

# COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE SA

## LEGISLATIVE AND POLICY OVERVIEW

**JUNE 2018**



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## INTRODUCTION

This review summarises select legislation and policy relevant to children and young people in South Australia, and in doing so, identifies areas that may be of interest to the South Australian Commissioner for Children and Young People (CCYP).

It also provides an insight into the work of children's commissioners and advocates in other jurisdictions.

The CCYP has an important role in promoting and advocating for the rights of all children and young people in South Australia, and in order to fulfil that function has a wide-ranging capacity to inquire, consult, and undertake research into areas related to the rights, development and wellbeing of children and young people at a systemic level.

This is a desktop review canvassing some of the main legislative and policy areas related to children and young people and there may be other areas of interest that do not appear in this review.

Note: The primary legislation concerning child protection in South Australia is the *Children's Protection Act 1993* and the *Children and Young People (Safety) Act 2017*. Some sections of the *Children and Young People (Safety) Act 2017* have commenced at the date of this report, with the remaining intended to commence in October 2018.

## THE ROLE OF THE CCYP

The South Australian CCYP was established under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* primarily in response to recommendation 245 of the Child Protection Systems Royal Commission.<sup>1</sup>

<sup>1</sup> The Hon Margaret Nyland AM, *Child Protection Systems Royal Commission* report: 'The life they deserve', 2016

The role is informed by the United Nations *Convention on the Rights of the Child* which sets out fundamental human rights for children and young people.

The CCYP's role includes to:

- promote and advocate for the rights and interests of all children and young people in South Australia
- promote the participation by children and young people in the making of decisions that affect their lives
- advise, and make recommendations to government and non-government bodies on matters related to the rights development and wellbeing of children and young people at a systemic level
- inquire into matters related to the rights, development and wellbeing of children and young people at a systemic level
- assist in ensuring that South Australia satisfies its international obligations in respect of children and young people
- undertake or commission research into topics related to children and young people
- prepare and publish reports on matters related to the rights, development and wellbeing of children and young people at a systemic level<sup>2</sup>

The 'development' of children and young people includes the physical, social, emotional and intellectual growth of each individual from birth through to adulthood.

The 'wellbeing' of children and young people includes the care, development, education, physical and mental health and safety of each individual from birth through to adulthood, as well as the cultural welfare and wellbeing of children and young people.

<sup>2</sup> Section 14

The CCYP may inquire into matters affecting children and young people at systemic level (a **section 15 inquiry**).<sup>3</sup>

### *What can give rise to a section 15 inquiry?*

The CCYP may initiate a section 15 inquiry for a number of reasons, including the policies, practices and procedures of a State authority or authorities as they relate to the rights, development and wellbeing of children and young people generally, or a particular group of children and young people.

The matter should be one that raises issues of particular significance to children and young people, the matter must be of a systemic nature, and it must be in the public interest to conduct the inquiry.

The inquiry cannot impede another investigation.

### *How does the CCYP fulfil their functions?*

Of primary importance, the CCYP is required to consult with children and young people in every aspect of delivering their functions.

### *Section 15 inquiries*

For the purposes of a section 15 inquiry, the CCYP has the powers of a commission as defined in the *Royal Commissions Act 1917*.<sup>4</sup>

Where the CCYP initiates a section 15 inquiry, state authorities are required to assist in any way requested by the CCYP.<sup>5</sup>

The CCYP may issue recommendations arising from a section 15 inquiry.<sup>6</sup>

### *Other functions*

Other functions of the CCYP could include preparing reports to the relevant Minister/s on matters related to the rights, development and

wellbeing of children and young people at a systemic level,<sup>7</sup> advice and recommendations to government or non-government bodies, and research.

The CCYP is given broad powers “as may be necessary or expedient” for functions in the legislation outside of a section 15 inquiry.<sup>8</sup>

In order to fulfil other functions, the CCYP is likely to require research and data from varied sources, including State authorities.

The methods for acquiring this information is not as clearly stated as some other jurisdictions (compare, for example, WA, where the Commissioner may ask a government agency or service provider to disclose relevant information).<sup>9</sup>

However, the CCYP can formally require a State authority to prepare and provide a report,<sup>10</sup> or by notice require information or documents from a state authority.<sup>11</sup>

Generally, the *Public Sector (Data Sharing) Act 2016* operates in respect of this legislation.<sup>12</sup>

The legislation also allows the sharing of prescribed information between the Commissioner, Guardian, the Committee, the Council, and other State authorities if it will assist in fulfilling functions under the legislation, or in managing risk to a child.<sup>13</sup>

Informally, in addition to consultation and engagement with young people, the CCYP is likely to consult with and request information from State authorities, and undertake further research in order to fulfil the CCYP’s functions.

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3 Section 15

4 Section 16

5 Section 15(6)

6 Section 17

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7 Section 19

8 Section 16

9 *Commissioner for Children and Young People Act 2006*, section 22(2)

10 Section 60

11 Section 61

12 Section 63

13 Section 62

### *What kind of work could the CCYP produce?*

The CCYP has broad discretion in fulfilling their functions.

Examples of work from commissioners in other jurisdictions (see further at “Comparison to other jurisdictions” below) include:

- consultations
- identifying and monitoring trends
- reports and research in conjunction with other State and non-government bodies
- policy or service delivery scorecards
- advisory opinions
- guidelines for policy makers
- resources for the public/community sector
- submissions on legislation/policy at both a State and Federal level

### *Role of Guardian, Committee and Child Development Council*

The legislation continues the existing role of the Guardian for Children and Young People (**Guardian**) and the Child Death and Serious Injury Review Committee (**Committee**), and creates a new Child Development Council (**Council**). Their roles are not detailed in this review except where relevant to the role of the CCYP.

Generally, the Guardian’s role is to advocate for and promote the rights and best interests of the children and young people under the guardianship of the Minister for Education. This includes a monitoring role.

