



**SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT**

**FINAL REPORT**

**OF THE**

**SELECT COMMITTEE ON ADVOCACY FOR  
CHILDREN (APPOINTMENT OF A  
COMMISSIONER FOR CHILDREN)**

Presented by Hon Barbara Scott MLC (Chairman)

Report 2  
July 2004

## **SELECT COMMITTEE ON ADVOCACY FOR CHILDREN (APPOINTMENT OF A COMMISSIONER FOR CHILDREN)**

### **Date first appointed:**

June 11 2003

### **Terms of Reference:**

That a select committee of three members be appointed to inquire into and report on -

- (1) The appointment of a commissioner for children or the establishment of an independent office for children as the most appropriate means of establishing an advocate for children to enable better government for children and to ensure government and Parliament are aware of the needs of children.
- (2) The responsibilities and duties of such a commission or office. This investigation should include but need not be limited to an examination of -
  - Developing an appropriate advocate for children in the heart of government;
  - Legislative and policy impact statements for children;
  - An advocacy function for children;
  - Coordination across government agencies affecting children;
  - Ensuring that child participation is basic to the functioning of the commission/office and to the development of public policy;
  - Developing and benchmarking a strategy for children;
  - Investigating complaints and reporting on maladministration of government;
  - The physical and mental health of children, including the importance of sport and play in child development and litigious and industrial issues restricting these, the role of television, videos and computers, time spent in childcare, immunisation rates, services for disabled children;
  - Research relevant to children and its relevance to the development of public policy;
  - The impact of the justice system on children;
  - The transport system and its relevance to children's needs;
  - The staffing and budget for this commission/office;
  - Any other matters that impact on the good growth and development of young children; and
  - The impacts of government and industry policy on the wellbeing of children.
- (3) The committee has power to send for persons, papers and records and to travel from place to place.
- (4) The committee report to the House not later than 30 June 2004 and if the House do then stand adjourned, the committee to deliver its report to the President, who shall cause the same to be printed by authority of this order.

### **Members as at the time of this inquiry:**

Hon Barbara Scott MLC (Chairman)

Hon Jon Ford MLC  
(discharged December 2 2003)

Hon Giz Watson MLC

Hon Kate Doust MLC  
(appointed December 2 2003)

### **Staff as at the time of this inquiry:**

Jan Paniperis, Senior Committee Clerk

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## Glossary

across government submission	the submission from the agencies under the portfolio of the Minister for Community Development, Women's Interests, Seniors and Youth prepared by the 'across Government' Office for Children and Youth
ALSWA	Aboriginal Legal Service of Western Australia
Board	Guardianship and Administration Board
DCD	Department for Community Development
ENOC	European Network of Ombudsmen for Children
FESA	Fire and Emergency Services Authority of Western Australia.
Forde Inquiry	<i>Forde Commission of Inquiry into Child Abuse in Queensland, 1999</i>
Gordon Inquiry	<i>Final Report, Putting the picture together. Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities</i>
HREOC	Human Rights and Equal Opportunity Commission of the Commonwealth
Lander	Districts in Austria
Meerilinga	Meerilinga Young Children's Foundation
NAPCAN (WA)	National Association for Prevention of Child Abuse and Neglect (WA) (Inc)
NIFTeY	National Investment for the Early Years: Western Australian Branch
OCY	Office for Children and Youth
RUCSN	Resource Unit for Children with Special Needs

UN Convention on the Rights of the Child	The United Nations Convention of that name adopted by General Assembly resolution 44/25 of 20th November 1989 and entered into force for Australia on January 16 1991
UNICEF	United Nations Children's Fund
WACOSS	Western Australian Council of Social Service Incorporated
Wood Royal Commission	Wood Royal Commission into the New South Wales Police Service, the Paedophile Inquiry, Volumes IV, V and VI (1997)
YACs	Youth Advisory Councils
YACWA	Youth Affairs Council of Western Australia
YLS	Youth Legal Service Inc Western Australia



## EXECUTIVE SUMMARY AND RECOMMENDATIONS

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### EXECUTIVE SUMMARY

- 1 In this Report, the Select Committee (**Committee**) has recommended the establishment of a Commission for Children and Young People with a Commissioner at its head, appointed by the Governor.
- 2 The Committee concluded that a commission structure with a commissioner enjoying comprehensive powers is the most appropriate means to establish advocacy for children and young people in Western Australia. This will enable better governance for them and ensure that both government and the Parliament are aware of their needs.
- 3 The Committee has restricted the mandate of the Commissioner to working with children and young people aged under 18 years.
- 4 On May 19 2004, the Minister for Community Development, Hon Sheila McHale MLA announced that the State Government intended to establish in 2005, a new independent children's commission, headed by a children's commissioner. The Committee welcomes this announcement and sees this Report as a useful basis for the work of establishing a Commission for Children and Young People in Western Australia.
- 5 The Committee intended to prepare and append a draft bill to this Report. However, a majority of the Committee, comprising Hon Giz Watson MLC and Hon Kate Doust MLC decided not to proceed and therefore the draft bill does not appear with the Committee's Report. Although the Committee did not finalise the draft bill, it found that it was a useful tool and assisted the Committee with its comparative analysis of the legislation of other jurisdictions, the crystallisation of issues for inquiry and the parameters of many of its recommendations.

### RECOMMENDATIONS

- 6 Recommendations are grouped as they appear in the text at the page number indicated:

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**Recommendation 1: The Committee recommends that the Government:**

- (a) establish a Commission for Children and Young People; and
- (b) appoint a Commissioner for Children and Young People.

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**Recommendation 2: The Committee recommends that the work of the Commission for Children and Young People be consistent with the United Nations Convention on the Rights of the Child.**

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**Recommendation 3: The Committee recommends that the Commissioner and the Commission for Children and Young People be independent from Government. Accordingly:**

- (a) the Commission for Children and Young People be established by a separate, dedicated Act of Parliament;
- (b) the Commission be autonomous, and free from Government direction and control;
- (c) the Commissioner be appointed by the Governor on recommendation of the Premier after consultation with the leader of each political party with at least five members in either House; and
- (d) the Commissioner be accountable directly to the Parliament, including, but not limited to, a requirement to table annual reports.

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**Recommendation 4: The Committee recommends that a Commissioner be provided with comprehensive statutory powers to perform functions.**

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**Recommendation 5: The majority of the Committee recommends that the Government consider a joint parliamentary committee to oversee the Commission and Commissioner and refers the Government to the overseeing legislation in NSW.**

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**Recommendation 6:** The Committee recommends that legislation establishing a Commission for Children and Young People should include specific reference to criteria for the eligibility of a person to be appointed as Commissioner for a five year, once renewable term of office.

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**Recommendation 7:** The Committee recommends that a Commission and Commissioner for Children and Young People have responsibility for the interests of all children and young people, not just those considered at risk.

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**Recommendation 8:** The majority of the Committee recommends that, if the Government is to provide an employment screening function, then it have regard to the employment screening legislation in NSW and Queensland. The Committee recognises the importance of an employment screening function, but cautions that it must not overwhelm the Commission's other functions.

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**Recommendation 9:** The Committee recommends that:

- a) the primary task of a Commissioner be the provision of systemic advocacy for all children and young people;
- b) the Commissioner have the discretion to investigate a complaint from an individual child or young person in exceptional cases; and
- c) the Commissioner consider and provide comment on the adequacy of complaints handling systems in government agencies to ensure that they are accessible to children and young people and meet their needs.

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**Recommendation 10: The Committee recommends that legislation expressly provide for the Commissioner to have the powers and duties as outlined in Chapter 8 of this Report. Such matters to include, but not limited to:**

- (a) the preparation of legislative impact statements on legislation, introduced into Parliament, that in the opinion of the Commissioner affects children and young people;
- (b) the revision and monitoring of existing legislation to assess its impact on children and young people, with any comments being included in reports to Parliament;
- (c) the making of submissions on community issues relevant to children and young people;
- (d) the power to initiate inquiries into any government agency which impacts on children or young people;
- (e) the referring of a child or young person to an appropriate agency for an investigation of a complaint;
- (f) an ability to act as *amicus curiae*;
- (g) the power to enter and inspect visitable sites during the course of an investigation;
- (h) a power to summon witnesses and documents;
- (i) a power to examine on oath; and
- (j) a power to inspect documents and retain them for a reasonable period.

