



Submission on the Controlled Substances (Youth Treatment Orders) Amendment Bill 2018

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1. The Castan Centre for Human Rights Law at Monash University welcomes the opportunity to consider the compliance with international legal standards of the Controlled Substances (Youth Treatment Orders) Amendment Bill 2018 (SA) ('the Bill'), as well as amendments proposed by the Minister for Health and Wellbeing.¹
2. The Controlled Substances (Youth Treatment Orders) Amendment Bill 2018 ('the Bill') amends the *Controlled Substances Act 1984* to permit the Youth Court ('the Court') to make orders under certain circumstances compelling a child with drug dependency to attend an assessment ('assessment order'), and subsequently attend treatment ('treatment order'). Where a child or young person fails to comply with an assessment or treatment order, the Court may make a "detention order" authorising the detention of the child or young person for the purpose of ensuring compliance with the relevant order.
3. In its current form, the Bill is inconsistent with a number of Australia's obligations under international human rights law. Of particular concern are: the risk of arbitrary deprivation of liberty; the reliance on compulsory treatment; failure to take account of the child's best interests; deficiencies in due process; and inadequate voluntary treatment services. These are addressed in turn.

Human Rights Obligations of the State of South Australia

4. Australia is a party to a number of treaties which impose obligations relevant to the measures proposed in the Bill. These include the International Covenant on Civil and Political Rights ('ICCPR'),² the Convention on the Rights of the Child ('CRC'),³ and the Convention on the Rights of Persons with Disabilities ('CRPD').⁴
5. The specific content and contours of these rights have been elaborated through international jurisprudence, interpretation aids (known as 'general comments' or 'general recommendations') published by relevant treaty bodies, and rules adopted by the UN General

¹ Legislative Council—Bill No 23, Amendments to be moved by Minister for Health and Wellbeing [1] (29 November 2018) Amendment No 9.

² Dec. 16, 1966, 999 U.N.T.S. 171.

³ Nov. 20, 1989, 1577 U.N.T.S. 3.

⁴ Dec. 13, 2006, 2515 U.N.T.S. 3.

Assembly. Relevant rules include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules')⁵ and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty ('Havana Rules').⁶

6. International human rights law is not automatically enforceable in Australian courts. However, by entering into these treaties, Australia has voluntarily committed to comply with their provisions in good faith and to take the necessary steps to give effect to those treaties under domestic law.⁷ That implementation depends on the actions of the states and territories – including South Australia - is no justification for failure to meet treaty obligations.⁸
7. A number of international human rights obligations have been directly incorporated into domestic legislation. However, even when treaties have not been directly incorporated by legislation, they are an indirect source of rights. They give rise to a legitimate expectation of compliance by the executive, and they provides guidance on how particular domestic laws and obligations should be understood.⁹

Arbitrary deprivation of liberty

8. Section 54A of the Bill empowers the Court to make detention orders for the purpose of ensuring compliance by a child with an assessment or treatment order. An order may be made for up to 12 months.
9. States have obligations to take appropriate measures to ensure the protection and care of children's well-being,¹⁰ including specific obligations to take appropriate measures to protect children from the illicit use of narcotic drugs.¹¹ However, these obligations must be

⁵ Adopted by General Assembly resolution 40/33 of 29 November 1985.

⁶ Adopted by General Assembly resolution 45/113 of 14 December 1990.

⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 26.

⁸ As above, art. 27. However, note Australia's declaration in respect of the ICCPR: "'Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.'" This declaration does not, however, alter Australia's obligations under international law.

⁹ *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

¹⁰ CRC, art 3.

¹¹ CRC, art. 33.

interpreted in light of the full range of rights afforded to children, including every child's right not to be arbitrarily deprived of their liberty.

10. Article 37(b) of the CRC provides that, 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'¹² This principle is reflected in the Havana Rules, which states that 'Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases.'¹³
11. The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has elaborated on these provisions, stating that, 'While the Convention on the Rights of the Child does not exclude the detention of children, *the strongest of presumptions against it are established* (art. 37 (b)). Children may be detained only as a measure of last resort... [This standard] is an obligation to exhaust all other strategies at the macro level and all other interventions at the micro level.' [emphasis added]¹⁴
12. As currently drafted, the Bill does not meet the preceding international legal standards. Nowhere does the Bill limit the imposition of a detention order as a measure of last resort. Section 54(C)(1) does not require the Court to satisfy itself that alternative, less restrictive treatment options have been considered and exhausted before imposing an assessment, treatment or detention order. There is no requirement that an order be made for the minimum necessary period, nor does the Bill require regular reassessment of the terms of an order, or require its termination as soon as the circumstances justifying its imposition have resolved. Permitting orders of up to 12 months, without adequate review mechanisms and without specific reference to any treatment regime, is manifestly excessive.

