Submission on the draft Children and Young People (Safety and Support) Bill 2024

September 2024

Commissioner for Children & Young People

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Introduction

Thank you for the opportunity to provide feedback in relation to the *Children and Young People (Safety and Support) Bill 2024*. This much anticipated Bill appears to incorporate many of the recommendations made by the majority of stakeholders. I particularly welcome:

1. The strengthening of child voice in most areas of decision making.
2. Improvements to strengthen support for children and young people leaving care (Part 15).
3. The enshrining of the Aboriginal Child Placement Principle to the standard of active efforts.
4. New provisions that appear to support a public health approach to child protection and show greater commitment to interagency support response.
5. The interagency practice review panels in relation to some child deaths.

However there is still an opportunity to strengthen the Bill to ensure it enshrines best practice in legislation and lifts the collective focus on improving outcomes for all children and young people in this state to prevent contact with the statutory child protection system. If the bill is not strong enough in reframing its focus to supporting children and their families earlier, the pressures the system has been experiencing since the enactment of the *Children and Young People (Safety) Act 2017* will remain.

The child protection system is still experiencing pressure from several directions for either (a) alienating many families and communities through a response that focuses on forensic investigations and child removal, or (b) a public discourse criticising the system for not 'rescuing children' enough and demanding more authoritarian intervention in families rather than the provision of genuine family support. However, as those of us involved in the system know, removing a child from their family creates trauma for the child, the family and ultimately the community.

Getting it right for all children and young people in this state means promoting their rights to be heard and to maintain meaningful relationships and connections with family, community and culture; reframing risk; building trust with families; and listening to children and families about their experience of the system and the support they need.

To this end, I recommend the draft Bill be amended to:

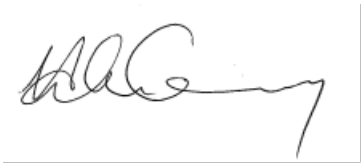
1. **Reframe the long title.**
2. **Ensure the best interests of the child is the paramount principle and consideration in decision making.**
3. **Strengthen and embed the guiding principles throughout the legislation, with regard to:**
    a. **Comprehensive principles of participation.**
    b. **Establishing a stand-alone principle of placement with order of priority.**
    c. **Strengthening the principle of 'effective intervention' with a focus on early intervention.**

   d. **Requiring the standard of 'active efforts' for all children.**
4. **Strengthen primary intervention provisions to support family preservation and reunification.**
5. **Ensure consistent application of the terms 'harm' and 'significant harm'.**
6. **Strengthen the Chief Executive's duty to make decisions in relation to children in care in line with strengthened principles of participation.**
7. **Ensure case plans are more child-centred in line with strengthened principles of participation.**
8. **Review Part 14 to ensure that parents, family and friends are supported and not criminalised.**

In supporting these recommendations I will also be referring back to my Submission on the Review of the (Safety) Act 2017 and the Submission on the Review of the (Safety) Act 2017 – Child Voice & Participation, as well as my Best Interests report, which highlight the importance of listening to children and young people's experiences within the child protection system.

If you have any further queries, please to not hesitate to contact this office.

Yours sincerely,



Helen Connolly
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1. **Reframe the long title.**

I commend the more detailed long title setting out the purpose of the legislation. It is important for all people in South Australia to understand the purpose is to support all children, young people and families in the state to have access to the support and services they need at the right time.

To better align with this intended purpose, I recommend that the long title be amended to:

'An Act to support and strengthen families and communities to improve outcomes for children and young people ***and promote children's best interests, safety and wellbeing, to support and build capacity of families,*** *to support children and young people who are in care to thrive, to promote working in partnership with families and their carers, to support children and young people leaving care ...'*

2. **Ensure the best interests of the child is the paramount principle and consideration in decision making.**

It is disappointing and somewhat embarrassing to see that South Australia will continue to be the only jurisdiction in Australia where 'safety' is the paramount principle of child protection legislation. In the Northern Territory, Victoria and Tasmania best interests is the paramount principle. In Queensland, New South Wales and Western Australia, safety is only one part of a paramount principle that also includes wellbeing and best interests.

The objective of the Act must not limit decisions to 'protect[ing] children and young people from harm' but instead seek to promote children's best interests and rights in a holistic way. Best interests is a well-established concept in Australian law and policy, which encompasses safety but also recognises the range of factors that influence children's overall wellbeing across the life-course.