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**Recommendation 11: The Committee recommends that the Commission be funded by a direct allocation of funds from the Consolidated Fund.**

# CHAPTER 1

## INTRODUCTION AND BACKGROUND

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### REFERRAL

- 1.1 On June 11 2003 the Legislative Council established a three person Select Committee on Advocacy for Children (Appointment of a Commissioner for Children) (**Committee**). The task of the Committee was to inquire into and report on the appointment of a commissioner for children or the establishment of an independent office for children as the most appropriate means of establishing an advocate for children to ensure government and the Parliament are aware of the needs of children and that those needs are reflected in government policy and practice. The terms of reference are reproduced at the front of this Report.
- 1.2 The Committee was due to table its Report on June 30 2004. However, an extension of time was sought and granted in the Legislative Council to report on July 2 2004.

### MEMBERSHIP

- 1.3 The Legislative Council initially appointed as members Hon Barbara Scott MLC (Chairman), Hon Jon Ford MLC and Hon Giz Watson MLC. However, on December 2 2003, Hon Jon Ford MLC was discharged from the Committee under Standing Order 344 as a result of heavy workload commitments on other committees and Hon Kate Doust MLC appointed.

### INQUIRY PROCEDURE

- 1.4 The Committee advertised the inquiry in *The West Australian*. It also invited submissions from all Members of Parliament. Details of the inquiry were placed on the parliamentary website at: [www.parliament.wa.gov.au](http://www.parliament.wa.gov.au). Forty-seven submissions were received. At Appendix 1 is a list of persons who contributed written submissions to the inquiry.
- 1.5 The Committee invited representatives from the Youth Advisory Councils to attend a hearing on October 29 2003. A group email was sent to the 106 Youth Advisory Councils throughout Western Australia to which three responses were received. The Committee met on 26 occasions. It held a number of public hearings and heard formal evidence from 11 witnesses. A list of witnesses is attached at Appendix 2.
- 1.6 The Committee extends its appreciation to all those who appeared at hearings, contributed submissions and responded by email.
- 1.7 The Committee intended to prepare and append a draft bill to this Report. However, a majority of the Committee, comprising Hon Giz Watson MLC and Hon Kate Doust MLC decided not to proceed and therefore the draft bill does not appear with the

Committee's Report. Although the Committee did not finalise the draft bill, it found that it was a useful tool and it assisted the Committee with its comparative analysis of the legislation of other jurisdictions, the crystallisation of issues for inquiry and the parameters of many of its recommendations.

## INQUIRY TRAVEL

- 1.8 The Committee resolved to travel internationally and interstate to meet with and discuss the merits of a children's commissioner with those jurisdictions that have already established offices for children's commissioners. Unfortunately, funding was not available for the Committee to travel to and meet with relevant personnel in New South Wales, Tasmania, Queensland or New Zealand. Funding for intrastate travel was also not forthcoming. The Committee tabled a Report about this matter on December 2 2003.
- 1.9 The Committee was disappointed that it was denied the opportunity to travel and meet, face to face, with the commissioners of those jurisdictions that have established children's commissioners. The Committee was also disappointed by its inability to consult with children and young people in regional Western Australia, whose interests the Committee is attempting to assist and whose views the Committee considered were important. The decision not to provide funding for travel constrained the work of the Committee and placed a fetter on its investigatory abilities.

## SUBMISSIONS

- 1.10 The inquiry was unique in that not one written submission opposed establishing a children's commissioner or an independent office for children. Only three of the 47 submissions were ambivalent. These were:
- the submission prepared by the 'across Government' Office for Children and Youth (**across government submission**);
  - the Ombudsman, Ms Deirdre O'Donnell; and
  - the Department of Education and Training.
- 1.11 Five other government departments, agencies or authorities were supportive of establishing a children's commissioner or an independent office for children. These were:
- the Department for Planning and Infrastructure. Correspondence from Mr Greg Martin, Director General, Department for Planning and Infrastructure, indicated that the appointment of a commissioner for children could be *"...beneficial to the Department as it would gain children's views on various*

*public transport matters that is not easily available at present.”*<sup>1</sup> Mr Martin commented that the Department is committed to consulting and the views of children and impact of departmental policies on children are not easy to gauge, given the disparate groups that represent their interests;

- the State Child Development Centre. Dr Trevor Parry, Head of Department, Department of Community and Developmental Paediatrics, Women’s and Children’s Health Service said *“We believe that the present Departmental structures of Government, while keenly engaged in many ways in providing services for children do not, as presently structured, have sufficient independence and neutrality to speak freely and comprehensively for the needs of children and to be inclusive of their views.”*<sup>2</sup>
- the Department of Health, Women’s and Children’s Health Service division. Ms Anne Bourke, Acting Area Chief Executive, speaking on behalf of senior staff said *“At present with children’s issues being addressed by a spread of agencies, there is a tendency for a piecemeal or uncoordinated approach to assessing and meeting children’s needs. This can result in duplication of services in some areas and an absence in others. A Commissioner for Children would provide leadership, be able to advocate for the rights of children in WA and bring a ‘whole of government’ focus to the development of coherent and comprehensive policies in relation to issues impacting on children”*; <sup>3</sup>
- the Western Australian Police Service. Detective Superintendent Alan McCagh, nominated representative of Mr Barry Matthews, Commissioner of Police, said either a Children’s Commissioner or an independent office for children was *“...an appropriate means of establishing an advocate for children to enable better government for children and to ensure Government and Parliament are aware of the needs of children”*; <sup>4</sup> and
- the Fire and Emergency Services Authority of Western Australia (FESA). Mr Bill Hewitt, Acting Chief Executive Officer said FESA *“...fully supports the appointment of a Commissioner for Children or independent office for*

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<sup>1</sup> Submission No 6 from Mr Greg Martin, Director General, Department for Planning and Infrastructure, August 28 2003, p1.

<sup>2</sup> Submission No 17 from Dr Trevor Parry, Head of Department, Department of Community and Developmental Paediatrics, Women’s and Children’s Health Service, August 26 2003, p2.

<sup>3</sup> Submission No 35 from Ms Anne Bourke, Acting Area Chief Executive, Department of Health, Women’s and Children’s Health Service, September 3 2003, p2.

<sup>4</sup> Submission No 42 from the Detective Superintendent Alan McCagh, Nominated Representative, Western Australian Police Service, September 18 2003, p1.

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*children, to ensure the Government and Parliament are aware of the needs of children.*<sup>5</sup>

## HEARINGS

- 1.12 Similar to the content of written submissions, witnesses who appeared before the Committee were supportive of the concept of either a children's commissioner or independent office for children in Western Australia. The Department for Community Development was not asked to express a view.

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<sup>5</sup> Submission No 5 from Mr Bill Hewitt, Acting Chief Executive Officer, FESA, August 25 2002, p2.



## CHAPTER 2

### CHILDREN'S ADVOCACY IN WESTERN AUSTRALIA

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#### DEFINITIONS

- 2.1 To set the parameters for this inquiry, two key terms needed to be defined. These were: 'child' and 'children's advocacy'.

#### **The definition of 'child'**

- 2.2 During the course of the inquiry, it became evident that there is little consistency in the definition of 'child' with a diverse range of ages attributed to this period of life by a number of disparate agencies and individuals in Western Australia. Many non government organisations' and government departments' submissions further distinguished between a 'child' and a 'young person'. The age a 'child' becomes a 'young person' also varied between those non government organisations' and government departments' submissions.
- 2.3 Legally, children become adults at age 18 in Western Australia and so for the purpose of this Report, the term 'child' will be used in its strict legal sense to refer to persons from birth to 18 years. However, the term 'young people' has also been used and refers to persons aged between 13 and 18.
- 2.4 The Committee notes that Dr Robin Sullivan, Commissioner for Children and Young People, Queensland, has spoken of her frustration with the lack of uniform definitions and age groupings for children and young people. Dr Sullivan said that "*...this makes it difficult to quantify or compare matters affecting children and young people and is one of the issues that the Commission would like to see eventually addressed across jurisdictions.*"<sup>6</sup>
- 2.5 Dr David Vicary, Executive Director, Office for Children and Youth (OCY), Department for Community Development (DCD), said: "*We consider children as under 12 and young people as between 13 and 25*".<sup>7</sup> Ms Jane Brazier, Director General, DCD, pointed out that because children above 13 years of age tend to consider themselves as 'young people', DCD wanted to acknowledge that perspective

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<sup>6</sup> Dr Robin Sullivan, Commissioner for Children and Young People, Queensland, at a speech to the Central Queensland Research Forum, June 29 2000, p2.