The Council is required to prepare an ‘Outcomes Framework for Children and Young People - Charter for Children and Young People’ which includes developing performance indicators against which progress in relation to the development and wellbeing of children and young people in the state can be tracked over time.

### *UN Convention on the Rights of the Child*

South Australia has developed a framework for giving effect to the UN *Convention on the Rights of*

*the Child* which has been endorsed by UNICEF Australia for use across Australia.<sup>14</sup>

### *Role of the South Australian Ombudsman*

The Ombudsman SA, amongst other functions, has a role in investigating complaints about South Australian government and local government agencies, and conducts audits of these agencies.

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<sup>14</sup> See more at <https://www.decd.sa.gov.au/teaching/projects-and-programs/child-friendly-sa>

## COMPARISON TO OTHER JURISDICTIONS

### *The role of a commissioner for children and young people*

Although the role of commissioner differs across jurisdictions, their primary role is to advocate for children's rights and review legislation, policy and practices that affect the health, welfare, care, protection and development of children and young people.

Commissioners generally have the power to report and make recommendations to parliament on issues concerning children and young people.

### *What is a guardian for children and young people?*

A children's commissioner or advocate works to improve and ensure better services for *all* children and young people and ensures the voice of all children and young people is heard in government decision making. A guardian works to help improve the services for children in government care. In many jurisdictions, the role of guardian and commissioner is combined.

### *The work of the commissioners*

Below is a general overview of some of the functions of commissioners in each state and territory, as well as examples of projects undertaken by those commissioners.

Many of the example projects have not been conducted through a formal statutory inquiry (such as the South Australian section 15 inquiry), but instead are topics of interest that have been identified through consultation with children and young people, in partnership with community organisations, by request of state or territory governments, through media attention, or by identifying gaps in research.

## CTH

### *National Children's Commissioner*

#### The Commissioner's role

- promoting respect and understanding of the human rights of children in Australia through research, education and discussion
- ensuring government policy and legislation recognises and protects the human rights of children

A *National Framework* outlines the long-term national approach to ensuring the safety and well-being of children in Australia. The National Framework is being implemented through a series of three-year action plans.<sup>15</sup>

## TAS

### *Commissioner for Children and Young People*

#### The Commissioner's role

- monitoring, promoting and advocating for the wellbeing of children and young people
- promoting and encouraging the participation of young people in decision-making
- supporting policy development on matters that relate to children and young people
- assisting Tasmania to meet national and international obligations around children and young people

The Commissioner can collect information or data for the purposes of:

- collating, studying, interpreting and maintaining information in relation to the

<sup>15</sup> <https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/protecting-australias-children>

wellbeing of children and young people in the state

- identifying and monitoring trends in respect of the wellbeing of children and young people in the State

This includes a power to investigate, and make recommendations in respect of government legislation and policies, as well as systems, policies and practices of organisations, government or non-government, that provide services that affect children and young people.

The Commissioner can investigate in any manner they consider appropriate.

The Commissioner can advocate for all Tasmanian children, but has a particular focus on children in need of strong advocacy, such as children involved with the Child Protection System and/or the Youth Justice system.

The Commissioner is an official advocate for young people who are detained under youth justice legislation.

### Example projects

The Commissioner makes a decision to undertake a project based on the Commissioner's assessment, in consultation with children and young people and others, of current issues which affect or have the potential to impact upon children and young people.<sup>16</sup>

*Health and Wellbeing of Tasmania's Children, Young People and their Families Report*<sup>17</sup>

This report measured the status and wellbeing of children and young people. The data is intended to be viewed either alone, or as a method to track and measure the progress of actions over time.

<sup>16</sup> <http://www.childcomm.tas.gov.au/projects/>

<sup>17</sup> <http://www.childcomm.tas.gov.au/wp-content/uploads/2017/03/Health-and-Wellbeing-of-Tasmanias-Children-Young-People-and-their-Families-Report.pdf>

## NSW

### Advocate

#### The Advocate's role

- consulting with and promoting the participation of children and young people in decision-making
- making recommendations to legislation, policies, reports and practices that affect children and young people
- conducting research and inquiries into issues that affect children and young people
- working with the minister to prepare NSW's strategic plan for children and young people

Responsibility for children and young people in out of home care rests with a separate Guardian.

### Example projects

*NSW Strategic Plan for Children and Young People*<sup>18</sup>

This is a legislated whole-of-government plan for children and young people.

*Support in tough times: Encouraging young people to seek help for their friends*

This review was undertaken by the NSW Commission for Children and Young People in partnership with the Mental Health Commission of NSW. It investigates the school's role in young people seeking adult help for a friend experiencing a mental health problem. The research also explored young peoples' views on seeking adult help for a friend.

This decision to conduct the research arose from discussions with the NSW Commission for Children and Young People's Young People Advisory Group,

<sup>18</sup> <https://www.acyp.nsw.gov.au/plan>

consultations with students, and identified gaps in existing research.<sup>19</sup>

## WA

### *Commissioner*

#### The Commissioner's role

- advocating on behalf of children and young people
- consulting with children, young people, families and relevant organisations and promoting their participation in decision-making
- undertaking and commissioning research and inquiries to do with children and young people's wellbeing
- monitoring children and young people's complaints made against government agencies
- investigation of these complaints
- monitoring and reviewing legislation, policies, practices and services that affect children and young people

#### Example projects

##### *Education consultation*

The Commissioner has undertaken a major education project regarding student engagement in schools.

The Commissioner has indicated that this will be a continuing area of advocacy, including working with schools and governing authorities to respond to the views expressed by students in this and previous consultations.

The Commissioner has indicated their intention to develop a series of policy briefs to assist decision-makers and teachers, and will monitor and report on progress on the recommendations of this

<sup>19</sup>

[https://cdn2.hubspot.net/hubfs/522228/publications/health\\_safety\\_and\\_wellbeing/Support\\_on\\_tough\\_times\\_website.pdf?t=1525846440667](https://cdn2.hubspot.net/hubfs/522228/publications/health_safety_and_wellbeing/Support_on_tough_times_website.pdf?t=1525846440667)

report "to ensure children and young people's views are respected and result in practical improvements for all WA students".

