FURTHER SUBMISSION OF THE SOCIETY TO
THE SELECT COMMITTEE
ON STATUTORY CHILD PROTECTION AND
CARE

8 MARCH 2017
1. My name is Tony Rossi and I am the President of the Law Society of South Australia. With me today are Jenny Olsson who chairs the Society’s Children and the Law Committee and Anna Finizio who is also a lawyer and is the Policy Coordinator of the Society. The Policy Coordinator assists in the formulation of the submissions of the Society with respect to Bills before the Parliament.

2. I thank you for the opportunity afforded to the Society to make an oral submission to the Committee.

3. I note that that Committee has been provided with a comprehensive written submission comprising a covering letter of 3 March 2017 addressed to the Chair of the Select Committee the Honourable Stephen Wade and three attached documents being an executive summary of the Society’s submission to the Honourable John Rau MP, a copy of the full submission to Mr Rau dated 27 January 2017 and a copy of a statement which I delivered to attending media on 23 February 2017.

4. I note the pleasing subsequent development of the Government agreeing to an amendment to the Bill to address the concerns of the Society with respect to female genital mutilation. However, it remains the position of the Society that, overall, the Bill is still so fundamentally flawed that it should not be passed by the legislative Council.
5. At the heart of the difficulties of the Bill is the fundamentally defective structure of it.

6. Clause 7 expresses the paramount consideration to be to ensure that children and young people are, so far as reasonably practicable, protected from harm. In discussion with respect to the Bill this has been referred to, generally, as the priority of “safety”. The paramount consideration should, in fact, be the best interests of the child. Properly understood, very different outcomes can arise, in particular circumstances, depending upon what is the paramount consideration.

7. The Government’s approach has continued to be reactive and welfare based rather than effectively shifting the focus to a proactive agenda of prevention, based upon the concept of the child’s rights. The Bill remains embedded in a welfarist approach which fails to have proper regard to the child’s rights as an individual.

8. The overarching idea is that children and young people are citizens in their own right and should not be treated simply as passive recipients of welfare. This is not a new concept, and has been the topic of previous independent reviews.

9. The Layton Child Protection Review of 2003¹ (“the Layton Review”) provided an overall State Plan for child protection. One of the stated

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¹ Our best investment: A state plan to protect and advance the interests of children (Robyn Layton QC 2003)
purposes of the State Plan was “to shift the current paradigm from a reactive system of child protection based upon response to incidents, to a proactive system which is focussed on prevention and early intervention.”

The goals of the plan included:

9.1. Promoting a whole of government and whole of community response to the prevention of child abuse and neglect; and

9.2. Ensuring a voice for children and young people and promoting their best interests.

10. The Layton Review was carried out specifically with reference to the United Nations Convention on the Rights of the Child (UNCROC) and with the aim of “ensuring that the UNCROC ratified by Australia is implemented in practice”.

11. The Layton Review also recommended the establishment of a statutory office of Children and Young Person's Guardian, with responsibility for promoting the best interests of children and young people under guardianship or custody of the Minister and advocating for their interests, as well as to provide independent monitoring of the circumstances of children and young people in alternative care. It recommended that the Guardian should report to Parliament and have the report included as part of the report of the Commissioner.²

² Ibid, Recommendation 4
12. The creation of this separate office was recommended on the basis of the need to ensure that those children who are most vulnerable and who are under the statutory Guardianship of the Minister or otherwise in care away from their parents have their rights articulated and safeguarded. However, the office could administratively be sited with the Commissioner.

13. Unfortunately, whilst the role of the Guardian for Children and Young People was created following the Layton Review (under the *Children’s Protection Act 1993*), the role of a Commissioner for Children and Young People was not.

**Legislative Changes following the Nyland Royal Commission**

14. Following the Nyland Report, the Government has now proposed two separate Acts, being the *Children and Young People (Safety) Bill 2017* and the *Children and Young People (Oversight and Advocacy Bodies) Act 2016*, splitting the role of the Guardian off from the traditional child protection legislation and placing it with the other advocacy bodies. The Commissioner for Children and Young People and the Guardian for Children and Young People now sit under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016*.

15. This Act specifically provides under section 5 that “each State authority must, in carrying out its functions or exercising its powers protect, respect and seek to give effect to the rights set out from time to time in the United
Nations Convention on the Rights of the Child and any other relevant international human rights instruments affecting children and young people.”

Under this Act the role of the Commissioner is as follows:

15.1. The Commissioner is to be independent of direction or control by the Crown or any Minister or Officer of the Crown.

15.2. The Commissioner acts as a champion for children and young people in South Australia with the primary function to promote and advocate for the rights and interests of all children and young people in South Australia.

15.3. To promote the participation by children and young people in the making of decisions that affect their lives.

15.4. To advice and make recommendations to Ministers, State authorities and other bodies on matters related to the rights, development and wellbeing of children and young people at a systemic level.