<sup>7</sup> Dr David Vicary, Executive Director, Office for Children and Youth, DCD, *Transcript of Evidence*, December 1 2003, p3.

with OCY responding “...to how children and young people see themselves.”<sup>8</sup> For this reason, OCY’s policy is to provide services from birth to age 25.<sup>9</sup>

- 2.6 Anglicare WA believes that no unequivocal definition of ‘child’ is possible. In its view, ‘children’ broadly fall within birth to 12 years of age and young people from 13-18. It states that despite the difficulty with definition, “...the needs of these two distinct groups should be recognized.”<sup>10</sup>
- 2.7 The Committee acknowledges the concerns of Relationships Australia, Youth Legal Service, DCD and other organisations providing support services for persons aged between 18 and 25, that advocacy for this group is also required. However, the Committee decided to restrict the mandate of a commissioner or independent office to persons under 18. This is consistent with the UN Convention on the Rights of the Child and aligns Western Australia with those other Australian jurisdictions, which already have specialist child advocates, children’s commissioners or children’s offices advocating for persons under 18 years.<sup>11</sup>

### **The definition of ‘children’s advocacy’**

- 2.8 According to the Macquarie Dictionary, advocacy is “an act of pleading for, supporting, or recommending; active espousal”.<sup>12</sup> The Oxford Dictionary defines it as “a standing up for, a maintaining, or public defending”.
- 2.9 Very few submissions defined advocacy, suggesting that this is, at least colloquially, a well understood term. Citizen Advocacy Perth West (Inc) sees advocacy as a system to defend the rights of vulnerable children.<sup>13</sup> Ms Michele Kosky, Executive Director, Health Consumers’ Council (Inc) WA, sees advocacy as a mechanism to provide invaluable insight into systemic areas of difficulty in health services.<sup>14</sup> Ms Prue Walsh, Play Environment Consultant, said advocacy was about a single body or group

<sup>8</sup> Ms Jane Brazier, Director General, DCD, *Transcript of Evidence*, December 1 2003, p3.

<sup>9</sup> Dr David Vicary, Executive Director, Office for Children and Youth, DCD, *Transcript of Evidence*, December 1 2003, p4.

<sup>10</sup> Submission No 23 from Mr Ian Carter, Chief Executive Officer, Anglicare WA, September 1 2003, p2.

<sup>11</sup> For example, NSW’s *Commission for Children and Young People Act 1998*, defines a child as under 18 years with young person not defined. Queensland’s *Commission for Children and Young People Act 2000* does not define either term but uses 18 in practice. Tasmania’s *Children Young Persons and their Families Act 1997* defines a child as under 18 and a young person as “16 or 17”. New Zealand’s *Children, Young Persons and their Families Act 1989* defines a child as a boy or girl under 14 and a young person as a boy or girl over 14 but under 17 and never married. The Australian Capital Territory’s Office of the Community Advocate under its *Community Advocate Act 1991* defines a child as under 12 and a young person as over 12 but not 18.

<sup>12</sup> The Macquarie Dictionary, (2<sup>nd</sup> edition), The Macquarie Library Pty Ltd, Macquarie University, NSW 1991, p24.

<sup>13</sup> Submission No 14 from Ms Janine Flemmer & Ms Diane Fraser Co-ordinators, Citizen Advocacy Perth West (Inc), September 1 2003, p1.

<sup>14</sup> Submission No 8 from Ms Michele Kosky, Executive Director, Health Consumers’ Council (Inc) WA, August 27 2003, p2.

placing "...individual initiatives within a wider perspective and drawing on specialist expertise to develop that wider perspective."<sup>15</sup> A majority of submissions linked children's advocacy to a human rights framework and specifically, the UN Convention on the Rights of the Child.<sup>16</sup>

- 2.10 The Office of the Community Advocate in the Australian Capital Territory defines advocacy as a "...considered appraisal of an injustice, be it individual or systemic, which is followed up by considered action to achieve justice."
- 2.11 The Committee considered that children's advocacy was best described by the New South Wales Parliament's Standing Committee on Social Issues when it tabled its *Inquiry into Children's Advocacy* Report in 1996. The Standing Committee said that children's advocacy is "...not simply about providing representatives to speak on a child's behalf, or about providing opportunities to incorporate a child's view. It also involves ensuring appropriate systems exist to recognise the rights and needs of all children and young people, and respond to them appropriately."<sup>17</sup> For the purposes of this Report, the Committee adopts that definition.

#### A SNAPSHOT OF WESTERN AUSTRALIAN CHILDREN

- 2.12 On Census night 2001, there were 502,401 children aged from birth to 18 living in Western Australia. This statistic represents 27.13% of the population.<sup>18</sup> The Committee was advised by the CREATE Foundation, a national consumer organisation for children and young people in out-of-home care, that 1,400 children live in out-of-home care in Western Australia.<sup>19</sup>
- 2.13 The Government develops policy and provides services for this large population primarily through its lead agency of DCD. Many non government organisations provide support services for children and their carers.

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<sup>15</sup> Submission No 36 from Ms Prue Walsh, Play Environment Consulting, September 5 2003, p3.

<sup>16</sup> For example, Submission No 23 from Mr Ian Carter, Chief Executive Officer, Anglicare WA, September 1 2003, p2.

<sup>17</sup> Parliament of NSW, Legislative Council, Standing Committee on Social Issues, *Inquiry into Children's Advocacy*, September 1996, p20.

<sup>18</sup> Australian Bureau of Statistics 2001 Census Basic Community Profile and Snapshot No 5 Western Australia.

<sup>19</sup> Submission No 45 from Ms Michelle Townsend, National Coordinator, CREATE Foundation, October 13 2003, p2. 'Out-of-home care' refers to those children who are the subject of a State or Territory care and protection order. According to the CREATE Foundation's *Annual Report 2002/2003* at p3, "Such children cannot live at home due to physical, sexual and emotional abuse as well as dangerous neglect within their own families."

- 2.14 Of the 502,401 children described in paragraph 2.12 above, 29,817 were of Aboriginal and Torres Strait Islander descent. Of these, 23.2% were aged from birth to 3 years; 46.3% were aged 4-11 years and 30.5% 12-17 years.<sup>20</sup>

### IS THERE A NEED FOR CHILDREN'S ADVOCACY IN WESTERN AUSTRALIA?

- 2.15 Under its terms of reference, the Committee's task was to decide the most appropriate means for establishing an advocate for children in Western Australia. This task was predicated on the assumption that an advocate for children is needed. The Committee resolved to consider why, Western Australia, a first world, economically and socially developed State requires a special children's advocate.

### ADVOCACY ORGANISATIONS

- 2.16 The Committee found it difficult to quantify with precision those government and non government organisations that provide a children's advocacy service. The Western Australian Council of Social Service Incorporated (**WACOSS**) website provided a membership list but this was inclusive of all welfare organisations and did not delineate specific children's advocacy bodies. Nevertheless, it is clear from evidence provided to the Committee, that there are many organisations undertaking children's advocacy. The National Investment for the Early Years: Western Australian Branch, (**NIFTeY**) advised that this is a 100% activity.<sup>21</sup> The National Association for Prevention of Child Abuse and Neglect (WA) (Inc) (**NAPCAN (WA)**) advised that this is approximately 90% of its activity<sup>22</sup> and for others, like Meerilinga Young Children's Foundation, (**Meerilinga**), advocacy is an integral part of all its activities.<sup>23</sup> The principal government agency claiming to advocate for children is the Department for Community Development through OCY.

### Advocacy in DCD's Office for Children and Youth

- 2.17 The across government submission from the Minister for Community Development claims that the government has established OCY as an appropriate advocate for children in the heart of government.<sup>24</sup> According to the submission, OCY achieves this by finding meaningful ways of engaging with children and young people from

<sup>20</sup> Zubrick SR, Lawrence DM, Silburn SR, Blair E, Milroy H, Wilkes T, Eades S, D'Antoine H, Read A, Ishiguchi P, Doyle S, *The Western Australian Child Health survey: The Health of Aboriginal children and young people*, Perth: Telethon Institute for Child Health Research, 2004, p25.

<sup>21</sup> Letter from NIFTeY, March 18 2004, p1.

<sup>22</sup> Letter from NAPCAN, April 13 2004, p1.

<sup>23</sup> Letter from Meerilinga, March 18 2004, p1.