## ACT

### *Commissioner*

#### The Commissioner's role

- consulting with children and young people on issues that are important to them and supporting others to consult with children and young people
- ensuring the commission is accessible to children and young people
- reviewing systemic issues which affect children and young people such as changes in policy or legislation, new research findings or service improvements

#### Example projects

The Commissioner maintains a register of systemic concerns, with issues on the register drawn from:

- complaints and complaint related enquiries received by the Commissioner
- issues brought to the attention of the Commissioner by agencies and individuals
- issues of national or international concern
- Contemporary research findings

Issues on the register are reviewed as resources and priorities permit.<sup>20</sup>

#### *Child Impact Assessments*

The Commissioner has developed Guidelines to assist individuals and agencies undertake Child Impact Assessments.<sup>21</sup>

<sup>20</sup> <http://hrc.act.gov.au/childrenyoungpeople/reviewing-issues-systemic-concern/>

<sup>21</sup> <http://hrc.act.gov.au/childrenyoungpeople/child-impact-assessments/>



## NT

### *Commissioner*

#### The Commissioner's role

- protecting and caring for vulnerable children through investigating complaints, undertaking inquiries and monitoring responses to complaints and inquiries
- monitoring the *Care and Protection of Children Act* and the Child Protection Department's response to abuse allegations
- promoting awareness of the rights, interests and wellbeing of vulnerable children

The NT Commissioner has a very clear role in monitoring and promoting the rights of vulnerable children.

#### Example projects

*Services Provided by the Northern Territory Department of Correctional Services to Don Dale Youth Detention Centre Alice Springs Youth Detention Centre*

An investigation to address the systemic issues emerging from complaints received from young persons in detention.

in the child protection and broader service system

- monitoring out-of-home care and other services for vulnerable children and young people, including receiving reports of serious incidents

#### Example Projects

In 2017, the Commission completed five major inquiries into systemic aspects of the child protection and youth justice systems.

The decision to investigate arises from reports from independent visitors, a series of incident reports, or data from child death inquiries.<sup>22</sup>

#### *The same four walls*

Initiated by the Commission because of escalating concerns about the use of isolation and lockdowns in youth justice facilities, based on:

- complaints to the Commissioner for Aboriginal Children and Young People from members of the community who were worried about the excessive use of isolation for Koori children and young people
- the Commission's review of isolation records for Koori children that indicated poor compliance with policies and the *Children, Youth and Families Act 2005*
- concerns repeatedly raised by the Commission's independent visitors to Victoria's youth justice centres
- the incoming Principal Commissioner's observations about the extent of lockdowns and the frequent use of isolation

## VIC

### *Commission for Children and Young People*

(which includes the Principal Commissioner and the Commissioner for Aboriginal Children and Young People)

#### The Commission's role

- undertaking policy analysis, research and communicating findings on issues relevant to children and young people
- conducting child death and other inquiries and informing systemic reform

## QLD

<sup>22</sup> <https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/about-our-systemic-inquiries/>

## *Family and Child Commission*

### *Principal Commissioner*

- overseeing and improving the child protection system
- ensuring the community is informed about services for children and families
- coordinating research to inform policy and practice
- advising on legislation, policy, practice and service delivery
- working to build capacity and increase collaboration to improve services for children, young people and families

### *Office of the Public Guardian*

- supporting children in care through the community visitor program and the child advocacy program

The legislation requires the Family and Child Commissioner to include in its annual report information on Queensland's:

- performance in relation to achieving state and national goals in relation to the child protection system
- performance over time in comparison with other jurisdictions
- progress in reducing the number of, and improving the outcomes for, Aboriginal and Torres Strait Island children and young people in the child protection system

### *Example Projects*

*Strengthening our sector: A strategy for working together for a responsive sustainable service system across the child and family support sector 2016–19*

Arising out of a legislated mandate to lead the development of sector wide workforce planning and development strategies, the strategy is

intended as a platform for bringing together the whole sector to drive transformation.

## RELEVANT LEGISLATION AND POLICY

There are a number of legislative and policy areas that are relevant to children and young people in South Australia.

The CCYP has a role in advising Ministers, State authorities and other bodies on matters related to the rights, development and wellbeing of children and young people at a systemic level, and must promote and advocate for the rights and interests of all children and young people in South Australia.

This could include (but would not be limited to) advising on matters in the areas identified below, but also new and emerging areas of policy and legislative development.

Below is an outline of some of the main areas of potential interest:

- education and children's services
- training and employment
- child protection
- law and order
- health, mental health, disability services and substance use

The CCYP may take an interest in these areas at a systemic level because of the legislative or policy requirements, but also because of issues identified in consultation with children and young people, issues raised in the media, or issues raised by government and non-government bodies.

The CCYP may gain further insight into these areas by consulting with relevant government and non-government bodies, inspecting agency records (for example, attendance records), or through existing research.

## EDUCATION AND CHILDREN'S SERVICES

As a voice for children and young people, the CCYP may take an interest in legislation and policy in the areas of education and children's services.

### Education

South Australia's education system is governed both by Commonwealth<sup>23</sup> and South Australian legislation.

#### Commonwealth

The Commonwealth legislation primarily facilitates the provision of Australian Government funding to government and non-government schools, although there is also a broad acknowledgement contained in the preamble that "a good education prepares students for full participation in society, both in employment and in civic life. Education also has a role to play in overcoming social and economic disadvantage."

#### Potential areas of interest

The CCYP has a very broad role in advocating for the rights of children and young people and as such may take an interest in Commonwealth legislation, but this would also likely be an area of interest for the National Children's Commissioner.

#### South Australia

The primary South Australian legislation<sup>24</sup> is very broad with the Minister and Director-General responsible for much of the implementation and determination of matters, including curriculum.<sup>25</sup>

#### Potential areas of interest

Related to the general state legislation, the CCYP is interested in a number of policy areas in the education and children's services area. At the date

of publication, these policies are administered by the Department of Education.