Including best interests as the paramount consideration will ensure decisions incorporate a more holistic and long-term view of a child's life, development, relationships, health and wellbeing. Decisions made in this context will drive better outcomes for all children and young people and reduce the high numbers of children and young people entering the child protection system.

As stated in my previous submission, the term 'safety' alters the perception of risk and how to approach risk. The paramountcy of safety ultimately leads to fear-based decision-making and bias favouring removals rather than an evidence-based assessment of risk and best interests in its broader construct. This is a principal reason for high rates of child removal and limits chances for reunification.

It is vital that the best interests of the child be the paramount consideration in decision making. Safety would still be a significant consideration but should be placed alongside other elements of a child's best interests and rights, including the right to be heard.

3. Strengthen and embed the guiding principles throughout the legislation, with particular regard to:

I commend the amendments made to strengthen children and young people's rights through the guiding principles. However, there is an opportunity for these to be strengthened and further embedded throughout the operational sections of the legislation. This includes principles in relation to children's participation, placement, effective early intervention and active efforts for all children. Some principles should become stand-alone, bringing these principles in-line with other jurisdictions.

Although many pieces of legislation now contain principles that should be embedded into practice - more often than not - policies, procedures and practices do not integrate the very principles that help facilitate the intention of the legislation. This can result in a disconnect between the intention of the legislation and actual outcomes.

Further, I am concerned that some of the rights within the best interests principle are weakened by the term 'desirability'. This term reduces any right or action that enables a right to a 'desire' rather than an obligation. I therefore recommend that any reference to 'desirability' be redacted from the Bill.

a) Comprehensive principles of participation.

I commend how the Bill has attempted to strengthen the voices of children and young people to be heard. I submit that Division 4 could be strengthened by outlining more comprehensive 'principles of participation'. This will ensure that children and young people are given all the information, tools and support they need to be able to have their voices heard. I am concerned by the 'get out clauses' in the draft Bill, which allow decision makers to not hear from children and young people if they determine that it is 'not in the best interests of the child or young person to do so' or that the child does not have the developmental capacity to do so.

As discussed in my previous child voice submission and Best Interests Report, it is submitted that the best interests of the child can only be met if they are included and supported to participate in decisions. All decision makers should be listening to children – their voices, non-verbal cues and behaviour – to understand how they feel about their situation and what they want to improve about their situation.

As the United Nations Committee on the Rights of the Child has emphasised, the dichotomy between protection and participation is a false one and:

> *'There can be no correct application of Article 3 [the best interests of the child] if the components of Article 12 [hearing the child] are not respected. Likewise, Article 3 reinforces the functionality of Article 12, facilitating the essential role of children in all decisions affecting their lives'.*[i]

Principles of participation are included in legislation in other jurisdictions, including in the ACT, Queensland, WA, NSW and NT. In New South Wales, for example, the legislation outlines the 'principle of participation' to ensure that all children and young people are 'able to participate' in decisions that affect their lives. Principles include providing

assistance that is necessary to have a child or young person to express their views, adequate information in a manner or language that they can understand, information about the outcome of the decision and an opportunity to respond to the decision. None of these principles in other legislation include the abovementioned 'get out clause'.

There can still be provisions in subsequent sections that can better define how children and young people participate in certain proceedings, plans or actions.

I also note that the Law Society of South Australia reached out to stakeholders almost two years ago to develop guidelines for lawyers working with children and young people, but this office has heard nothing since. Standards like these should be developed to support all adults working across the system, not only legal representatives, to better facilitate children views.

b) Establishing a stand-alone principle of placement with order of priority.

Currently, the principles in respect to placement are included under the Best interests principle and only apply to case planning. It is recommended that a principle of placement becomes a stand-alone principle and reflects the order of priority outlined in the draft best interests principle. This will align South Australia's legislation with other jurisdictions and should be central to any decision made by the state or courts.

It is also recommended that the principle of placement should require decision makers to prioritise the child's experiences above what is expedient for the system. This principle should include a commitment to:

- Continue ongoing positive, trusting and nurturing relationships with persons of significance to the child, including the child's parents, siblings, extended family members and carers; and
- Provide stable living arrangements, with connections to the child's community, that meet the child's developmental, educational, emotional, health, intellectual and physical needs.