<sup>24</sup> Submission No 41 from the across government submission, September 12 2003, p2.

around the State to ensure that their voices are heard when decisions affecting their lives are being made.<sup>25</sup>

- 2.18 An Office for Children and Young People's Policy was created in late 2002. Dr David Vicary, its Executive Director, described that office as an amalgamation of two previous offices, namely: the Office of Youth Affairs and the Family and Children's Policy Office. Initially called the 'Office for Children and Young People's Policy', it was later renamed as the 'Office for Children and Youth'. The website states that its role is to: "...engage children and young people in the planning and evaluation of services, policies and programs to better meet their needs."<sup>26</sup> The Committee notes that the term 'advocacy' is absent.
- 2.19 At a hearing on December 1 2003, Dr Vicary explained that OCY has only been operational for 12 months.<sup>27</sup> It employs 21 full-time equivalents and has six regional positions.<sup>28</sup> The budget is approximately \$7 million. According to Dr Vicary, the office consults with children and young people through Youth Advisory Councils (YACs) and 6,500 cadets spread throughout 158 units across the State.
- 2.20 When OCY was first established a *Reference Group* of children, young people and professionals gathered information and ideas about how the office should work. This *Reference Group* wrote a Report titled "Creating the Office for Children and Young Peoples' Policy," and presented it to the Minister for Community Development in December 2002. According to the website, this was the first time West Australian children had been part of a reference group to government.<sup>29</sup> Additionally, 80 stakeholders working directly with children and youth were consulted to promote and develop:

*...the ideas of young Western Australians. Our mission is to connect all young Western Australians with government and the community and to shape policy programs with insights and experiences of young Western Australians.*<sup>30</sup>

- 2.21 However, at the hearing on December 1 2003, Dr Vicary said that there are no reference or advisory groups of children and young people assisting OCY on policy or the types of activities in which it might engage and act as a guide for the direction of

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<sup>25</sup> *ibid.*

<sup>26</sup> <http://youngpeople.communitydevelopment.wa.gov.au/>, (viewed on March 23 2004).

<sup>27</sup> Thus, at the time of tabling this Report, it has been operational for approximately 18 months.

<sup>28</sup> Kununurra, Port Hedland, Geraldton, Albany, Esperance and Manjimup.

<sup>29</sup> <http://youngpeople.communitydevelopment.wa.gov.au/>, (viewed on March 23 2004).

<sup>30</sup> Dr David Vicary, Executive Director, Office for Children and Youth, DCD, *Transcript of Evidence*, December 1 2003, p2.

OCY. Dr Vicary explained that plans are in progress to implement these initiatives in 2004.

*Committee Comment*

- 2.22 The Office for Children and Youth has no independent legislative framework. It exists under the umbrella of the *Community Services Act 1972*. In the Committee's view, it sits within a child welfare context but is emerging from a pure policy position to delivering services and providing funding for programs. When the Committee heard evidence, OCY had only been in operation for a short time, hence its efficacy is difficult to determine at this early stage. Very few submissions mentioned the office, suggesting it has a low profile in the child and youth sector. Of those that did mention it, the major criticism, is its direct nexus to 'government' and therefore, it is perceived as not being independent.
- 2.23 The Committee heard evidence indicating that OCY is a new initiative in response to the 2001 Machinery of Government Taskforce recommendations that the former Family and Children's Services Department create a "*.new organisation with a new culture and a new way of working*".<sup>31</sup> However, the Committee is not convinced. It appears that following a re-allocation of resources, the former Office of Youth Affairs and the Family and Children's Policy Office merely merged to deliver programs as well as policy advice, but, in the Committee's view, this could not be labelled a new initiative.
- 2.24 On May 19 2004, the Minister for Community Development, Hon Sheila McHale MLA announced that the State Government intended to create "*...an independent commission, to be headed by a new Children's Commissioner*."<sup>32</sup> The Committee welcomes this announcement.

**Advocates in other government organisations and non government organisations**

- 2.25 A plethora of evidence from non government organisations, private individuals and a small number of other government organisations has confirmed the need for children's advocacy for a diverse range of reasons. Some of these reasons are listed in paragraphs 2.26 to 2.40 below.
- 2.26 Mrs Raelene Walter, Executive Director, Ngala Family Resource Centre, made specific reference to parents with clinical depression using Ngala's overnight stay service and how this is a "*...silent area...*"<sup>33</sup> for those children who have parents with a mental illness. According to Mrs Walter, there is a need for advocacy for that

<sup>31</sup> Ms Jane Brazier, Director General, DCD, *Transcript of Evidence*, December 1 2003, p2.

<sup>32</sup> Hon Sheila McHale MLA, Minister for Community Development, *Media Release*, 'Green Light for Western Australia's First Children's Commission', May 19 2004.

<sup>33</sup> Mrs Raelene Walter, Executive Director, Ngala, *Transcript of Evidence*, October 20 2003, p2.

particular group of children because they are “...*at a very vulnerable stage in their relationship with their carers and their parents.*”<sup>34</sup> Mrs Walter also pointed out that in their work with children, the needs of the family and parent are considered. The difficulty is their needs are different “...*and that the question needs to be asked - what does this way of work mean from the child's point of view? That voice can sometimes be forgotten unless that question is quite deliberately asked.*” Ngala envisages a child advocate as asking that question and challenging the organisation.

- 2.27 The Citizens Committee on Human Rights Inc, sees children's advocacy as needed for that group of “...*defenceless...*”<sup>35</sup> children who come into contact with the “...*psychiatric industry*”.<sup>36</sup> Its submission commented on the need to ensure children are not subjected to psychiatric labelling which justifies treatment for conditions like attention deficit hyperactivity disorder, with powerful addictive drugs. Such a diagnosis remains, in the opinion of the Citizens Committee on Human Rights Inc, speculative with the culture of prescription medication for children with behavioural and learning problems “...*potentially creating drug addicts.*”<sup>37</sup>
- 2.28 Similarly, the Health Consumers' Council, an independent, community based organisation representing the consumer voice in health policy and planning, made the point that children's advocacy was needed to address “...*the delineation between consumer and carer perspectives in respect to health service issues.*”<sup>38</sup> According to the Health Consumers' Council, there is a risk that a child's interest can be subsumed to that of the carer/parents' interests such as occurs in child behavioural issues which are being “...*medicalised by parents and others through insistence on diagnosis and treatment of ADHD.*”<sup>39</sup> The Health Consumers' Council sees child advocacy as needed to respond to this perceived risk.
- 2.29 Dr Philip King, Chairman, Kidsafe WA, in highlighting the need for children's advocacy, commented on how many government and non government agencies focus on child well-being, health, safety and welfare, but each, like Kidsafe, have their own specific focus. Dr King said: “*With so many agencies all trying to get their message heard and programs implemented, the end result is often that those with the loudest voice, the highest profile and the best marketing team gain government and public attention, regardless of the proportion of the child population that is affected.*”<sup>40</sup>

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<sup>34</sup> ibid.

<sup>35</sup> Submission No 43 from Ms Shelley Wilkins, Director and Mr Ron Carlisle, President, The Citizens Committee on Human Rights Inc, September 30 2003, paragraph 31.

<sup>36</sup> ibid, paragraph 16.

<sup>37</sup> ibid, paragraph 61.

<sup>38</sup> Submission No 8 from Ms Michele Kosky, Executive Director, Health Consumers' Council, August 29 2003, p1.

<sup>39</sup> ibid.

<sup>40</sup> Submission No 29 from Dr Philip King, Chairman, Kidsafe WA, September 1 2003, p1.

- 2.30 Ms Cheryl Vernon, Manager, Youth Legal Service, believes advocacy is required because of the *"...need to bring a child focused voice to governmental deliberations. For too long children and young people have been powerless and reliant on adults to voice their concerns."*<sup>41</sup>
- 2.31 Ms Moria Rayner, Barrister, said that children's advocacy is needed as a response to our international human rights obligations to children which are *"...precisely that: both community and individual duties and obligations, not options."*<sup>42</sup>
- 2.32 The Australian Family Association, Western Australian Division, also supported the need for children's advocacy as a response to human rights instruments such as the UN Convention on the Rights of the Child. However, its response was limited to *"...authoritative support for the essential participation of parents and families so parents can exercise their legal rights, perform their duties & fulfil their responsibilities required by law."*<sup>43</sup>
- 2.33 Grandparents Raising Grandchildren (WA),<sup>44</sup> see children's advocacy as needed in emergency situations. The members of this organisation are often single, widowed, in poor health or elderly people who have their grandchildren *"...dumped on them at very short notice because their substance dependent parents, ie their own children, cannot or do not want to look after them any longer"*.<sup>45</sup> According to the organisation, these grandparents rise to the occasion but then at a later point, the adult parents reclaim the child because *"...they think they would like to be a parent again or need the extra CentreLink payment that has been cut."*<sup>46</sup> The submission makes the point that because grandparents know little about bureaucracy or family law matters, they lack skills to ensure that the grandchildren remain in their care. The organisation claims that DCD's policy of family reunification exacerbates the situation with grandparents standing helplessly by as their grandchildren are returned to dysfunctional and abusive environments. The organisation claims that there *"...does not seem to be anyone who is able to quickly intervene and make sensible decisions regarding the child's safety based on the facts."*<sup>47</sup>

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<sup>41</sup> Submission No 32 from Ms Cheryl Vernon, Manager, YLS, August 8 2003, p6.