#### *Attendance and participation*

Subject to certain exemptions, children in South Australia are required to attend and participate in school.<sup>26</sup>

The Department of Education has released an *Attendance Strategy for Government Schools and Preschools*<sup>27</sup> which notes, amongst other things, that "absences that are a result of incidents at school, such as bullying or peer-related issues and suspensions, result in children and young people missing critical learning times".<sup>28</sup>

Given the legislative requirements for attendance and participation and the issues identified by the Department for Education, this is an area of interest or further research, consultation and investigation for the CCYP.

Attendance and participation is also affected by education behaviour management policies, as well as the employment commitments of children and young people (see further below regarding "Behaviour Management" and "Training and Employment").

#### *School performance and determination of curriculum*

The Director-General has responsibility for setting curriculum in South Australia.<sup>29</sup>

At a Commonwealth level, the Review Panel for the *Review to Achieve Educational Excellence in Australian Schools* delivered its final report to the Prime Minister and Commonwealth Minister for Education and Training on 28 March 2018.

<sup>23</sup> *Australia Education Act 2013 (Cth)* and regs

<sup>24</sup> *Education Act 1972* and *Education Regulations 2012*

<sup>25</sup> Section 12, see also section 82 relating determination of curriculum

<sup>26</sup> Section 5

<sup>27</sup> <https://www.education.sa.gov.au/sites/g/files/net691/f/attendance-strategy-government-preschools-schools.pdf>

<sup>28</sup> P. 4

<sup>29</sup> Section 82

The CCYP may have a role in advocating for or promoting the rights of children and young people as they relate to any South Australian responses to or actions arising out of this review (as long as this does not impede other concurrent investigations).

### *Duty of Care*

There is a legal requirement for all Department of Education staff to exercise a duty of care towards children in their care and control.<sup>30</sup>

This general requirement is also likely to be of interest to the Guardian.

### *Creating safe environments for children*

Certain organisations are required to provide a child safe environment,<sup>31</sup> which is safe and friendly setting where children feel respected, valued and encouraged to reach their full potential.

See further at “Child Protection” below.

### *Principles of Inclusion for Children and Students with Disability in Education and Care*

These principles were developed to promote equity, access, opportunity and the rights of children and students with disability in education and care and provide early childhood education and care centres and schools with broad and consistent criteria for inclusion.<sup>32</sup>

### *Healthy Eating Guidelines*

A framework through which schools and preschools can promote learning, health and wellbeing in relation to food and nutrition.<sup>33</sup>

### *Cyber bullying and e-safety*

There are a number of resources developed by the South Australian Department for Education related to e-safety and wellbeing.<sup>34</sup>

The Commonwealth Office of the E-Safety Commissioner also has a role in assisting all Australians, including children, to have positive and safe experiences online.<sup>35</sup>

### *Behaviour Management*

In government schools, principals have the authority to impose controls on the behaviour of students and to apply penalties for breaches of school rules.

All South Australian public schools have a written policy setting out expectations of behaviour, forms of unacceptable behaviour and methods for behaviour management.

This includes broad powers to suspend, exclude or expel a student if they threaten or are violent at school or represent a threat to the safety of students or staff (including not performing school work and not participating in class)<sup>36</sup> and the right of teachers to detain students during their lunch break and after school hours.<sup>37</sup>

Physical punishment cannot be administered in government schools.

The governing body determines the rules for behaviour management in non-government schools.

Students can be excluded from attendance at the school for up to 20 weeks per year. Before

<sup>30</sup> <https://www.education.sa.gov.au/doc/duty-care-policy>

<sup>31</sup> *Children's Protection Act 1993*, Div 3

<sup>32</sup> <https://www.education.sa.gov.au/doc/principles-inclusion-children-and-students-disability-education-and-care>

<sup>33</sup> <https://www.education.sa.gov.au/doc/healthy-eating-guidelines>

<sup>34</sup> <https://www.education.sa.gov.au/supporting-students/health-e-safety-and-wellbeing/cyber-safety-bullying-and-harassment>

<sup>35</sup> <https://www.esafety.gov.au/esafety-information/esafety-issues/cyberbullying>

<sup>36</sup> *Education Regulations 2012*, r 44-46

<sup>37</sup> *Education Regulations 2012*, r 43

excluding the student, the student must first have been suspended.<sup>38</sup>

A student can be expelled for behaviour for which they have previously been suspended.<sup>39</sup> Expulsion can be from a particular school, or all schools.<sup>40</sup>

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<sup>38</sup> *Education Regulations 2012*, r45

<sup>39</sup> *Education Regulations 2012*, r46

<sup>40</sup> *Education Regulations 2012*, r47

## TRAINING AND EMPLOYMENT

### Employment

There are no specific child labour laws in South Australia, and no minimum age for working. However it is unlawful to employ a child of compulsory education age during the hours in which they are required to attend school, or employ them in work that would make them unfit to attend school or to obtain proper benefit from attending.<sup>41</sup>

Industrial awards may have restrictions on the kind of work that can be done by a person under 18 years of age, or have different rates of pay for their employment. Children and young people may also participate in apprenticeships and traineeships before they turn 18 years. To do this, a parent or guardian must sign the training contract.

The Commonwealth Fair Work Ombudsman provides a number of resources for young workers and their employers and provides an avenue for complaints.<sup>42</sup>

School based counsellors are teachers with additional skills, whose assistance can include career counselling.<sup>43</sup>

### Anti-discrimination legislation

The *Equal Opportunity Act 1984* prohibits discrimination in employment on the grounds of age, sex, sexuality marital status, pregnancy, race or physical and intellectual impairment.

Complaints in this area are made to the Commissioner for Equal Opportunity.

### Traineeships and apprenticeships

Students can complete a Vocational Education and Training qualification at school or do units from a qualification which goes towards their South Australian Certificate of Education (SACE) and post-school training, or an apprenticeship.

