



Aboriginal Legal Rights Movement & Aboriginal Community Leadership Reference Group

Submission
Children and Young People (Oversight and Advocacy Bodies) Bill 2016

14 September 2016

Aboriginal Legal Rights Movement (ALRM) is making this submission in collaboration with the South Australian Aboriginal Community Leadership Reference Group (ACLRG).

Preamble

The Children and Young People (Oversight and Advocacy Bodies) Bill 2016, was introduced in accordance with recommendations from the Child Protection Systems Royal Commission [Recommendations 245-248 and 250-253 of the Child Protection Systems Royal Commission Report; The Life They Deserve].

Specifically the Bill establishes the independent Commissioner for Children and Young People, in addition to the Child Development Council. It also aims to consolidate the Guardian for Children and Young People and the Child Death and Serious Injury Committee into a single Act of Parliament. The Bill proposes to introduce changes to the surrounding monitoring, referral and review of child protection matters and system-level issues.

The Government argues that the proposed laws will address 'gaps' in the oversight of child protection in South Australia and improve advocacy for the interests of children and young people. It is argued that the Bill will *'ensure that the voices of children and young people are heard'*, and that their [presumably children] wellbeing and safety are comprehensively protected. It is argued that this Bill will strengthen the oversight of child protection matters in South Australia, and ensure greater advocacy for the rights and wellbeing of children.

ALRM has considered the Children and Young People (Oversight and Advocacy Bodies) Bill 2016 ('the Bill') and the implications for the SA Aboriginal community specifically.

ALRM has examined the Bill and the current Children's Protections Act 1993, as well as the accompanying media releases and discussion pieces.

The Bill does not address the gaps in oversight of child protection in South Australia and improve advocacy for the interest of Aboriginal children and young people. The Bill does not ensure 'comprehensive protection' for the safety and wellbeing of Aboriginal children and young people.

The Bill is completely absent of any provisions for Aboriginal children and young people. Aboriginal people make up just under three (3) percent of the South Australian population. Of the three (3) percent South Australian Aboriginal population, 50 percent reside in regional and remote South Australia. Over 70 percent of this cohort are under 25 years old. The largest Aboriginal children and young people cohort are aged between 15 and 19 years.

Aboriginal children currently make up 50 percent of matters before the South Australian courts in Child Protection. Almost 40 percent of children in out-of-home care are Aboriginal. More than 50 percent of children in residential care are Aboriginal. The absence of legislative oversight and advocacy that is specific to Aboriginal children and young people in this Bill is alarming and negligent.

The Nyland report demonstrates that the State cannot rely on Government and non-Government policies and practice guides alone to meet the needs of Aboriginal children, and as a result there is specific needs that need to be addressed by amending the Children's Protections Act which will legislate existing policy.

Of the 3000 children under Guardianship of the Minister, almost 40 percent are Aboriginal. Of the 1000 admissions a year to the Adelaide Youth Training Centre, more than 50 percent are Aboriginal.

The South Australian Guardian for Children and Young People currently has and is the only independent statutory body that monitors, advocates, advises, investigates, inquires into, and protects the rights of these children and young people, however there is only a .8 fte Aboriginal Advocates position throughout that organisation. The State cannot assume that without legislated responsibility specific to Aboriginal perspective and Cultural safety that non-Aboriginal people within the oversight and advocacy bodies, have the skills and knowledge that will ensure the rights, safety and wellbeing of Aboriginal children and young people.

Child protection legislation, policy and practice guidelines and decision-making are reviewed and amended to ensure effective safeguards and differential recognition of the unique rights of Aboriginal and Torres Strait Islander children to safe and stable connections to kin, culture and community.

July 2016, SNAICC Policy Position Statement, *Achieving stability for Aboriginal and Torres Strait Islander children in out-of-home care*

There is currently no Aboriginal staff within the Council for the Care of Children (although currently legislated to have at least one Aboriginal member) and Child Death, Serious Injury Review

Committee. There is no legislative requirement to ensure the Cultural rights of Aboriginal children are met throughout their policy, practice and strategic direction. To date Government policy and practice has failed Aboriginal children.

It is critical that Aboriginal inclusion is mandated across all roles and functions of the *Oversight and Advocacy* bodies for South Australian Children and Young People to ensure that Aboriginal children and young people have the same positive and healthy lives as other South Australian children and young people. The South Australian Child Protection Reform is an opportunity to ensure children and young people are protected and given *The life They Deserve*. The Government cannot sustain the tragic and enduring legacy from past Government policies and actions that have excluded Aboriginal people from decision making in developing many programs, services and opportunities without mandating shared decision making with Aboriginal communities. We believe this has resulted in the unintended consequence of Aboriginal children and young people being overrepresented in the child protection system described above.