<sup>42</sup> Submission No 24 from Ms Moria Rayner, Barrister, September 2 2003, p2. The Youth Legal Service correctly point out that the 1995 High Court decision in *Teoh* makes it clear that both the Federal and State Governments are obliged to take the UN Convention on the Rights of the Child into account in decision-making.

<sup>43</sup> Submission No 37 from Mr John Barich, Australian Family Association, Western Australian Division, September 5 2003, p15.

<sup>44</sup> This non government organisation has approximately 40 members located in the metropolitan area from Yanchep to Mandurah. Its submission was lodged by Hon Paddy Embry MLC, on behalf of the body.

<sup>45</sup> Submission No 3 from Hon Paddy Embry MLC on behalf of Grandparents Raising Grandchildren, August 20 2003, p1.

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*



- 2.34 The CREATE Foundation is a national consumer organisation for the 20,000 children and young people in out-of-home care in Australia. As previously stated at paragraph 2.12, there are 1,400 children and young people living in out-of-home care in Western Australia.<sup>48</sup> It pointed out that children's advocacy is needed for this particular group of children because "...without parents as advocates, this group would easily classify as our most vulnerable children and young people".<sup>49</sup>
- 2.35 The Child Study Centre Clinic at the University of Western Australia's School of Psychology, conducts research on children with learning, language and behavioural problems. It sees a children's advocacy service being needed to ensure that research findings from this particular group of children are applied through appropriate intervention services.<sup>50</sup>
- 2.36 The Resource Unit for Children with Special Needs<sup>51</sup> (RUCSN) said children's advocacy is needed to address inequities in the funding system for non government organisations. In its submission, RUCSN stated that in 2003, the Commonwealth froze a special needs subsidy scheme and that a children's advocate could have spoken with authority on the inequity of the funding system. RUCSN further pointed out that advocacy was needed to address the issue of departmental policies often being developed "...without adequate assessment of how these programs may impact on children."<sup>52</sup>
- 2.37 The Aboriginal Legal Service of Western Australia (ALSWA) commented that a children's advocacy service is needed for Aboriginal families as an alternative to DCD. Mr Dennis Eggington, Chief Executive Officer, ALSWA said: "*The assimilation policy has done lasting damage to the relationship between the department for Community Development and the Aboriginal population. As a result, some Aboriginal families refuse entirely to engage with the department, even in cases where their children are at risk.*"<sup>53</sup> ALSWA holds the view that as a direct reaction to the assimilation policy, current policy or decisions of DCD means they intervene less often in situations where at risk children are from Aboriginal families.

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<sup>48</sup> Submission No 45 from Ms Michelle Townsend, National Coordinator, CREATE Foundation, October 13 2003, p2.

<sup>49</sup> *ibid*, p1.

<sup>50</sup> Submission No 44 from Dr Janet Fletcher, Dr Robin Harvey and Dr Stephanie Heath, Child Study Centre Clinic, University of Western Australia, September 30 2003, p1.

<sup>51</sup> RUCSN provides support to children with a disability, those from culturally and linguistically diverse backgrounds and Aboriginal families in Commonwealth funded children's services, such as child care, outside school hours care and vacation care.

<sup>52</sup> Submission No 19 from RUCSN, September 1 2003, p1.

<sup>53</sup> Submission No 9 from Mr Dennis Eggington, Chief Executive Officer, Aboriginal Legal Service of Western Australia, August 28 2003, p32.

- 2.38 YouthCARE, a non government organisation representing 110 school chaplains, submitted that advocacy is needed to overcome the deleterious effects of materialism and commercialisation on children's lives in order to improve the moral and spiritual dimensions of children.<sup>54</sup>
- 2.39 Associate Professor David Forbes, School of Paediatrics & Child Health, University of Western Australia, commented on how paediatricians have accepted child advocacy as one of the core objectives of their principal professional organisation. Professor Forbes said that as a group of professionals, "...we have a holistic view of the needs of children's health and well being and recognise that health services alone cannot ensure positive outcomes for children."<sup>55</sup>
- 2.40 The Department of Health's recent review of the *Mental Health Act 1996* noted the deficiencies in the that Act for children under 18 years. One of the 78 recommendations is the insertion of a new Part 11 into the Act titled 'Youth Advocate'. This person would be a member of the Council of Official Visitors.<sup>56</sup> The proposed role and function of the Youth Advocate provides for every minor admitted to a psychiatric institution being visited, as soon as practicable, by a youth advocate. It is proposed that the youth advocate become acquainted with the circumstances of the admission, advocate for that minor and where appropriate become involved in the child's care and treatment.<sup>57</sup>

#### Committee Comment

- 2.41 The Committee finds that evidence provided to it has confirmed the need for children's advocacy in Western Australia. The Committee further finds that advocacy is occurring through the work of non government and government organisations as well as private individuals.<sup>58</sup> However, a consistent theme reiterated to the Committee is that the advocacy is uncoordinated and therefore ineffective.
- 2.42 One of the five submissions from government agencies reinforced this view. Ms Anne Bourke, Acting Area Chief Executive, Department of Health, Women's and Children's Health Service Division, speaking on behalf of senior staff, referred to the need for a "...co-ordinated strategy..."<sup>59</sup> to address the long term care of a small

<sup>54</sup> Submission No 25 from Ms Jill Clements, Field Officer, YouthCARE, September 1 2003, p2.

<sup>55</sup> Submission No 31 from Associate Professor David Forbes, School of Paediatrics & Child Health, University of Western Australia, September 1 2003, p2.

<sup>56</sup> Similar to the official visitor program under section 8 of the *Child Welfare Act 1947*. It states: "*The Minister may, from time to time, appoint so many fit and proper persons as he thinks necessary to be visitors of Departmental facilities*".

<sup>57</sup> Recommendation Y.10 of *The Way Forward: Recommendations of the Review of the Mental Health Act (1996)*, December 12 2003, pp34-36.

<sup>58</sup> For example, Private Submission No 4 from a Foster Carer, August 24 2003.

<sup>59</sup> Submission No 35 from Ms Anne Bourke, Acting Area Chief Executive, Department of Health, Women's and Children's Health Service, September 3 2003, p2.

- number of children who are dependent on technology for their survival and well-being.
- 2.43 The Parliament of NSW's 1996 Report into Children's Advocacy commented on how NSW advocacy groups were uncoordinated and reactive, that advocacy was ad hoc and piecemeal with the organisations responding to the issues or needs of individual children, rather than the collective welfare of children or special groups of children. The Report further claimed the organisations were "...remedial or grievance driven, rather than being positive and pro-active in their advocacy".<sup>60</sup>
- 2.44 Evidence provided to the Committee suggests that this criticism may be extrapolated to Western Australian advocacy organisations. It is a pervasive theme, consistent with Chapter 13 of the *Final Report, Putting the picture together. Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities (Gordon Inquiry)*.<sup>61</sup> The report of the 2002 Gordon Inquiry, headed by Magistrate Sue Gordon, was a comprehensive investigation into widespread sexual abuse and violence within Western Australia's Aboriginal community. The Gordon Inquiry made 197 findings and recommendations.
- 2.45 Chapter 13 of the Gordon Inquiry is a reflective documentation of how DCD described a "...lack of clarity as to a leading coordinating agency"<sup>62</sup> across government departments and other agencies each advocating for and servicing a young person, can have adverse consequences.

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<sup>60</sup> The Parliament of NSW, Legislative Council, *Report of the Standing Committee on Social Issues- Inquiry into Children's Advocacy*, Report Number 10, September 1996, p193.

<sup>61</sup> Gordon, S, Hallahan, K & Henry, D (2002) *Final Report, Putting the picture together. Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, Department of Premier and Cabinet WA, July 31 2002.