The South Australian Office of the Training Advocate has a primary role in advising the State Government on ways to improve the training system, including for children and young people.<sup>44</sup>

Trainees and apprentices can also access support through the South Australian Employment Tribunal.

The *Training and Skills Development Act 2008* regulates higher education, vocational education and training, adult community education, and education services for overseas students, and establishes the Training and Skills Commission and the Training Advocate.<sup>45</sup>

Looking to other jurisdictions, the Australian Capital Territory government consulted with the Commissioner for Children and Young people in preparing a guide for young people at work.<sup>46</sup>

### TAFE SA review

Following an Australian Skills Quality Authority (ASQA) audit of some TAFE SA courses, the state Government is reviewing TAFE SA to identify the systemic issues that contributed to ASQA's adverse findings, and set out key reforms.

### Potential areas of interest

Outside of work health and safety considerations and general career guidance, there appears to be little promotion of the voice of children and young people in relation to employment (for instance, in

<sup>41</sup> *Education Act 1972*, section 78

<sup>42</sup> <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/a-guide-for-young-workers>

<sup>43</sup> <https://www.education.sa.gov.au/sites/g/files/net691/f/school-based-counselling-service-brochure.pdf?v=1459299244>

<sup>44</sup> <http://www.trainingadvocate.sa.gov.au/faqs/frequently-asked-questions>

<sup>45</sup> Training and Skills Development Act 2008

<sup>46</sup>

[https://www.education.act.gov.au/\\_\\_data/assets/pdf\\_file/0018/193212/Young\\_People\\_at\\_Work.pdf](https://www.education.act.gov.au/__data/assets/pdf_file/0018/193212/Young_People_at_Work.pdf)

discussing the quality of work for young people, or aligning education and training to the contemporary labour market).

Training and employment is an area of interest for further research, consultation and investigation for the CCYP.



## CHILD PROTECTION

The primary legislation concerning child protection is the *Children's Protection Act 1993*, the *Children and Young People (Safety) Act 2017 (the CYPS Act)*, and the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (discussed further above at "Role of the CCYP").

Some sections of the CYPS Act commenced on 26 February 2018, with the remaining intended to commence in October 2018.

The CYPS Act aims to:

- protect children and young people from harm
- to provide for children and young people who are in care
- and for other purposes

The CYPS Act also contains a broad declaration recognising and acknowledging the role of children in South Australia,<sup>47</sup> their value, the importance of ensuring children and young people have the opportunity to thrive, the importance of keeping them safe from harm, to enjoy a healthy lifestyle, to do well at all levels of learning and to have skills for life, and to be active citizens who have a voice and influence.

The CYPS Act is intended to work in conjunction with the *Children and Young People (Oversight and Advocacy Bodies) Act 2016*.<sup>48</sup>

### Needs of children

The legislation makes it clear that the needs of children and young people to be considered in the administration, operation and enforcement of the Act. These needs include:

- the need to be heard and have their views considered
- the need for love and attachment

<sup>47</sup> Section 4 CPYS Act

<sup>48</sup> Section 6 CPYS Act

- the need for self-esteem
- the need to achieve their full potential<sup>49</sup>

### Role of the Guardian

The role of the Guardian is detailed explicitly as it relates to young people in care.

### Role of the Minister

The role of the Minister includes promoting the wellbeing of children and young people and early intervention where they may be at risk of harm.

This role is accompanied by annual reporting obligations.<sup>50</sup>

Harm is quite clearly defined and psychological harm does not include emotion reactions such as distress, grief, fear or "anger that are a response to the ordinary vicissitudes of life."<sup>51</sup>

### Right to be heard

Part 3 makes it clear that, unless certain circumstances apply, the views of children and young people are to be heard in any proceedings under the Act.

This includes:

- the right of children and young people to have an advocate at family group conferences<sup>52</sup>
- where a legal practitioner is representing a child or young person they must, as far as is reasonably practicable, act in accordance with any instructions given by the child or young person<sup>53</sup>

The Department of Child Protection has prepared an information sheet for young people outlining their right to have their view taken into account.

<sup>49</sup> Section 8

<sup>50</sup> Section 15

<sup>51</sup> Section 17

<sup>52</sup> Section 23 (in effect October)

<sup>53</sup> Section 63

### *South Australian Administrative Appeals Tribunal*

From 26 February 2018, SACAT has a review jurisdiction under the CPYS Act.

This includes decisions about:

- providing information to approved carers and to the child or young person
- involving approved carers in the decision-making process about the child or young person
- voluntary custody agreements

The decision must first be internally reviewed within the Department for Child Protection before it can be reviewed by SACAT.

### *Child and Young Person's Visitor Scheme*

The legislation gives the power to establish a Child and Young Person's Visitor scheme for children in government facilities.<sup>54</sup>

A trial community visitor program for young people in residential care has been prepared by the Guardian's office and is expected to run until June 2019.

Although it is not clear what locations would be included in the trial program, a similar program has run out of the Queensland Office of the Public Guardian, designed to protect the rights and interests of adults with impaired capacity and children and young people in out-of-home care.

Under that scheme, 'visitable locations' include foster homes, homes of kinship carers, residential care facilities, youth detention centres and mental health facilities, to help ensure children and young people are safe and well and that their needs are being met in line with approved standards of care.<sup>55</sup>

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<sup>54</sup> Chapter 9

<sup>55</sup> <http://www.publicguardian.qld.gov.au/child-advocate/child-community-visiting>

### *Family and Community Services Act 1972 and Family and Community Services Regulations 2009*

This is broad legislation with its object to promote the welfare of families and the community in South Australia, including the provision of family and welfare services, support services for children, and foster care.

#### *Potential areas of interest*

Recent changes to child protection and safety legislation have been designed to ensure that the child's voice is heard, including participating in decision-making where appropriate.

There is broad scope for promoting and advocating for the rights and interests of all children and young people in South Australia.

The extent to which the voices of children and young people are considered in the implementation of the CPYS Act is an area of interest for the CCYP.

