under that Act against the defendant in relation to the matters alleged in the proceedings for the offence.
>
> (2) An order issued under this section has effect as an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009.

Where clause 8 is passed, this would amend s 20 of the Intervention Orders (Prevention of Abuse) Act 2009 to include a new s 20(1)(ab):

> 20 – Application to the Court for intervention order
>
> (1) The following persons may make an application to the Court for an intervention order:

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(a) a police officer;

(ab) the Director of Public Prosecutions; [emphasis added]

(b) a person against whom it is alleged the defendant may commit an act of abuse or a suitable representative of such a person given permission to apply by the Court;

(c) a child who it is alleged may hear or witness, or otherwise be exposed to the effects of, an act of abuse committed by the defendant against a person;

(d) if the defendant or a person proposed to be protected by the order is a child and there is a State child protection order in force in respect of the child—the Minister responsible for the administration of the Children and Young People (Safety) Act 2017.

What is the rationale for the change?

Unlike the amendments mentioned above, the changes relating to intervention orders do not seem to be grounded in the recommendations from the Royal Commission's Criminal Justice Report.

In the explanatory minute accompanying the draft Bill, the Attorney-General states that the current provisions cause unnecessary delay and duplication of proceedings.

My position

In principle, I am supportive of measures to prevent this delay and duplication, noting that court proceedings can be highly distressing for children and young people involved as both persons to be protected, and the defendant in an intervention order. It is significant though to create new jurisdiction for the District Court or Supreme Court, and this will require relevant judicial members to become familiar with the operationalisation of the Intervention Orders (Prevention of Abuse) Act 2009. This could be expected to lead to delays during transition period.

I raise this for consideration, as a practical matter beyond legislative reform.

Serious repeat offences

What is the change?

Prior to getting into the 'nitty gritty' of these changes I wish to highlight the importance of wording. This change is characterised by the government as a change related to 'serious repeat offenders' – but it is actually a change to the definition of a 'serious offence'. Why does this matter? Because it not only affects adults who may be deemed 'serious repeat offenders' but it also applies to children and young people who may be declared a 'recidivist young offender'. This is something that the government has been silent on.

The Sentencing Act 2017 contains certain provisions relating to repeat offending – both for adults, 'serious repeat offenders' captured by section 53 – and for children and young

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people, who may be subject to a declaration as a 'recidivist young offender' under section 55 which can have significant rights-breaching implications for a child or young person:

55—Declaration that youth is recidivist young offender

(1) A youth is liable to be declared a recidivist young offender if the youth has been convicted of—

(a) at least 3 serious offences committed on separate occasions (whether or not the same offence on each occasion); or

(b) at least 2 serious sexual offences committed on separate occasions (whether or not the same offence on each occasion).

(2) If a court convicts a youth of a serious offence, and the youth is liable, or becomes liable as a result of the conviction, to a declaration that the youth is a recidivist young offender, the court—

(a) must consider whether to make such a declaration; and

(b) if of the opinion that the youth's history of offending warrants a particularly severe sentence in order to protect the community—should make such a declaration.

(3) If a court convicts a youth of a serious offence, and the youth is declared (or has previously been declared) to be a recidivist young offender—

(a) the court is not bound to ensure that the sentence it imposes for the offence is proportional to the offence (but, in the case of the Youth Court, the limitations relating to a sentence of detention under section 23 of the Young Offenders Act 1993 apply to the sentence that may be imposed by the Youth Court on the recidivist young offender); and

(b) any non-parole period fixed in relation to the sentence must be at least four-fifths the length of the sentence.

The proposed amendments seek to amend a related definition – what constitutes a 'serious offence'. It would expand this definition, changing how wholly suspended sentences and community-based sentences are treated. These sentences were previously excluded from being considered serious in certain contexts, but under the changes could be captured.

Clause 10 of the Bill would mean that it can be considered a serious offence where:

- someone had been subject to a wholly suspended sentence or a sentence that consists of a community-based custodial sentence (suspended sentence bond, home detention, or intensive correction order), and
- they had breached the relevant conditions, and
- as a result has served the balance of that term in custody.

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What is the rationale for the change?

This is another one of those changes that does not stem from the Royal Commission's recommendations – the government has described the changes as coming from a 'gap that has been identified'.[21] But who identified this gap, when this gap was identified, and the impacts of this gap have not been disclosed.

The government does, however, provide one example of when the Court has declined to treat a conviction as a qualifying offence – Moran v The Queen (2020) 136 SASR 504 (Moran). It is important to note in the context of the broader changes introduced by the Bill, that the offending described in Moran does not include child sexual abuse.

Moran concerned an appeal against a sentence in which the appellant had been characterised as a serious repeat offender. The appeal was allowed, with the Court finding that the appellant was not a serious repeat offender, and the appellant was resentenced.

In Moran, the appellant argued that the words 'other than a suspended sentence' should be read to include partially suspended sentences, while the prosecutor argued that it should be read only to include wholly suspended sentences. The Court was persuaded by the appellant's argument.