If children and young people are taken by the State from their family, it is vital that any legislation protects them from having every aspect of their lives turned upside down. Legislation in both New South Wales and Victoria note the importance of following 'the least intrusive intervention' and the importance of 'allowing the education, training or employment of the child to continue without interruption or disturbance' respectively.

c) Clarifying that the principle of 'effective intervention' requires early intervention.

The definition for 'effective intervention' is currently unclear. It is not a term normally used for all children and young people, with this term used more frequently in both the justice and health systems. This makes it essential to assist all who work within the ambit of this legislation by including a wider and more prescriptive definition.

The definition should be extended beyond 'timely, direct and fit for purpose given the circumstances of the child or young people' and include that intervention should be iterative and allow children and their families to seek and receive the right intervention and support at the right time. Effective intervention should also be appropriate to the age, developmental stage, culture, religion, education and needs of the child or young person.

The Bill should recognise that 'effective intervention' includes early intervention and prioritise investment in family support services, resources and supports that we know are needed prior to statutory intervention. As outlined in the next sections, this can be achieved through strengthening the principle of active efforts for all children and strengthening primary intervention provisions to support family preservation and reunification.

d) Requiring the standard of 'active efforts' for all children.

I welcome the implementation of active efforts for Aboriginal and Torres Strait Islander children and young people. As noted in my previous submission, the guiding principles should embed a requirement of active efforts to be made for all children and young people. All children and young people deserve the highest standard of practice to keep them healthy and safe with their family and community and culture. The requirement of 'active efforts' will enshrine the right for children to remain with their family as there will be a commitment by the state to provide support services and resources for this to occur.

When New South Wales accepted the recommendation for active efforts for Aboriginal and Torres Strait Islander children and young people as a result of the *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-Home-Care in New South Wales* the government made the decision to ensure it applies to all children and young people. As stated in Hansard, it 'ensures that the highest standard of practice is the norm and is applied consistently across the board. We want to get it right for Aboriginal children and all children. This bill gives us that opportunity.'[ii]

As addressed in my previous submission, any active effort principles should embed a requirement for all-of-government to take active efforts to keep children at home and in community, recognising that outcomes can often be worse for children who are taken from their family.

Most of the services that should be in a position to address the structural determinants of abuse and neglect – including housing and homelessness services, healthcare services, mental health services and drug and alcohol services – are not administered by the Department. The principle of 'active efforts' should therefore be embedded in all legislation governing agencies that provide services to children and families and front of mind when developing the 'State Strategy'.

A requirement of 'active efforts' will strengthen the legislative base for early intervention and family preservation and reunification. As asserted in my previous submission, support services must be extended to all parents and families both prior to and post-removal to improve their parenting capacity and readiness for reunification. Regardless of whether reunification happens, it is in the child's best interests that the parents address the

protective concerns. Even where removal is necessary and reunification is not achievable at one point in time, it is important to work with and support parents to address underlying trauma and parenting concerns and to ensure a relationship is maintained.

4. **Strengthen primary intervention provisions to support family preservation and reunification.**

I commend the provisions that seek to support a public health approach to child protection, including the powers of both the Minister and Chief Executive to create new services, interagency responses and other actions to help children and families earlier. However, the Bill is weakly worded and appears not to explicitly provide clear guidance on how any intervention will be achieved to ensure children remain safely at home.

South Australia's record in respect to investing and resourcing services and supports in the early intervention space is one of the worst in the country, with only 20 percent being invested earlier.[iii] This is an issue that was raised by Commissioner Nyland in the Child Protections Systems Royal Commission and there have been no significant changes since that time. It is concerning that the Bill omits the additional annual reporting obligations of the Minister in section 15 of the current Act, including the requirement to benchmark the resources allocated to family support and intensive family support services against other states and territories.

Legislation in other jurisdictions outlines the responsibility of the State to provide support for families prior to making a care application and to show evidence of such support. Beyond the mandatory requirement for Family Group Conferencing for Aboriginal children and the optional use for other children, the Bill misses an opportunity to strengthen the rights of children and young people to remain with their families and have access to appropriate support and services.