## LAW AND ORDER

The youth justice system in South Australia is regulated by the *Youth Justice Administration Act 2016* and the *Young Offenders Act 1993* (SA). The two Acts are to be read together.<sup>56</sup>

### *Young Offenders Act 1993*

This legislation provides for the care, correction and guidance necessary for youths who offend against the criminal law to secure their development into responsible and useful members of the community and the proper realisation of their potential.<sup>57</sup> This objective is always balanced against the need for the community to be protected against violence and wrongful acts.<sup>58</sup>

### Representation in court

The Legal Services Commission of South Australia provides a duty solicitor service in the Youth Court of South Australia, to ensure that those appearing in the Court are not disadvantaged or denied access to justice.

The duty solicitor at the Youth Court also advises and represents young people in custody who have been refused police bail.

### Police

There are a number of rights for children and young people where police issue cautions,<sup>59</sup> arrest, bail, remand and custody.<sup>60</sup>

### Family conference

Family conferences can be held in certain circumstances to establish a forum for offender/victim mediation.<sup>61</sup>

<sup>56</sup> Section 5

<sup>57</sup> Section 3

<sup>58</sup> Section 3(2)

<sup>59</sup> Section 8(2)(a))

<sup>60</sup> Section 14

<sup>61</sup> Section 7

Youths have the right to have parents, guardians, relatives or support persons attend,<sup>62</sup> as well as legal representation.<sup>63</sup>

### *Youth Justice Administration Act 2016*

This legislation regulates the administration and oversight of youth training centres and other facilities relating to young offenders.<sup>64</sup>

Guiding principles:

- a youth should be made aware of their obligations under the law and of the consequences of breach of the law
- the community, and individual members of it, must be adequately protected against violent or wrongful acts.
- there should be a focus on preserving family relationships between a youth, the youth's parents and other members of the youth's family
- youth should not be withdrawn unnecessarily from the youth's family environment
- there should be no unnecessary interruption of a youth's education or employment
- a youth's sense of racial, ethnic or cultural identity should not be impaired

### Training Centre Visitor

This role is filled by the Guardian for Children and Young people who has a monitoring and advocacy role within Training Centres.

The functions include:

- conducting visits and inspections of training centres
- promoting the best interests of the residents of the training centre
- acting as an advocate for residents of the training centre to promote resolution of issues relating to care, treatment or control

<sup>62</sup> Section 11(1)(c) and section 10(1)

<sup>63</sup> Section 11(4)

<sup>64</sup> Section 3

- inquiring into or provide advice to the Minister regarding systemic improvements to care, treatment and control of residents and the management of the training centre

young people in the development and application of laws and policies relating to law and order.

This is an area of interest for further research, consultation and investigation for the CCYP.

### *Victims of Crime*

Special provisions are made for children in dealing with police, as well as witnesses who are children.<sup>65</sup>

A child can apply for compensation for injury caused by a criminal offence as a victim of crime.

### *Civil claims*

Children have three years from the date of their 18<sup>th</sup> birthday to make a claim for compensation.<sup>66</sup>

If they are under 18 years, a parent or guardian or other adult can bring the claim on their behalf.

### *Contracts*

Children do not have full contracting powers. For a contract to be binding, a minor usually has to agree to be bound by a contract after they turn 18 years.

Exceptions to this are goods or services that are usual or appropriate to their way of life, like food, clothing, accommodation, medical care, school requirements or sporting goods appropriate to their age and their standard of living.

A child can also contract for services of instructional or educational benefit, like sports coaching or musical instruments.<sup>67</sup>

### *Potential areas of interest*

Children and young people have the opportunity for individual representation and advocacy at various stages of the legal system, but there is scope for the broader involvement of children and

<sup>65</sup> <http://www.voc.sa.gov.au/vulnerable-victims-witnesses>

<sup>66</sup> *Limitation of Actions Act 1936*, section 45(1)

<sup>67</sup> *Minors Contracts (Miscellaneous Provisions) Act 1979*

## HEALTH, MENTAL HEALTH, DISABILITY SERVICES AND SUBSTANCE USE

Health, mental health, disability services and substance use all impact upon children and young people.

### *Mental Health*

There is a large role for the South Australia Community Visitors Scheme (see below) in advocating for and monitoring rights of consumers in mental health services.

However, the CCYP may still have a role in advocating for the rights of children and young people specifically.

Child and Adolescent Mental Health Service (CAMHS) is a free community-based mental health service provided through SA Health's Women's and Children's Health Network.

### *SA Mental Health Act 2009*

#### *Application of the Act to children*

The legislation applies to children in the same way as to persons of full age, with certain exceptions (detailed below).

#### *Guiding principles relevant to children and young people<sup>68</sup>*

- mental health services should be governed by comprehensive treatment and care plans that are developed in a multi-disciplinary framework in consultation with the patient
- mental health services should take into account the different developmental stages of infants, children, young persons, adults and older persons
- children and young persons should be cared for and treated separately from other patients as necessary to enable the

care and treatment to be tailored to their different developmental stages

- the rights, welfare and safety of the children and other dependants of patients should always be considered and protected as far as possible

### *Patients' right to be supported by a guardian*

All patients are entitled to have another person's support in the exercise of rights under the legislation, or in any communications between the patient and a medical practitioner, and the director or staff of a treatment centre in which the patient is an inpatient.<sup>69</sup>

In the case of a child, this support may be provided by a parent or guardian of the patient, a guardian, medical agent, relative, carer or friend of the patient, a person who provides advocacy services whether on a professional or voluntary basis, or a community visitor.