Subsequently, the Sentencing Act 2017 was subject to several changes to the relevant section, bring us to where we are today where a relevant offence:

> 'is not a serious office unless a sentence of imprisonment (other than a wholly suspended sentence or a sentence that consists only of a community based custodial sentence) has been, or is to be, imposed for the offence)'[22]

Indeed, this section has been subject to multiple changes since Moran and without looking into it further, I am unclear as to why Moran has again been stated as a reason for change.

As Moran has been raised, I do wish to draw attention to a point that the Court made in its deliberations – laws that seek to encroach on the common law principle of proportionality should be read very strictly, and only to the extent clearly and expressly declared. I will come back to this point shortly.

In terms of the reasons put forth for this change – or lack thereof – I do not believe that the rationale behind this proposed amendment has been adequately stated, and I see no evidence that potential impacts on children and young people as defendants has adequately been considered.

As such, I raise matters for consideration below, including questions about the focus of youth justice (rehabilitation vs punishment) and the principle of proportionality.

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[21] Attorney-General (SA), Minute to Guardian for Children and Young People: Statutes Amendment (Criminal Procedure and Evidence) Bill 2024 (5 December 2024).

[22] Sentencing Act 107, s 52

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My position

Expanding the definition of a 'serious offence' makes it more likely that a child or young person could be subject to a declaration that they are a 'recidivist youth offender', and therefore it will be more likely they may receive a sentence that is not proportional to their circumstances, and the circumstances of their offending.

This is not appropriate and, accordingly, I do not support this amendment in its current form.

The existing provisions are already a contravention of the UN Convention on the Rights of the Child. The amendment would further the applicability of these laws to young people – and violation of their rights. That takes us in the wrong direction.

The UN Convention on the Rights of the Child has been noted as 'the most ratified of all international human rights treaties, but also the most violated with apparent impunity.'[23] These rights must be afforded to all children and young people. This convention (alongside other relevant conventions) is accompanied by a specific set of guidelines and rules such as:

- the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);
- the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines); and
- the Guidelines for Action on Children in the Criminal Justice System.

As I have spoken about earlier in this submission, and under these international obligations, children and young people in contact with the criminal justice system require their own set of rules. Rules that uphold their rights and have a focus on rehabilitation and setting them up for the future.

This is why the Young Offenders Act 1993 exists – with its focus on rehabilitation, diversionary programs, and alternative sentencing for children and young people, with the aim of diverting them from the adult criminal justice system.

The Youth Court, under the Young Offenders Act 1993 (ss 23-25) can sentence a child or young person to:

- detention in a training centre for up to three years;
- home detention or a period of up to 12 months or for periods not exceeding 12 months in total over two years or less;
- community service work of up to 500 hours
- a fine of up to $2500 for an offence

[23] Cunneen, C., Goldson, B & Russell, S. (2016). Juvenile justice, young people and human rights in Australia, Current Issues in Criminal Justice, vol. 28, no. 2.

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- licence disqualification.

There are other provisions relating to sentencing, where children and young people are dealt with as an adult (s 29):

- Children and young people who are found guilty of murder must be dealt with an adult and must be sentenced to imprisonment for life.
- A child or young person who has been found guilty by the Supreme Court or District Court of any offence other than homicide may be sentenced in the same manner as an adult.

Under s 3(2) the focus in sentencing a young offender is on the deterrent effect on the youth personally, not general deterrence, as is the case in the adult jurisdiction. However, where a child or young person is being dealt with as an adult the court may consider the general deterrent effect on other children or young people. The court must also take into account the need to balance the protection of the community with the rehabilitation needs of the child or young person.

As we can see there are distinct differences between the adult and child jurisdiction.

But what about a declaration that a young person is a recidivist youth offender?

Where a child or young person has been convicted of at least three serious offences or at least two serious sexual offences they can be declared as a recidivist young offender under the Sentencing Act 2017. Where such a declaration is made then heavier sentences can be imposed and there are also implications for conditional release.

This declaration can be made, and the provisions enlivened, at sentencing for the third 'serious offence'.

While making a declaration is discretionary, it can have serious implications for the child or young person and their rehabilitation as the court is not bound to ensure that the sentence it imposes for the offence is proportional to the offence.

This is in direct contradiction to the Beijing Rules which state:

> *'The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.'*[24]

[24] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 5.1.

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Conclusion

To summarise, I am supportive of the amendments related to Markuleski-type directions, but I do not support the remaining five amendments in their current form.

These amendments require further consideration. The rationale must be made clear, and the impacts must be assessed.

This is a critical step that has been missing in the multiple rounds of changes to criminal procedure and evidence law – and it is why we are in this position of piecemeal change.

South Australia requires a coherent legislative framework for criminal procedure and evidence that balances children and young people's rights both as complainants and defendants. It must also consider the unique circumstances of children and young people who have experienced out-of-home care and detention.

In addition to legislative change, it is critical that we get the policy and practice settings right.

This is why I set out my observations about strengthening practice within SAPOL, the ODPP and DCP to better support children and young people who have been subject to child sexual abuse, including at all stages of intervention, investigation, and prosecution; and about the need to promote education on reliability of children and young people's evidence. These are areas where we must strive to make a real and immediate difference for children and young people who have experienced sexual abuse – while work continues to progress law reform to achieve the intent of the Royal Commission's recommendations.

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