Alongside embedding the standard of active efforts for all children, I recommend amendments to:

- Include a chapter making provisions for effective primary intervention services, with guidance about how to refer children to these services and provisions. This could be similar to Chapter 3 of the *Children, Youth and Families Act 2005* (Vic)), and should give effect to Division 6 of Part 3 of the Bill in relation to establishing multi-agency networks and services for children and young people.
- Ensure that the Minister or Chief Executive 'will' - and not 'may' - resource these services. This should ensure the two-track process that Commissioner Nyland envisioned can be implemented.
- Clarify the objectives and purpose behind the 'State Strategy' and the Safety and Support Plans that support it. I would recommend that an explanation be included within this section to ensure all actors understand the purpose behind the Strategy and Plans. I would further recommend that s61(2)(c) be expanded to include an objective 'to promote the health, safety and wellbeing of all children and young people in the state.'

- Include a requirement in the Annual Reports of both the Strategy and Plans to report on the measures and outcomes set under s61(2)(b).

As discussed in my previous submission, primary intervention would be the largest part of a more balanced system, with secondary and tertiary services making up progressively smaller parts of the system. A public health approach provides a framework for all government agencies to be responsible for, and supported to take a more active role in, supporting children and families. This approach is also consistent with Nyland's recommendations and the National Framework for Protecting Australia's Children and Young People.

In 2021-2022 the Victorian government embedded an Early Intervention Investment Framework 'linking Government's funding to quantifiable impacts both for people using the services as well as the service system, EIIF guides investments to where timely assistance for Victorians will improve life outcomes for individuals and reduce pressure on acute services.'[iv] It may be an important framework that could boost early intervention and prevent children and young people from entering the child protection system and I hope the government considers this model within its budgetary process in the future to support the implementation of any new legislation.

5. Ensure consistent application of the terms 'harm' and 'significant harm'.

I support the increase in the threshold for reporting from the risk of harm to significant harm. I understand the intention behind the Bill including 'significant harm' as well as 'harm' is to allow the system to respond to those at greatest risk while diverting those at lower risk to the services they require to keep them out of the statutory child protection system. However, it appears the threshold for actions is being inconsistently applied throughout the Act.

I note that significant harm is only being applied in relation to mandatory reporting and the removal of children by child protection officers, undermining the intention of inserting the higher threshold in the first place. For example, it appears that the court can order issue certain orders if there is 'a reasonable suspicion that a child or young person is at risk of harm'. This could translate to children and young people still being removed at the lower threshold of 'risk of harm' when the purpose of the lower threshold is to protect children's rights to remain safely in their homes.

I concede that the lower threshold should allow courts to make orders to ensure support for children and their families to remain at home, but at the same time there is a danger that it will not stem the flow of children being taken from their homes even when there is no 'significant harm'. I therefore recommend that the bill be fully reviewed to ensure that the intention behind the bill remains and addresses the high numbers of children being removed from their birth families.

More guidance, including providing examples, on what significant harm looks like would also better assist practitioners and those working with children and families ensuring consistency of practice.

6. Strengthen the Chief Executive's duty to make decisions in line with strengthened principles of participation.

There is an opportunity to strengthen provisions throughout the Bill to ensure children and young people receive information about how and why decisions have been made about their life, including contact arrangements. The provision of such information is consistent with the strengthened principles of participation recommended above, which draws on practice in other jurisdictions.

The current draft provisions guiding the decisions the Chief Executive is able to make do not explicitly require the CE to consider what is in the best interests of the child, nor does it require them to talk to the child or young person (for example, in relation to placement [s 130] and contact arrangements [s 138]). The CE should have a duty to ensure that any decision that is made is in the child or young person's best interest, with their input. All decisions should be made alongside children and young people to give them agency. A child or young person's agency is too often taken from them when they are removed from their families. It will also strengthen children and young people's civic skills, wellbeing, health and safety in the long term.

I would further submit that any major decision made, such as a child or young person moving homes, schools and other life changing circumstances needs to be recorded and documented alongside the child or young person's view on the matter.

I note that the Bill allows children and young people to have certain decisions reviewed internally (s197) when they do not agree, however the provision does not enforce a time for the CE to complete their review. To protect a child's best interests and mental health, they should be required to close the review within 30 days. If the review is not closed within that time they should be able to revert the review to SACAT in-line with s198.

Contact decisions detailed in ss137 and 141 also appear to be another decision that is made to the child or young person and not with them. S138(2) states that 'the Chief Executive *for any reason*' they see fit can determine that there be no contact. This appears to be very wide when s138(4) provides some guidance on when the CE should not grant contact arrangements and could result in decisions being made that are not in the best interests of the child.