### *Minister's functions as they relate to children*

The Minister has a role in developing or promoting ongoing programmes for optimising the mental health of children and young persons who are or have been under the guardianship or in the custody of the Minister pursuant to *the Children's Protection Act 1993*.<sup>70</sup>

### *Community Visitors Scheme*

The legislation provides for a Community Visitors Scheme that allows for the visiting, advocacy and inspection of services in order to promote and protect the rights and wellbeing of people with a mental illness.<sup>71</sup>

The Community Visitor Scheme aims to protect the rights of people living with disability or mental illness who are:

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<sup>69</sup> Section 47

<sup>70</sup> Section 86(c)

<sup>71</sup> Division 2

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<sup>68</sup> Section 7

- receiving care in a mental health treatment centre
- attending a community mental health facility
- living in disability accommodation
- attending a Day Options program
- living in a Supported Residential Facility (SRF)

#### *Potential areas of interest*

The Queensland *Commission for Children and Young People and Child Guardian Act 2000* provides for community visitors specifically to promote and protect the rights, interests and wellbeing children residing at a residential facility or detention centre, or at an authorised mental health service, as well as children under guardianship.

#### *Mental Health Strategic Plan*

South Australia's Mental Health Strategic Plan (**Plan**) was released in December 2017 and sets a 20-year vision for mental health and wellbeing in South Australia.

Short term objectives of the Plan as they relate to children and young people include to:

- coordinate and provide strategies and opportunities to build the wellbeing of infants, children and young people with a focus on those who experience disadvantage or vulnerability, and provide support to parents, families, friends and caregivers across South Australia to promote and build good mental health and wellbeing
- build the capacity of early childhood centres, schools and tertiary institutions to foster and support good mental health, wellbeing and resilience, and to support early detection and intervention
- establish specific support for at-risk young people who are transitioning to adult

services, for example children under the guardianship of the Minister

Specific objectives or strategies for children and young people in the Plan primarily relate to young people "at risk".

#### *South Australian Youth Mental Health System of Care Operational Guidelines (2014)*

These Guidelines are intended to provide a set of operating guidelines to assist the development of a strong and effective partnership between the specialist mental health services, other key services and young people, their family, friends and other supports.

#### *Suicide Prevention*

The South Australian Government has released *The South Australian Suicide Prevention Plan 2017-2021*,<sup>72</sup> (**the Prevention Plan**) which was developed following public consultation, including online feedback through the South Australian YourSAy website.

The Prevention Plan identifies three priority areas to prevent suicide in South Australia:

- making people a priority
- empowering communities
- translating evidence into practice

During the consultation phase, the then Council for the Care of Children made a submission informed by *Young Minds Matter: The Second Australian Child and Adolescent Survey of Mental Health and Wellbeing*, the *IB Middle Years Program: Student Social-Emotional Well-being and School Success Practices* and the *Youth mental health report Youth Survey 2012-2016*, noting that children and young people were "largely missing from the

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<http://www.sahealth.sa.gov.au/wps/wcm/connect/Public+Content/SA+Health+Internet/Health+services/Mental+health+services/Suicide+Prevention+Plan+Feedback>

Plan”<sup>73</sup> and recommending that children and young people be engaged in the concepts, development, implementation and evaluation of the Prevention Plan.

An example of engaging children and young people in suicide prevention policy in other jurisdictions is the Queensland Family and Child Commission’s research entitled *Preventing youth suicide: The voice of children and young people*,<sup>74</sup> based on a series of Insights Papers published by yourtown. The research summaries the views of 472 children and young people who had thought about, planned or attempted suicide shared in online survey.

#### *Potential areas of interest*

There does not currently appear to be a coordinated child-centred approach to mental health policy and services in South Australia. This may be an area of interest for the CCYP.

#### *Health care*

##### **Health and Community Services Complaints Act 2004**

The main objective of this legislation is to improve the quality and safety of health and community services in South Australia through the provision of a fair and independent means for the assessment, conciliation, investigation and resolution of complaints.

In addition, the legislation provides a means to identify, investigate and report on systemic issues concerning the delivery of health or community services.

#### *Can children make a complaint?*

If the health or community service user is a child, they can make the complaint, or if they are 16 or

over, a person appointed by the child to make the complaint on the child's behalf; or if they are under 16 years, a parent or guardian of the child.<sup>75</sup>

#### *Health Care Act 2008*

This legislation enables the provision of an integrated health system and healthcare services.<sup>76</sup>

Its guiding principles include that the health system should recognise that Aboriginal people and Torres Strait Islanders have a special heritage and the health system should support values that respect their historical and contemporary cultures; that the planning and provision of health services should take into account the situation and needs of people who live or work in the country or regional areas of the State; and that service providers should seek to engage with the community in the planning and provision of health services.

#### *South Australian Public Health Act 2011*

The object of this legislation includes promoting the health and well-being of individuals and communities and to prevent disease, medical conditions, injury and disability through a public health approach.

This includes protecting individuals and communities from risks to public health, particularly those who live within disadvantaged communities, and to provide for or support policies, strategies, programs and campaigns designed to improve the public health of communities and special or vulnerable groups.

Under Part 4 the Minister must prepare and maintain a State Public Health Plan.

#### *Procedure for making policies*

When preparing a State Health Policy, the Minister must take reasonable steps to consult with a

<sup>73</sup> Council for the Care of Children, South Australian Suicide Prevention Plan 2017-2021 Submission 19 May 2017

<sup>74</sup> <https://www.qfcc.qld.gov.au/knowledge-and-resource-hub/preventing-youth-suicide-voice-children-and-young-people>

<sup>75</sup> Section 24(b)

<sup>76</sup> Section 4



number of parties, as well as any other person or body considered relevant by the Minister, and invite interested persons to make written representations on the proposal within a period specified by the Minister.

### Consent to treatment

Consent to treatment is complicated and would require detailed legal advice.

Generally, young people over 16 years of age have a right to make decisions which their welfare, including in respect of medical treatment.

Doctors have a duty to explain to patients, so far as may be practicable, about the nature, consequences and risks of proposed medical treatment.<sup>77</sup> There are numerous exceptions.

There are a number of provisions relating to consent to treatment by children under 16 years.<sup>78</sup>

### *Potential areas of interest*

As with mental health policy and services, there does not currently appear to be a coordinated child-centred approach to health policy. In particular, where state health policy is prepared by the Minister, there may be a role for the CCYP at the consultation stage.