ALRM strongly urges that the Government include the South Australian Aboriginal Community in genuine and meaningful consultation during the long term planning and strategies stages of child protection reform.

ALRM insists the Government not ignore the comprehensive findings of the Bringing Them Home Report [Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families; April 1997].

ALRM petitions the Government to look to and be guided by, the United Nations Convention of the Rights of the Child and the United Nations Declaration on the Rights of Indigenous Peoples.

ALRM are gravely concerned of the risk of a re-emergence of the past racist and destructive Government policies of the removal of Aboriginal Children from their families and community.

We are concerned that family preservation and the strengthening of cultural connections is not a focus of the Government during this reform process. ALRM are extremely disappointed that instead, permanent removal (or permanency planning measures) appears to be at the forefront of the Government's response to the proposed child protection reforms. We are concerned that the main objective of the Government seems to be the forced adoption of Aboriginal Children and placing them into the care of non-Aboriginal carers.

For Aboriginal children who are placed in out-of-home care, the stability of relationships and Cultural identity are vitally important to their wellbeing and must be promoted. ALRM is deeply concerned, however, that the Government child protection reform process fail to sufficiently recognise that stability for South Australian Aboriginal children is grounded in the permanence of their connection with kin and culture.

Children and Young People (Oversight and Advocacy Bodies) Bill Examined:

The Commissioner for Children and Young People

1. A Commissioner for Children and Young People ('the Commissioner') is established under section 5 of the Bill.
2. This Commissioner acts independently of the Crown or any Minister or department,¹ and is appointed by the Governor for a term of up to 7 years.²
3. The functions of the Commissioner include:
 - a. To promote and advocate for the rights and interests of all children and young people in South Australia;
 - b. To promote the participation by children and young people in the making of

1. ¹ s 5(2).

2. ² s 6(1). A Commissioner must not serve more than 10 years, including reappointments.

decisions that affect their lives;

- c. To advise, and make recommendations to, Ministers, State authorities and other bodies on matters related to the rights, development and wellbeing of children at a systematic level;
 - d. To assist in ensuring that the State, as part of the Commonwealth, satisfies its international obligations in respect of children and young people.
 - e. To prepare and publish reports on matters related to the rights, development and wellbeing of children and young people at a systemic level.
4. Therefore, the Commissioner acts largely as an advocate for children and young people, including by conducting research and making recommendations to ensure the wellbeing of children and young people in South Australia.
 5. The Commissioner may also, at their discretion, conduct an inquiry into 'the policies, practices and procedures of a State authority or authorities as they relate to the rights, developments and wellbeing of children and young people generally, or a particular group of young people.'³ The fact that this section extends to 'a particular group of young people' would seemingly enable the Commissioner to inquire into issues relating to specific groups such as Aboriginal children, children in juvenile justice, or children in the foster care system.
 6. However, the scope of the Commissioner's powers is limited to matters that are 'of particular significance to children and young people', 'the matter is of a systemic nature' and 'it is in the public interest to conduct the inquiry'. Therefore, the Commissioner cannot conduct an inquiry or make recommendations in relation to a matter that is affecting only a particular child or young person. However, they may 'conduct an inquiry... as a consequence of becoming aware of a matter affecting a particular child or young person.' That is, the

3. ³ s 12(1).

Commissioner may act where the circumstances of a particular child are reflective of a systematic issue and affects other children.

7. Following section 12 inquiry, the Commissioner may make recommendations to a State authority in writing.⁴ In response, the authority must provide the Commissioner with a report that explains whether or not they plan to implement the recommendation, and either details of how it will be implemented, or why it will not be implemented.⁵ If the authority does not implement the recommendation, the Commissioner may report to the Minister about their views about the authority's failure to implement the recommendation.⁶ The Minister must then prepare a report for Parliament regarding the recommendation and the failure to implement it.⁷
8. The Commissioner must also prepare a report for the Minister regarding the section 12 inquiry and its findings. The Minister must then 'cause a copy of the report to be laid before both houses of Parliament'. They must also provide a copy to the Minister for each area identified in the report,⁸ and prepare another report regarding the Minister's response to the report, and, either what action will be taken, or why no action will be taken.⁹

Guardian for Children and Young People

9. The Guardian for Children and Young People ('the Guardian') will retain all of their current powers. Like the Commissioner, they will be independent. They are nominated by the Governor on nomination of the Minister.
10. The Guardian's functions include:
 - a. To promote the best interests of children under the guardianship, or in the

4. ⁴ s 14(1).