<sup>62</sup> *ibid*, p343.



## CHAPTER 3

### INTERNATIONAL MODELS OF CHILD ADVOCACY

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#### INTRODUCTION

- 3.1 The Committee examined a number of international children's advocacy institutions as source material for a children's commissioner or independent office for children in Western Australia. The Committee noted a worldwide trend toward establishing independent institutions to safeguard children's rights and promote their well-being.
- 3.2 In 1997, the United Nations Children's Fund (UNICEF) identified 16 ombudsmen<sup>63</sup> or commissioners for children throughout the international community.<sup>64</sup> By 2001, UNICEF had documented another 16 in its *Innocenti Digest No. 8: 'Independent Institutions Protecting Children's Rights'*.<sup>65</sup> However, that Digest did not include the three Australian children's commissioners.<sup>66</sup> More recently, in April 2004, Scotland appointed its first children's commissioner and in March 2004, the English Parliament introduced the 'Children Bill [HL]' which includes the establishment of a children's commissioner. As at June 2004 this bill is still being debated.
- 3.3 UNICEF claims that children's commissioners or ombudsmen in Europe and elsewhere reflect a "...substantially growing interest...on all continents..." in the concept.<sup>67</sup> Independent evaluations in Norway and Sweden show that in those countries, their ombudsmen are well known, attract widespread popularity and result in positive changes for children.
- 3.4 This Chapter examines the range of powers and functions of various international children's ombudsmen and commissioners as well as the diversity of initiatives and activities.

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<sup>63</sup> The term "ombudsman" originated in Scandinavia. It originally meant something akin to ambassador; a person or office established to safeguard the rights of individual citizens, or a particular group of citizens, in relation to the powers and actions of government. The idea of a children's ombudsman was first developed by non government organisations such as 'Radda Barnen', the *Save the Children Fund Sweden*, which established an Ombudsman for Children in the 1970s and promoted the idea internationally during International Year of the Child (1979). UNICEF advise that it uses the term ombudsman (singular) or ombudsmen (plural). This term is not gender specific and may refer to an office, or function, rather than to any particular person.

<sup>64</sup> UNICEF, 'Ombudwork for Children', *Innocenti Digest No. 1*, 1997.

<sup>65</sup> UNICEF, 'Independent Institutions Protecting Children's Rights', *Innocenti Digest No. 8*, 2001, p1.

<sup>66</sup> Tasmania's was established in 1997, NSW in 1998 and Queensland initially in 1996 and then a new Act in 2000.

<sup>67</sup> UNICEF, 'Independent Institutions Protecting Children's Rights', *Innocenti Digest No. 8*, 2001, p15.

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**WALES**

- 3.5 According to the website of the Children's Commissioner for Wales, the catalyst for a children's commissioner was the 2000 Waterhouse Report *Lost in Care: Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974*.<sup>68</sup> That Report recommended the establishment of an independent children's commissioner.
- 3.6 The *Care Standards Act* (UK) then established the Office of the Children's Commissioner for Wales on July 20 2000, with functions limited to children's care services regulated by that Act. At the time, the Commissioner's functions included reviewing and monitoring the arrangements for complaints made by service providers, whistleblowing, advocacy, the provision of advice and information, the power to examine particular cases, providing other assistance and making reports. However, in 2001 the *Children's Commissioner for Wales Act* extended the Commissioner's role to *all* children. It also gives the Commissioner power to review proposed legislation and policy from the National Assembly for Wales considering the potential effect that it might have on children, and to make representations to the National Assembly for Wales about any matter that affects children.
- 3.7 The first Commissioner, Mr Peter Clarke was appointed in March 2001 with two offices established in Swansea, South Wales and a smaller office in Colwyn Bay, North Wales. The Commissioner's functions include:
- the reviewing and monitoring of arrangements by service providers for dealing with complaints, for ensuring that proper action is taken in response to information regarding possible unlawful or dangerous activities, or their concealment ('whistleblowing'), and for making persons available to represent children's views and provide them with advice and support;
  - the provision of advice and information;
  - the examination, where the Commissioner considers appropriate, of the cases of particular children who are receiving or have been in receipt of such services;
  - the provision of assistance, including financial assistance, and representation, in respect of proceedings or disputes or in relation to the operation of procedures and arrangements monitored by the Commissioner; and

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<sup>68</sup> <http://www.childcom.org.uk/publications>, (viewed on June 18 2004), Sir Ronald Waterhouse, The North Wales Child Abuse Tribunal of Inquiry, The Stationery Office, February 2000.

- making reports, including an annual report on the exercise of his or her functions to the Assembly through the First Minister. There is a requirement for a child friendly version of any reports.
- 3.8 The First Secretary<sup>69</sup> of the National Assembly appoints the Commissioner. However, under the Act, children were involved in the selection panel and they are encouraged to participate in the Commissioner's work. Mr Clarke has a seven-year non-renewable term of office.
- 3.9 The Commissioner has power to review the effect on children in Wales of any existing or proposed legislation of the Assembly. The Commissioner also has power to review the effect on children in Wales of any policy, or practice of, or service provided by the Assembly or any body or person listed in the Act. The Commissioner is given the same investigative powers as the United Kingdom High Court, that is, he has access to information, can summon and examine witnesses. There is a restriction if the matter is subjudice.<sup>70</sup>
- 3.10 The principal aim of the enabling legislation is for the Commissioner, in exercising his functions, to safeguard and promote the rights and welfare of children. The legislation also provides for the Commissioner to consider and make representations to the Assembly about any matter affecting the rights or welfare of children in Wales. The Commissioner has no power to bring legal proceedings or intervene in judicial proceedings.<sup>71</sup>
- 3.11 Publicly, the Commissioner has spoken out against a number of issues of concern to children including plans by some local authorities to build schools on former landfill sites and exam stress. In March 2002, the Commissioner commenced his first investigation, the *Clywch Inquiry*, looking into complaints of child abuse against a former teacher and television writer who committed suicide while awaiting trial.<sup>72</sup> In October 2003, the Commissioner published his second annual report which highlighted child and adolescent mental health services, planning, play and leisure, and anti-social behaviour as areas of concern. The Welsh Assembly Government's mental health strategy, 'Everybody's Business' was praised in the report but the Commissioner was critical of the lack of funding provided for the strategy.<sup>73</sup>

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<sup>69</sup> This is the equivalent our Premier.

<sup>70</sup> Subjudice means "before a judge". That is, the matter is still being considered by a court of law and is not yet decided. The matter is not to be canvassed publicly because of the risk of being in contempt of court.

<sup>71</sup> Children's Commissioner for Wales, *Annual Report and Accounts 2002-2003*, p3.

<sup>72</sup> *ibid*, p8.

<sup>73</sup> *ibid*, p16.

**NORTHERN IRELAND**

- 3.12 In October 2003, Mr Nigel Williams was appointed as the first Commissioner for a four-year term under the *Commissioner for Children and Young People (Northern Ireland) Order 2003*. The term of appointment is renewable only once. The First Minister and Deputy First Minister<sup>74</sup> acting jointly appointed the Commissioner. Under section 3 of the Order, the Commissioner reports to the Assembly through the First Minister and Deputy Minister. The Commissioner is also required to table an annual report detailing his functions and for the purposes of the law of defamation, under section 25, any matter which the Commissioner is required or authorised to publish are absolutely privileged.
- 3.13 The principal aim of the Commissioner in exercising his functions is to safeguard and promote the rights and best interests of children and young persons. In doing this, the Commissioner must have regard, in particular, under section 6(2)(b), “...to the ascertainable wishes and feelings of the child or young person (considered in the light of age and understanding)”; but, in his dealings with any body or person, at all times, have regard to any statutory provision or rule of law which authorises or requires that body or person to act in a particular manner.
- 3.14 The Commissioner is also required to have regard to the importance of the role of parents in the upbringing and development of their children; and any relevant provisions of the UN Convention on the Rights of the Child. Under section 7, the Commissioner is to actively promote an understanding of the rights of children and young persons. Additionally, the Commissioner is to keep under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and services.
- 3.15 Under section 8, the Commissioner may undertake, commission or provide financial or other assistance for research or educational activities concerning the rights or best interests of children and young persons or the exercise of the Commissioner’s functions. Best practice guidance in relation to any matter concerning the rights or best interests of children can also be issued. The legislation is replete with whistleblowing provisions, similar to Wales.<sup>75</sup> The Commissioner has an express *amicus curiae*<sup>76</sup> function under section 14. Under section 21 of the Order, the

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<sup>74</sup> These are the equivalent of our Premier and Deputy Premier.