¹² The right to liberty and security of person, and to be free from arbitrary arrest or detention, is also protected under article 9(1) of the ICCPR.

¹³ [2].

¹⁴ Dainius Pūras, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (10 April 2018) A/HRC/38/36 [59].

Compulsory treatment

13. The proposed powers contained in the Bill to order treatment of a child (and where such an order is not complied with, to detain a child for the purpose of ensuring compliance) constitutes a form of compulsory treatment. International legal consensus is that compulsory drug treatment poses unjustifiable risks to the rights of those subjected to it.
14. The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has found that ‘virtually all forms of confinement [following medical or social-welfare advice] without informed consent represent a violation of the right to health.’¹⁵ In 2012, twelve UN entities,¹⁶ including World Health Organisation, Office of the High Commissioner for Human Rights, and United Nations Office on Drugs and Crime, released a joint statement asserting that ‘there is no evidence that [compulsory drug detention and rehabilitation centres] represent a favorable or effective environment for the treatment of drug dependence’ and ‘calling on States that operate compulsory drug detention and rehabilitation centres to close them without delay and to release the individuals detained.’¹⁷
15. In addition to the general consensus against compulsory treatment, specific international human rights standards have emerged to protect people with disability from forced medical intervention. Article 14 of the CRPD protects the liberty and security of people with disability, and asserts that ‘the existence of a disability shall in no case justify a deprivation of liberty.’¹⁸ Persons with long-term mental ill-health are considered to fall within the scope of the CRPD.¹⁹ The Committee on the Rights of Persons with Disabilities has interpreted this provision in the strictest terms, stating that ‘article 14(1)(b) prohibits the deprivation of liberty on the basis of

¹⁵ Dainius Pūras, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (10 April 2018) A/HRC/38/36 [6].

¹⁶ The signatories are: 2 International Labour Organisation; Office of the High Commissioner for Human Rights; United Nations Development Programme; United Nations Educational, Scientific and Cultural Organisation; United Nations Population Fund; United Nations High Commissioner for Refugees; United Nations Children’s Fund; United Nations Office on Drugs and Crime; United Nations Entity for Gender Equality and the Empowerment of Women; World Food Programme; World Health Organisation; and Joint United Nations Programme on HIV/AIDS.

¹⁷ Joint Statement, *Compulsory drug detention and rehabilitation centres* (2012) 1.

¹⁸ Art. 14(1)(b).

¹⁹ Article 1 states that ‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’

actual or perceived impairment even if additional factors or criteria are also used to justify the deprivation of liberty.²⁰ Detention of children with disability (including mental ill-health), where their condition is a reason for their drug misuse,²¹ would therefore violate article 14.

16. The Committee has also stated that States have an obligation to require all health and medical professionals to obtain free and informed consent of persons with disabilities prior to any treatment, and not to permit substituted decision-making.²² The making of treatment orders, and detention to compel compliance, against children with disability clearly violates the CRPD.
17. The Australian Medical Association (South Australia) observes that the 'patient group envisaged [by the Bill] would be very complex, characterized by high rates of psychiatric co-morbidity.'²³ Children with other disability (including intellectual disability and Fetal Alcohol Spectrum Disorder) may also be overrepresented. The Office of the Guardian for Children and Young People further notes that misuse of drugs can often be a maladaptive coping strategy.
18. However, at present the Bill contains no specific protections for children with disability. While a child must be assessed as meeting the diagnostic criteria for dependence syndrome in order for a treatment order to be made, there is no requirement that any screening or assessment for disability or psychiatric illness is undertaken, nor is the Court compelled to consider any such condition when making an order.

Best interests of the child

1. Article 3 of the CRC states that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

²⁰ Committee on the Rights of Persons with Disabilities, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities* (September 2015) [7].

²¹ Importantly, the Committee considers that disability need only be a contributing factor (not the only, or even primary factor) to the behaviour in question.

²² Committee on the Rights of Persons with Disabilities, *General comment No. 1, Article 12: Equal recognition before the law* (19 May 2014) CRPD/C/GC/1.

²³ Letter from Joe Hooper, Australian Medical association (South Australia) to Members of Parliament (6 December 2018).