5. ⁵ s 14(2).

6. ⁶ s 14(4).

7. ⁷ s 14(5).

8. ⁸ s 14(3)(a).

9. ⁹ s 14(3)(b).

custody of, the Minister, and in particular those in alternative care;

- b. To monitor the circumstances of children under the guardianship, or in the custody of, the Minister
- c. To investigate and report to the Minister on matters referred to the Guardian by the Minister.

11. The Guardian must report to the Minister on the performance of their functions, and this must be laid before both Houses of Parliament.

12. The Guardian may refer matters to the Commissioner, in a form determined by the Commissioner.¹⁰ They may also make complaints to the Ombudsman, or Health and Community Services Complaints Commissioner¹¹

Youth Advisory Committee

13. The Guardian must establish a Youth Advisory Committee ('the YAC'), the composition of which can be determined by the Guardian but must include children who are, or have been, under guardianship or in the custody of the Minister.

14. The main function of the YAC is 'to assist the Guardian in the performance of the Guardian's functions by ensuring that the Guardian is aware of the experiences of, and receives advice from, children who are, or have been, under the guardianship or in the custody of, the Minister.'¹²

Child Death and Serious Injury Review Committee

15. The Child Death and Serious Injury Review Committee ('Review Committee') consists of up to 20 members appointed by the Minister.¹³ The Review Committee is the subject of the

10. ¹⁰ s 35(1).

11. ¹¹ s 37 and s 38.

12. ¹² s 23(3)(a).

13. ¹³ s 26(2).

Minister but cannot be directed to make a particular finding or recommendation.¹⁴ The Review Committee does not make a finding about civil or criminal liability.

16. The committee is to meet at least 5 times per year¹⁵ and has functions including reviewing cases where children die or are seriously injured, with a view to preventing such incidents by making recommendations where necessary.¹⁶ They also maintain a database of child deaths and serious injuries. The Committee should review a case of child death or serious injury if there are grounds to suspect it is due to abuse or neglect; where there is grounds to suspect it may have been prevented by systemic change; where there had been a notification of suspected abuse or neglect of the child in the three years prior to the incident; where the child was under the guardianship of the minister; or if the case was referred by the Coroner.¹⁷
17. In performing its functions, people or organisations must supply requested information about the incident, except where they are exempt on grounds including being a 'prescribed person' to the child, or where the information sought would tend to incriminate the person.
18. The Committee must report to the Minister before 31 October each year, and that report must be laid before both Houses of Parliament.¹⁸ The Review Committee may refer matters to the Commissioner.¹⁹

Reporting

19. In addition to that contained under individual headings, the following applies:
 - i. The Commissioner, Guardian or Review Committee become aware of the possibility of any professional misconduct or unprofessional conduct, or corruption, misconduct or

14. ¹⁴ s 26(3).

15. ¹⁵ s 29(2).

16. ¹⁶ s 32(1).

17. ¹⁷ s 35(3).

18. ¹⁸ s 34.

19. ¹⁹ s 35(1).

maladministration in public administration, then it must be reported to the appropriate body.²⁰

- II. The Commissioner, Guardian or Review Committee may also make an immediate report to Parliament if they are satisfied that 'the matter raises issues of such importance to the safety or wellbeing of children and young people that the Parliament should be made aware of the matter as a matter of urgency.'²¹

Child Development Council

20. The Child Development Council ('Council') is established, with up to 12 members appointed by the Minister.²² The Council must meet at least 5 times per year and these meeting can be attended by the Commissioner.²³ The Council may establish committees.²⁴

21. It will replace the current Council for the Care of Children and 'will maintain the Outcomes Framework for Children and Young People and advise Government on Policy issues relating to the health, safety and development of children and young people.' In particular, one of the roles of the Council is to advise and report to the Government on 'improving the participation of children and young people in... cultural... activities'²⁵ and 'maintaining the cultural identity of children and young people.'²⁶

22. The Council should also, as far as reasonably practicable, seek to work collaboratively with 'relevant industry, professional and community groups and organisations.' Therefore, it would be hoped that ALRM would be an organisation that is consulted by the Council.

Outcomes

20. ²⁰ s 36.

21. ²¹ s 39(1).

22. ²² s 41.

23. ²³ s 47.

24. ²⁴ s 45.

25. ²⁵ s 49(2)(a)(v).

26. ²⁶ s 49(2)(a)(vii).