<sup>75</sup> That is, the Commissioner can review the whistleblowing arrangements of the authorities, such as the arrangements for ensuring that proper action is taken in response to any disclosure of information which may tend to show that a criminal offence has been committed; or that a person has failed to comply with any legal obligation to which he is subject; or that the health and safety of any child or young person has been endangered.

<sup>76</sup> This term translates as ‘a friend of the court’. A person, usually a barrister, may with permission of the court, advise the court on a point of law or on a matter of practice. An *amicus curiae* has no personal interest in the case as a party and does not advocate a point of view in support of one party or another. The court may hear an *amicus curiae* if it considers it is in the interests of justice.



Commissioner has an express power to enter any premises managed by a relevant authority in which children are living, being looked after or detained; examine the management of the premises; and inspect documents.

- 3.16 The Commissioner is generally not permitted to investigate the concerns or complaints of individual children. However, he may do so if a child's rights have been infringed. He may carry out formal investigations connected to the carrying out of his functions. The Commissioner is given the same investigative powers as the United Kingdom High Court, that is, he has access to information, can summon and examine witnesses. There is a restriction if a matter is subjudice or the subject of public or local inquiry. Unlike Wales, the Commissioner may bring legal proceedings or intervene in judicial proceedings if a question of principle is raised.
- 3.17 At a logistical level, the Commissioner is required to send copies of his reports to all relevant authorities and undertake research. Under section 8 of the Order, the Commissioner must ensure children and parents are aware of his functions and develop methods for effective communication.

## SCOTLAND

- 3.18 The *Commissioner for Children and Young People (Scotland) Act 2003* received Royal Assent on May 1 2003. Professor Kathleen Marshall was appointed by the Scottish Parliament to take up her post as the first Commissioner in April 2004 for a five-year term with a maximum of two terms. Unlike Northern Ireland and Wales, the executive is not involved in the Commissioner's appointment. The Commissioner is required to report annually to Parliament through the Secretary of State for Education and Skills. Her annual report must include a review of the issues, her activities, the steps taken to fulfil each of the functions and an overview of future work including a strategy to involve children. Like her Northern Ireland counterpart, Professor Marshall must publish child friendly versions of reports.
- 3.19 Professor Marshall and her staff are provided with immunity from prosecution for defamation with respect to reports or communications resulting from investigations. The principal aim of the enabling legislation is to promote and safeguard the rights of children by having regard to the UN Convention on the Rights of the Child. Under section 10(c) of the Act, Professor Marshall can make recommendations to government and review the laws, policies and practices. Professor Marshall is expressly forbidden to investigate the concerns of particular children. She can require persons to give evidence and produce documents. Similar to her Wales counterpart, the Commissioner is required to report the results of investigations to Parliament. She is to conduct research and must consult with children on her work.

**ENGLAND**

- 3.20 On October 4 2002, the *United Nations Committee on the Rights of the Child* made a strong recommendation that the United Kingdom Government provide children's commissioners for all of its children. Another motivating factor for legislation to establish children's commissioners was the *Kennedy Report of the Public Inquiry into children's heart surgery at the Bristol Royal Infirmary 1984-1995*;<sup>77</sup> the *Every Child Matters* Green Paper<sup>78</sup> and the United Kingdom Parliament's formal response to the Victoria Climbié, Inquiry Report.<sup>79</sup> The Explanatory Notes to the 'Children Bill [HL]' state that the *Every Child Matters* Green Paper proposed changes in policy and legislation in England to maximise opportunities and minimise risks for all children and young people, focusing services more effectively around the needs of children, young people and families.<sup>80</sup>
- 3.21 At the time of this Report, the Bill proposes a commissioner for children, independent of government reporting to Parliament through the Secretary of State for Education and Skills. The Bill provides for a commissioner to be concerned with the views and interests of children relating to the following aspects of their well-being: physical and mental health, protection from harm and neglect, education and training; the contribution made by them to society, social and economic well-being.<sup>81</sup>
- 3.22 Clause 2(6) of the bill proposes that, like Scotland, the commissioner be prohibited from investigating the complaints of an individual child but under clause 4(1) where the Secretary of State considers that the case of an individual child raises issues of relevance to other children, the Secretary of State may direct the Children's Commissioner to hold an inquiry into that case.

**SWEDEN**

- 3.23 The Swedish Parliament approved the appointment of a Children's Ombudsman when *The Children's Ombudsman Act (1993:335)* came into effect on July 1 1993. Under its provisions, the work of the Children's Ombudsman is general in nature and includes information and opinion-forming activities on matters concerning the rights and needs

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<sup>77</sup> Learning from Bristol: The report of the public inquiry into children's heart surgery at the Bristol Royal Infirmary 1984 -1995, Command Paper: CM 5207, presented to Parliament by the Secretary of State for Health by Command of Her Majesty, July 2001. Amongst other things, it recommended that consideration should be given to the creation of an Office of Children's Commissioner in England, with the role of promoting the rights of children in all areas of public policy and seeking improvements to the ways in which the needs of children are met.

<sup>78</sup> Mr Charles Clarke, Education Secretary, *Every Child Matters* Green Paper, September 2003.

<sup>79</sup> Lord Laming, *The Victoria Climbié Inquiry Report*, January 2003.

<sup>80</sup> Explanatory Notes to the Children Bill [HL], introduced in the House of Lords on March 3 2004, prepared by the Department for Education and Skills, p1.

<sup>81</sup> Children Bill [HL], clause 2(4).

of children and young people. The Children's Ombudsman is not permitted to focus on individual cases.<sup>82</sup>

- 3.24 In March 1999, the Swedish Parliament unanimously approved a national strategy to implement the UN Convention on the Rights of the Child. The strategy emphasises that the spirit and intentions of the UN Convention on the Rights of the Child should be given consideration in all decision-making concerning children in the country's municipal and county authorities and in government agencies.<sup>83</sup>
- 3.25 On July 1 2002 the work of promoting the introduction of the UN Convention on the Rights of the Child in government agencies and municipal and county authorities was made one of the Children's Ombudsman's permanent tasks. The *Children's Ombudsman Act* was modified in July 2002. Changes in the legislation aim to strengthen the mandate and authority of the Office. Statutory provisions now regulate a greater part of the Children's Ombudsman's activities. Thus, decisions on the work of the Children's Ombudsman were passed by Parliament, not the Government. The Children's Ombudsman is now empowered to request from individual government agencies and municipal and county authorities, information about what they are doing in their activities to ensure compliance with the UN Convention on the Rights of the Child. Furthermore, the Children's Ombudsman is also empowered to summon government agencies and municipal and county authorities for discussions.
- 3.26 The Ombudsman is appointed for a term of six years. The current incumbent is Ms Lena Nyberg, appointed in 2001. The Ombudsman submits bills for legislative changes to the Swedish Government and disseminates information on the UN Convention on the Rights of the Child. A key duty of the Ombudsman is to participate in public debate, promote public interest regarding key issues, and influence the attitudes of decision-makers and the public.<sup>84</sup>
- 3.27 The Ombudsman maintains regular contact with children and young people, in order to discover their views and opinions. The Ombudsman visits children in schools and youth clubs, and children can reach Ms Nyberg, by letter, telephone and through a website. Twice a year the Ombudsman obtains the responses of a number of 'contact classes' to a questionnaire survey. Ms Nyberg also runs several children's councils and one youth council. Each year Ms Nyberg, submits a report to the Government. The most recent initiative of the Children's Ombudsman was lobbying to establish a National Council on Child Abuse and Neglect.<sup>85</sup>

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<sup>82</sup> Website of the Children's Ombudsman, [www.bo.se](http://www.bo.se), (viewed on June 18 2004).

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> Website of the European Network of Ombudsmen for Children, [www.ombudsnet.org](http://www.ombudsnet.org), (viewed on June 18 2004).