### Disability Services

The National Disability Insurance Scheme (NDIS) is changing the way that disability services are administered in Australia.

The NDIS is intended to provide support for children and people who have a developmental delay or permanent and significant disability. The NDIS is administered by the National Disability Insurance Agency (NDIA).

Where a person is a child under the NDIS Act, the best interests of the child are paramount, and full consideration should be given to the need to:

- protect the child from harm
- promote the child's development
- strengthen, preserve and promote positive relationships between the child and the child's parents, family members and other people who are significant in the life of the child<sup>79</sup>

There are a number of general principles which are relevant to children and young people, including that:

- people with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves
- people with disability should be encouraged to engage in the life of the community
- the judgements and decisions that people with disability would have made for themselves should be taken into account
- the cultural and linguistic circumstances, and the gender, of people with disability should be taken into account
- the supportive relationships, friendships and connections with others of people with disability should be recognised<sup>80</sup>

### Right of children to represent themselves

Under the NDIS Act, a child will be assumed not to be able to do the things required under the Act, and instead these things will be done on behalf of a child by the child's representative (generally, a the person, or the persons who have parental responsibility for the child).

However, the NDIA can decide that a child can represent themselves for the purposes of the NDIS Act in certain circumstances.<sup>81</sup>

<sup>77</sup> *Consent to Medical Treatment and Palliative Care Act 1995*, Section 15

<sup>78</sup> *Consent to Medical Treatment and Palliative Care Act 1995* Section 12(a)

<sup>79</sup> Section 5

<sup>80</sup> Section 5



The Department of Human Services notes that:

*“A child's capacity for making decisions, as well as the appropriateness of them acting for themselves will evolve over time. The NDIA will be considerate of the evolving nature of a child's capacity and take this into account when making decisions about whether a child can represent themselves.*

*The NDIA is also conscious that a child's decision making capacity may vary according to the environment in which the child makes the decisions. The NDIA will, wherever possible, make their assessment of whether a child is capable of making decisions in the environment in which the child feels most comfortable.”<sup>82</sup>*

A decision by the NDIA to determine that a child cannot represent themselves can be reviewed.<sup>83</sup>

#### Potential areas of interest

Whilst there are a number of avenues for complaints or advocacy relating to NDIS, there is scope for more involvement of children and young people in developing and delivering disability services and policy in South Australia. The CCYP has an interest in reviewing the experiences of children and young people with the NDIS.

#### Substance Use

The *South Australian Alcohol and Other Drug Strategy 2017-2021* includes as one of its actions to “implement engagement strategies to increase the number of young people involved in the planning, implementation and evaluation of policy and services” with responsibility for delivery assigned to SA Health.<sup>84</sup>

#### Potential areas of interest

The CCYP may have a role in supporting SA Health engage with young people for the purpose of co designing appropriate responses.

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81 Section 74(5)

82 <https://www.ndis.gov.au/operational-guideline/child-representatives>

83 Section 99(j)

84 Action item 30

## HOUSING AND HOMELESSNESS

The United Nations *Convention on the Rights of the Child* outlines that all children have the right to an adequate standard of living that includes a clean environment and a safe place to live.<sup>85</sup>

Housing and homelessness services for young people are primarily targeted at ages 15-25 years.

Where the legislation below deals with young people, it is primarily in the form of dependents.

### Renting

The *Residential Tenancies Act 1995* applies to most residential tenancy agreements, with exceptions including caravan parks, boarders and lodgers.

### Public Housing

Public housing is delivered in South Australia through Housing SA. Public housing is targeted at people most in need, determined by a range of criteria and is regulated by the *South Australian Housing Trust Act 1995*.

### Community Housing

Community housing is managed and maintained by non-government organisations and regulated by the *Community Housing Providers (National Law) (South Australia) Act 2013*.

### Homelessness

Crisis assistance is provided through the Homelessness Gateway (including families) and Youth Gateway (aged 15 to 25 years) hotlines.

HYPA<sup>86</sup> runs a number of services for young people including:

- Trace-A-Place, for young people aged between 15-25 in South Australia who are experiencing homelessness or at risk of

experiencing homelessness (including young parents with accompanying children)

- Eastern Adelaide Youth Homelessness Service
- Integrated Housing Exits (Youth Justice) for young people who are or have recently exited South Australia's youth training centres
- Get-A-Place, for young people 17 to 25 years of age who are entering the independent housing market for the first time

### Potential areas of interest

There may be scope for more involvement of young people in developing and delivering housing and homelessness policies and services in South Australia.

For example, the Commissioner for Children and Young People WA is delivering the *Young and Homeless Project* in partnership with the Edith Cowan University, supported by the Youth Affairs Council of WA and Youth Futures.

The project's key goals are to raise public awareness around the experiences of homeless young people under the age of 16 years, and to develop recommendations to respond to and prevent youth homelessness.<sup>87</sup> This may be an area of interest for the CCYP.

<sup>85</sup> See in particular articles 24 and 27

<sup>86</sup> <https://www.hypa.net.au>

<sup>87</sup> <https://www.ccyp.wa.gov.au/our-work/projects/youth-homelessness/>

## CONCLUSIONS

The CCYP has a far-reaching capacity to inquire, consult and undertake research in order to fulfil the CCYP's functions in giving a voice to children and young people in South Australia.

The legislation and policy areas detailed in this review all impact upon children and young people, and as such, may be areas of interest for further research, consultation or investigation for the CCYP.

The CCYP has broad powers as may be necessary or expedient to fulfil its functions. In practice, this is likely to include consultation with children and young people; consultation with and requests for information from State authorities; consultation with other sectors; and further research.

The work of commissioners in other jurisdictions demonstrates that the identification of areas of interest occurs in a number of ways, including through consultation with children and young people; in partnership with community organisations; by request of state or territory governments; through media attention; or by identifying gaps in research.

The CCYP can have a role in every stage of policy development, from initial consultation, through to delivery, as well as review.