15.5. To inquire into matters affecting children and young people at a systemic level (the power to conduct such inquires is broad and the Commissioner is vested under section 16 with the powers of a Royal Commissioner in order to carry out such an inquiry).
16. The Society notes the announcement, yesterday, of Helen Connolly as the Commissioner for Children and Young People. Her appointment is under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016*. Section 4 of that Act expressly refers to the rights, development and wellbeing of children and by reference to the United Nations Convention on the rights of the child.

17. Article 3(1) of that Convention provides that the best interest of the child be a primary consideration for all actions concerning children. Article 12 provides that the child’s right to express his or her views freely in all matters affecting the child. Those views should be given due weight.

18. Further, the UNCROC principles stress the role of a child’s parents and family in articles 5 and 18. The rights of children are understood in the context of the family environment.

19. By contrast, the *Children and Young People (Safety) Bill 2017* makes no reference to what is in the best interests of the child as being relevant to the application of the provisions of the Bill. There is no reference to the importance of the rights of the child within the family.

20. It is this fundamental flaw, at the heart of the Bill, which informs the numerous specific concerns in the written submission of the Society.

21. The two pieces of legislation are disjointed, one referring specifically to the rights of the child, and the other referring to the safety of the child.
This is demonstrated in the role of the Guardian for Children and Young People, which now sits under the *Children and Young People (Oversight Advocacy Bodies) Act*, whilst the children and young people who are within the remit of the Guardian’s concerns fall under the provisions of the Child Safety Bill. The Charter of Rights for Children and Young People in care which previously sat with the role of the Guardian now sits alone under the *Children and Young People (Safety) Bill*. In fact, the Charter of Rights was initially dropped out of the legislation altogether and was hastily reinserted into the *Children and Young People (Safety) Bill* after concerns were raised.

22. As it stands, the presence of the Charter of Rights in the *Safety Bill* appears as an anomaly given that there is no other reference to rights of children and young people in the Bill.

23. As sought to be emphasised, repeatedly, in the documents forming the written submission, a major concern is the discretion sought to be afforded to the Chief Executive of the Government Department in the event of a child being identified as being “at risk”. That position is inconsistent with the mandatory requirement of reporting under the current Child Protection Act 1993 in similar circumstances, the recommendation of Commissioner Nyland, the position of all stakeholders known to the Society including SACOSS, the SA Branch of the AMA, Anglicare and the Aboriginal Legal Rights Movement.
24. Moreover, as recently as 17 February 2017 this issue was expressly addressed by the Coroner’s Court in its finding of inquest in relation to the circumstances of the death of Lewis Mike McPherson. Lewis McPherson was 18 years of age when he was fatally wounded by a gunshot from a gun at the hands of Liam Humbles who was, at the time, a child of 17 years.

25. The finding of the Coroner was that in the many months leading to the day of the fatal shooting there was the clearest of evidence that Liam Humbles was a boy who would be considered, relevantly, as “at risk”. The findings of the Deputy Coroner at page 81 are telling in relation to the question of mandatory action in relation to a child identified as being at risk. The Deputy Coroner said:

*quote from p81, 12.7 and 12.8*

26. The importance of the best interest of the child being in the context of the family unit was also addressed at paragraph 11.8 on page 72 of the findings:

*read from highlighted sections*

27. There can be no justification for the Parliament providing an imprimatur to the Chief Executive that in the circumstances of a child who is identified as being at risk that it may be okay to do nothing. The circumstances of Chloe Valentine and Lewis McPherson tragically inform us of what can happen when no action is taken by relevant authorities.
28. Throughout the Bill primacy is given to the interests of the Department. If it seeks the long term removal of a child from its biological parents it would require the parents to persuade the court that the child should nevertheless remain with them. This is despite the evidence gathering capacity of a Government Department in comparison to frequently socially and economically disadvantaged parents. Up to 50% of the families involved are from poor aboriginal background.

29. Noting how many children have suffered already as a result of the negligence of this Department, it is extraordinary that clause 156(1) of the Bill would seek to provide, effectively, an immunity from a civil damages claim to officers of the Department in relation to any injury, loss or damage sustained by a child as a result of the negligence of the Department.

30. It is vitally important in this area that every incentive operate to encourage officers of the Department to be proactive and to act appropriately. The imposition of a civil liability if they don’t is one such factor.

31. It is a curious feature of the Bill that if there are proceedings in the youth court and a child is represented by a legal practitioner then the legal practitioner must act in accordance with the instructions received from the child. There is no such obligation on the part of the Department.
32. Another example of the preferential treatment afforded to the Department when compared to the child or the parents is where biological parents seek access to a child who is the subject of an order for removal. Any application made to the South Australian Civil and Administrative Tribunal is required to be made within 2 weeks and stringent criteria apply for any application for an extension of time. Timeline requirements with respect to the Department, when it would be expected to act, are notably silent. It is startling that when a child is identified as being at risk there is no stipulated time limit for the Department, but if the Department moves to remove a child from biological parents strict time limits are applied to the parents if they want even access to their children.

33. The written submission documents identify numerous other serious concerns. Overall, the concerns are too fundamental, serious and widespread for the Bill to be amenable to amendment. To use a metaphor more appropriate for the AMA, even radical surgery cannot save it.