2. We note that the current Bill makes no reference to the best interests of the child. We note also that the amendments proposed by the Minister includes the insertion of a general statement regarding the paramountcy of the best interests of the child.²⁴
3. While the proposed amendment is an improvement, we remain concerned that the Court is not explicitly required under section 54C to satisfy itself that an assessment, treatment or detention order is in the child's best interest, before making such an order.

Due process

4. We are deeply concerned that the proposed Bill represents a violation of fundamental due process rights. By allowing for a detention order to be made in order to ensure a child's compliance with an assessment or treatment order, section 54C(3) in effect imposes a criminal sanction for the violation of a civil order. This is both punitive and disproportionate, in contravention of the State's obligations under both the CRC²⁵ and Beijing Rules²⁶.
5. Moreover, civil penalty provisions may engage criminal process rights under articles 14 and 15 of the ICCPR (and in the case of children, articles 37 and 40 of the CRC) where the penalty may be regarded as 'criminal' for the purpose of international human rights law.²⁷ Given the severity of the penalty (detention for up to 12 months) and its punitive nature, the regime envisaged in the Bill is likely to fall within this definition.²⁸
6. The Bill presently fails to ensure proper protection and fulfilment of due process rights. The provisions in section 54E for variation or revocation of an order are inadequate. In particular, requiring a child to secure the permission of the Court to make an application for variation or revocation is overly onerous, and places an unreasonable burden on a vulnerable child. Moreover, the requirement that the Court only grant such permission if it is 'satisfied there has been a substantial change in the relevant circumstances since the order was made or last varied' is vague and arbitrary. The Bill should include a regime for the Court to periodically

²⁴ Legislative Council—Bill No 23, Amendments to be moved by Minister for Health and Wellbeing [1] (29 November 2018) Amendment No 9.

²⁵ See art. 40(4).

²⁶ See rule 5.

²⁷ See, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

²⁸ See, Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) 3-5.

review any order, and to revoke or vary the order as soon as detention is no longer necessary as a measure of last resort.

7. The Bill also fails to fulfil the right of a child facing criminal sanction to legal assistance. Article 37(d) of the CRC provides that ‘every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance.’ The right to legal assistance, provided by the State where necessary, is also protected under article 14(b) of the ICCPR. This should be provided for in the Bill, both because of the severity of the proposed sanction, and also to enable the child to participate in proceedings as envisaged in sections 54(D)(2)(a) and 54E.
8. According to article 12 of the CRC, ‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child’, and ‘for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’
9. The Bill contains inadequate opportunities for the child to participate meaningfully in proceedings, and does not give due weight to the child’s views. Under section 54C, the Chief Executive of the relevant government department must be given notice of the proceedings and the opportunity to make submissions. This opportunity is not extended to the child who is the subject of the proceedings. This is inappropriate and contrary to international legal standards.

Inadequate voluntary treatment services

10. As noted by the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the standard that children may be

detained only as a measure of last resort ‘is an obligation to exhaust *all other strategies at the macro level* and all other interventions at the micro level.’ [emphasis added]²⁹

11. It is unclear that all other policy and service options have been exhausted at the macro level. The Australian Medical Association (SA) has observed that ‘on the issue of ‘voluntary services’, our state is significantly under-resourced for drug and alcohol services and treatment centres,’ and that the compulsory regime envisaged in the Bill will only add further pressure to the funding of existing voluntary services.³⁰ Health and community services representatives similarly describe existing voluntary treatment services as ‘seriously inadequate’.³¹
12. South Australia must develop accessible voluntary treatment services underpinned by a comprehensive approach to the individual, social and community causes and impacts of drug misuse. This is consistent with the position of UN entities, which state that ‘in the case of children under the age of 18 years, the most effective and appropriate responses [to drug misuse] are those that are family-based and build on the strengths of local communities. These should be the first option in full compliance with their rights to welfare, protection, care and justice.’³²
13. In situations where children are detained due to drug dependence (voluntarily or otherwise), the State must ensure that supports are in place to assist the child to reintegrate and thrive in their community.³³

²⁹ Dainius Pūras, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (10 April 2018) A/HRC/38/36 [59].

³⁰ Letter from Joe Hooper, Australian Medical Association (South Australia) to members of Parliament (6 December 2018).

³¹ Letter from Penny Wright et al, to Hon. Steven Marshall (2 December 2018).

³² Joint Statement, *Compulsory drug detention and rehabilitation centres* (2012).

³³ These measures are required under rules 79 and 80 of the Havana Rules.