Further to this there appears to be no provision that allows children and young people to express who they want to contact and why. It appears their wishes are not a part of this decision-making process. I understand the case plan has a 'part' that sets out wishes and preferences of children and young people which should include who they want to have relationships with, but there is no guarantee that the CE will consider these 'wishes and preferences' in practice. The child's view needs to be strengthened, including talking to the child what the contact decision is and why.

While I welcome the requirement for the Chief Executive to provide a copy of the Charter of Rights to children and young people in care, I note the CE need not comply if they are 'of the opinion that the child or young person is not reasonably capable of understanding the Charter'. There should be a requirement for the CE to take steps to ensure children and young people receive this information in a way that is age-appropriate, developmentally appropriate and culturally appropriate.

7. **Ensure case plans are more child-centred in line with strengthened principles of participation.**

While the current drafting of the Bill takes into consideration many aspects of children and young people's lives, more can be done to ensure case plans are more child-centred.

The current draft 128(3) states that the CE 'must, in causing a plan to be prepared, take reasonable step to ascertain the views, and encourage the participation, of any person who, in the opinion of the Chief Executive, has information relevant to the preparation of the case plan of a particular child or young person.' A cold reading of this could imply that all other actors, apart from the child or young person, have the relevant information that will help the CE with their decision when it is the child or young person who is the real expert in their own lives. This provision should be strengthened to include 'the Chief Executive must take reasonable steps to ascertain the views of the child or young person'.

To ensure the child voice is heard outside the making of a case plan, the case plan should contain a part that details how the child participates in the decisions that are being made by the Department, case workers and other decision makers. This includes how the Department will work with them when making everyday decisions that impact their lives. Examples include what sport club they choose, how they can visit friends and families when they are invited at short notice and all those small decisions that families and children negotiate on a daily basis.

Opportunities for children to be heard at a systemic level are not consistent enough to capture key aspects of a child's life and changes over time, including in relation to their relationships, experiences, wellbeing and aspirations. The plan should outline how children and young people can communicate and ask for decisions to be made in real time, like parents do. Real time conversations, decision making and checking in with how a child feels is simple in this technological age and should be fully utilised (including through phone calls, messaging and other social media apps).

The draft principles provide that all actions and decisions made under this Act (whether by legal or administrative process) that significantly affect a child or young person must account for the culture, disability, language, religion and sexuality of the child or young person and, if relevant, those with parental responsibility for the child or young person. This important principle is not included as a 'part' of the case plan (with the exception of 'a part setting out a cultural maintenance plan') despite it being essential for the child and anyone working with the child.

8. **Review Part 14 to ensure that parents, family and friends are supported and not criminalised.**

I welcome the harbouring provisions detailed in Part 14 of the Bill insofar as they protect children and young people from interacting with people that are effectively grooming them or using them as part of a criminal enterprise and the increase in the penalty to 3 years (compared to 12 months in the current Act) in these specific circumstances. However, it could be argued that the current drafting continues to run the risk of

criminalising family, parents or others who accept children in their homes when they run away.

Families, carers or friends should not be criminalised for 'harbouring' children in these circumstances. It is simply adding an extra burden for both the child and family to be laid with such punitive consequences and could negatively effect the trust a child has in the 'system' and with the family or friends. I therefore recommend that Part 14 be reviewed to ensure that it has no unintended consequences.

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[i] United Nations Committee on the Rights of the Child, General Comment No. 12 (2009) The right of the child to be heard, p. 18. Available at https://www.refworld.org/docid/4ae562c52.html.
[ii] Parliament of New South Wales. Legislative Council Hansard – 13 October 2022. Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022. The Hon. NATASHA MACLAREN-JONES (Minister for Families and Communities, and Minister for Disability Services). Accessed at https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-90494'.
[iii] Guardian for Children and Young People. Child Protection in South Australia from the Productivity Commission's Report on Government Services 2023. Accessed at https://gcyp.sa.gov.au/wordpress/wp-content/uploads/2023/06/OGCYP-Child-Protection-from-the-Report-on-Government-Services-2023.pdf.
[iv] Victoria State Government Treasury and Finance. Early Intervention Investment Framework. Accessed at https://www.dtf.vic.gov.au/funds-programs-and-policies/early-intervention-investment-framework.