23. The Council is to create an *Outcomes Framework for Children and Young People* ('Framework').
24. In preparing this, the Council must 'ensure an appropriate focus on the needs of priority population groups' and may consult with persons or bodies that the Council thinks appropriate.²⁷ Again it would be hoped that this would include Aboriginal organisations although this is not specifically stipulated in the Bill.

Investigative Powers and Miscellaneous Provisions

25. The Commissioner may require a State authority to prepare and provide a report to the Commissioner. If they do not do so, the Commissioner may request the authority to provide a report explaining their noncompliance, which can then be submitted to the Minister.²⁸ The Minister must then report to Parliament.
26. The Commissioner, Guardian, Committee or Council, may require a specified person or body to provide information or documents. However, the Minister may exempt certain bodies from this requirement.²⁹
27. Information may be shared between the bodies.
28. There are various offences for refusal to comply, misleading sentences etc, with a maximum penalty of \$10,000 for each.
29. There can be no liability for the Commissioner, Guardian, Committee or Council for good faith acts or omissions.³⁰ The Act preserves legal professional privilege and public interest immunity,³¹ and a person cannot be compelled to answer a question or produce a document

27. ²⁷ s 51.

28. ²⁸ s 54.

29. ²⁹ s 55(5).

30. ³⁰ s 62(1).

31. ³¹ s 62(3)(a).

if they would not be required to do so in proceedings in the Supreme Court.³²

Amendments

30. Schedule 1 of the Bill amends a number of other Acts.
31. Parts 7A, 7B and 7C of the *Children's Protection Act 1993* are repealed. These sections relate to the pre-existing arrangements regarding the Guardian, Youth Advisory Council, Charter, Council for the Care of Children and the Child Death and Serious Injury Review Committee.
32. While many of the amendments do not have a large practical effect as the Bill largely restates the Act, there are some significant changes.
33. The Child Development Council replaces the existing Council for the Care of Children. Previously, under section 52F(3) of the *Children's Protection Act 1993*, the Council for the Care of Children was required to have at least one Aboriginal member and at least 1/3 female members. This requirement is no longer required and instead the Council's composition is 12 people who 'in the opinion of the Minister [have] the knowledge, skills and experience necessary to enable the Council to carry out its functions effectively.'
34. In addition, instead of reporting to the Government on progress, the Child Development Council is asked to develop performance indicators against which progress can be tracked. However, how this will be reported to the Government is unclear.
35. Furthermore, the *Children's Protection Act 1993* section 52J(d)(ii) codified the previous Council's responsibility to, especially, Aboriginal children. This is no longer required, although it is noteworthy that this may be contained in the as yet unreleased Regulations.
36. In addition, the Bill appears to remove the Charter of Rights for Children and Young People in Care as established by section 52EB of the *Children's Protection Act 1993*. Although there

32. ³² s 62(4).

will be an *Outcomes Framework for Children and Young People*, this does not appear to be specific to children in care.

37. Similarly, the Bill removes the requirement that 1/3 of the Child Death and Serious Injury Review Committee be female and 1/3 be male.

38. There are other changes to the *Freedom of Information Act* (makes the various bodies exempt agencies), the *Health and Community Services Complaints Act 2004* (removes the time limitation) and the *Ombudsman Act 1972* which removes the time limitation and restrictions on who can report.

Summary

- The Bill aims to provide greater oversight, and perhaps most significantly establishes a Commissioner for Children and Young People to conduct inquiries into 'systemic issues' relating to children in South Australia. However ALRM is gravely concerned that the Commissioner's role is limited to only examining those systemic issues, and this significantly narrows the scope of the Commissioner's role.
- ALRM is gravely concerned that the 'actual' powers of the independent Commissioner for Children and Young People are quite limited. While the Commissioner's Reports to South Australian Parliament, this may serve as an incentive for Government Departments to act, there is no real avenue for any enforcement or remedy.
- For the South Australian Aboriginal community and ALRM specifically, it is very concerning that the South Australian Aboriginal community will not be given a voice as the 'Outcomes Framework for Children and Young People' has limited avenues for consultation with

organisations of any kind. Although the Council “may” consult with organisations and bodies, but this is not required.

- ALRM is gravely concerned that there is almost no acknowledgment of Aboriginal children and the Aboriginal community specifically. This given alarming numbers of Aboriginal children who come to the attention of the child protection authorities.
- Furthermore, it is gravely concerned that Aboriginal children are not the focus of the Government when drafting this Bill, given that the *Children’s Protection Act 1993 (SA)* section 52J(d)(ii), codified the previous Council’s responsibility to, especially, Aboriginal children. Under the proposed Bill, this is no longer required. Again given alarming numbers of Aboriginal children who come to the attention of the child protection authorities.
- ALRM is gravely concerned that the Child Development Council replaces the existing Council for the Care of Children and that the new council is not culturally appropriate and the council will not properly represent the interests of Aboriginal children. Previously, under s52F(3) of the *Children’s Protection Act (SA) 1993*, the Council for the Care of Children was required to have at least one Aboriginal member and at least 1/3 female members. This requirement is no longer required and instead the Council’s composition is 12 people who *‘in the opinion of the Minister [have] the knowledge, skills and experience necessary to enable the Council to carry out its functions effectively.’* ALRM seeks assurances that the Government will include, as a mandatory requirement, at least, one third SA Aboriginal Community representatives within this Council.

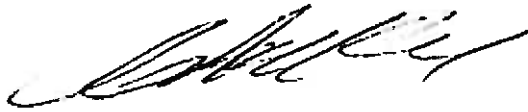
- ALRM notes that the Council is to create an Outcomes Framework for Children and Young People ('Framework'). In preparing this, the Council must *'ensure an appropriate focus on the needs of priority population groups'* and may consult with persons or bodies that the Council thinks appropriate. ALRM urges the Government to consult and to include SA Aboriginal Organisations, such as ALRM, in this Framework process.
- ALRM notes the proposal to establish The Child Death and Serious Injury Review Committee ('Review Committee') to consist of up to 20 members appointed by the Minister. ALRM seeks assurances that the Government will include, as a mandatory requirement, at least, one third SA Aboriginal Community representatives within this Review Committee.
- ALRM notes the proposal to establish the Child Development Council ('Council'), with up to 12 members appointed by the Minister. ALRM seeks assurances that the Government will include, as a mandatory requirement, at least, one third SA Aboriginal Community representatives within this Review Committee.
- ALRM notes that the Guardian must establish a Youth Advisory Committee ('the YAC'), the composition of which can be determined by the Guardian. ALRM seeks assurances that the Government will include, as a mandatory requirement, at least, one third South Australian Aboriginal Children representatives within this Committee.
- ALRM urges the SA Government to consider amending the Children and Young People (Oversight and Advocacy Bodies) Bill 2016, to take into consideration all the conclusions of this response and to consult with the SA Aboriginal Community widely and with ALRM, specifically.

Aboriginal Legal Rights Movement and the Aboriginal Community Leadership Reference Group advocates for the Bill to have provision for:

1. Two Co Commissioners with equal powers, one of whom will focus on Aboriginal Children and Young People. Or at the very least, an Assistant Commissioner. The Commissioner's office to be set up with adequate resourcing to access appropriate Aboriginal cultural information focussed on positive cultural outcomes for Aboriginal children involved.
2. Aboriginal Inclusion across all roles and functions of the oversight and advocacy bodies. The inclusion would look like: Aboriginal people involved in all aspects of decision making through consultation, planning, strategy development, policy and program development and implementation, community engagement, monitoring and evaluation and reporting.
3. Transparency and Accountability in relation to Aboriginal children and communities. This would look like: Policies, practices and procedures to have clear values which are important to Aboriginal people at the centre, demonstrated by leadership throughout any Agency and structures and bodies relating to child protection matters.
4. Aboriginal workforce development. Real pathways developed, with mentoring and support to grow a highly skilled and effective Aboriginal child protection workforce – with skills to work in any area of children protection systems from Ministerial Advisors, Executive support to any of the Child Protection Councils, leadership and management, social workers, psychologists and family support workers.

More widely, ALRM urges the Government to undertake the following:

1. Long term (5-10 year) planning and strategies in this area of child protection law.
2. Include the SA Aboriginal Community in genuine and meaningful consultation during the long term planning and strategies stage in this area of child protection.
3. Make family preservation and not permanent removal (or permanency planning measures) as the primary focus of child protection:
 - a) Place the child as the central focus of all planning and strategy decisions, but also consider the preservation of Aboriginal family and communities as a high priority
 - b) Provide adequate resources and funding and provide more options for early intervention 'wrap around' services and supports for SA Aboriginal families.
4. Aboriginal Non-Government Organisations to be given adequate and respectful resources (time, space, people and funding) to enable them to carry out their work efficiently and effectively in leading family early intervention strategies and ongoing child protection services. Current competitive tendering and contract management processes with funders does not support and actually detracts from the important business of child protections services and programs. Where non-Aboriginal Non-Government organisations provide services and programs to Aboriginal children and families, that their policies and service delivery is informed by an Aboriginal Children and Families Advisory Group and an accountability mechanism be adopted to ensure the policies and practice are Culturally safe and appropriate.



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and on behalf of

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