3.28 In 1998, a committee of inquiry was established by the Swedish Government to examine the strengths and weaknesses of the Ombudsman. UNICEF listed its strengths as:

- playing a significant role in the development of issues relating to children through information and opinion forming activities;
- bringing visibility to the overall living conditions of children and young people and helping create a comprehensive picture of their lives;
- contributing to the implementation of the UN Convention on the Rights of the Child; and
- being most effective in promoting children's rights when it could act as their representative and refer to their experiences and lives.<sup>86</sup>

3.29 Its weaknesses were listed as a lack of legal powers and limited opportunities to build networks and contacts in its capacity as the representative of children and young people.<sup>87</sup>

## DENMARK

3.30 Denmark established a National Council for Children in 1994 with eight members. The Minister of Social Affairs appointed five and three were appointed by non government organisations. Initially the National Council for Children was established as a three year trial inside the Ministry for Social Affairs.<sup>88</sup> However, after an evaluation in 1996, it became a permanent body established by a Ministerial Order with an inter-professional make-up, consisting of a chairperson and six members. Its new mandate at that time extended its functions to assess the conditions under which Danish children live in terms of the UN Convention on the Rights of the Child.<sup>89</sup>

3.31 The Council undertakes policy and advocacy work on matters affecting children and operates in a manner similar in many respects to the Children's Ombudsman in Sweden. Although formally independent of government, UNICEF, in 1997, referred to how some non government organisations had expressed concern that the Council is a poor substitute for an Ombudsman, that is, neither fully independent<sup>90</sup> nor using the

<sup>86</sup> UNICEF, 'Independent Institutions Protecting Children's Rights', *Innocenti Digest No. 8*, 2001, p13.

<sup>87</sup> *ibid.*

<sup>88</sup> Website of the National Council for Children, Denmark, [www.boerneraadet.dk](http://www.boerneraadet.dk), (viewed on June 18 2004).

<sup>89</sup> UNICEF, 'Independent Institutions Protecting Children's Rights', *Innocenti Digest No. 8*, 2001, p18.

<sup>90</sup> For example, the National Council's Chairperson and its two members are appointed by the Danish Minister for Social Affairs.

UN Convention on the Rights of the Child as a framework for its policy work.<sup>91</sup> However, by 2004, the website of the National Council is claiming to the contrary that the UN Convention on the Rights of the Child is an important basis for the National Council's day-to-day work in safeguarding children's rights and interests in society. *"Given the developments in society, the Convention on the Rights of the Child is constantly making new demands of politicians, authorities and professionals. The National Council for Children constantly holds them to adhere to the Convention on the Rights of the Child as a self-evident basis whenever decisions involve children."*<sup>92</sup>

## NORWAY

- 3.32 Norway was the first country to establish a commissioner, or 'ombud', with statutory rights to protect children. From the late 1960s, a strong political debate regarding the need for children to have an official ombudsman to speak for them was present in Norway, where it was appreciated that children constituted a vulnerable group in society.<sup>93</sup> Several debates also took place in the Norwegian National Assembly and finally Act No 5 was passed in March 1981, the *Ombudsman for Children Act 1981*.
- 3.33 To select the Ombudsman for Children, there is an open application procedure. After screening the candidates, one is nominated and presented to the Cabinet. The King, (that is, the Cabinet) appoints the Ombudsman for Children for a four-year period renewable once. Mr Trond Waage is the current incumbent having been appointed in 1996.<sup>94</sup>
- 3.34 Act No 5 provides the basis for the Ombudsman for Children as an independent, non-partisan, politically neutral institution. Although the Ombudsman is administratively under the jurisdiction of the Ministry for Children and Family Affairs, neither the National Assembly nor the Government have the power to instruct the Ombudsman. The Ombudsman is regarded as an active participant complying with the UN Convention on the Rights of the Child both on a national and international level. The duties of the Ombudsman are to promote children's interests to public and private authorities and to investigate the developments of conditions under which children grow up.<sup>95</sup>
- 3.35 The Ombudsman has the power to investigate, criticise and publicise matters important to improve the welfare of children and youth. However, the Ombudsman cannot by law reverse administrative actions or revoke administrative decisions. In

<sup>91</sup> UNICEF, 'Ombudwork for Children', *Innocenti Digest No. 1*, 1997, p6,

<sup>92</sup> Website of the National Council for Children, Denmark, [www.boerneraadet.dk](http://www.boerneraadet.dk), (viewed on June 18 2004).

<sup>93</sup> Website of the European Network of Ombudsmen for Children, [www.ombudsnet.org](http://www.ombudsnet.org), (viewed on June 18 2004).

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

investigating complaints, the Ombudsman has statutory rights of access to records and of entry to children's institutions. An advisory panel of six people supports the Ombudsman with expertise in children's issues. The office of the Ombudsman for Children is independent from the Government although the Ministry of Children and Family Affairs provides its funding.<sup>96</sup>

- 3.36 The Office of the Ombudsman for Children stresses its flexibility and aims for a holistic approach in the work that is carried out on behalf of the children. The Office takes on the role of a politician on behalf of the children and the role of an activist when a special case needs attention from the authorities and the media. However, in the next instance, however, the Office may function as the adviser for children, parents, professionals and organisations regarding children's interests.
- 3.37 Initiating projects and research is another way to collect information concerning children. In addition, many institutions as well as the media turn to the Ombudsman for information. An increasing part of the Office's workload stems from the aspect of communications, which represents another challenge for the future.
- 3.38 To stay in touch with children, the Office employs the 'Children's Powerline', established in 1989, to gather information about the lives of children and youth and attempts to provide swift replies and information to the callers. The replies are placed on the Ombudsman web page as well as on Text-TV through Norway's largest public broadcasting channel.<sup>97</sup> In 2000, the Ombudsman received approximately 1,500 written queries, of which 500 were by email. In 2000, the office received over 7,000 telephone calls which were followed up through either counselling, the provision of information or by re-directing the inquirers to other offices.<sup>98</sup>
- 3.39 When possible, enquiries are referred to competent offices as the Ombudsman reserves its primary capacities for cases of significant principal value.<sup>99</sup> Currently, the office has established an Internet-Parliament for students in secondary schools. The aim is to empower young people by entitling them to have their say through mini-referendums on matters concerning themselves. The Ombudsman's most recent initiative was to successfully raise the age at which children can be held in adult prisons.
- 3.40 An evaluation of the Ombudsman in 1996 by the Norwegian government found:

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<sup>96</sup> Website of the European Network of Ombudsmen for Children, [www.ombudsnet.org](http://www.ombudsnet.org), (viewed on June 18 2004).

<sup>97</sup> 23,200 people called the free Children's Powerline number in 2000. In addition, the Office received 500 emails aimed at the Powerline.

<sup>98</sup> Website of the European Network of Ombudsmen for Children, [www.ombudsnet.org](http://www.ombudsnet.org), (viewed on June 18 2004).

<sup>99</sup> Unlike the Swedish Children's Ombudsman who can investigate any individual case.

- the Ombudsman had helped to place children higher up on the political agenda;
- that children were aware of the office and its functions;
- the Ombudsman had been instrumental in promoting acceptance of the idea that children have rights and are entitled to be heard;
- its work in disseminating information about children's rights had improved the position of children in the law; and
- internationally, the Ombudsman had been seen as a positive model for other countries and contributed to putting children on the international agenda.<sup>100</sup>

## AUSTRIA

- 3.41 Each of the nine Lander (districts) has an Ombudsman for Children and Youth. They have been operational since 1989 and were established through the *Youth Welfare Act 1989*. Each Lander has developed its own legislation, structure and functions. The nine offices form a 'conference of ombudpersons' to respond to federal issues. The offices undertake individual casework and in 1998, (the latest statistics available), dealt with 10,000 new cases. Activities include campaigning for the lowering of the voting age and an analysis of the extent to which the principles of the UN Convention on the Rights of the Child are respected in Austrian legislation.<sup>101</sup>

## FRANCE

- 3.42 The Office of the Défenseur des Enfants was established by Law No. 2000-196 of March 6 2000. The Office is totally independent and vested with authority by the State. It is charged with defending and promoting children's rights as defined by law or by an international agreement ratified or approved like the UN Convention on the Rights of the Child.
- 3.43 The Office reviews individual cases in which the rights of a child have not been respected. This situation arises when cases have not been resolved in an equitable and satisfactory way despite attempts by the many other structures already in place in France. The Office does not act in place of the specialised services, the associations or the legal and/or social aid structures set up to protect children. Rather, the Ombudsman intervenes when the normal procedures and systems have proven inadequate and when children are the victims of this inadequacy, when their

<sup>100</sup> The Ombudsman for Children and Childhood in Norway, *Norwegian Official Report*, Ministry of Children and Family Affairs, Oslo, 1996, quoted in UNICEF, 'Independent Institutions Protecting Children's Rights', *Innocenti Digest No. 8*, 2001, p.13. Of the nine Ombudsoffices of the Austrian Federal States, the voting age in two has been reduced to 16 years.

<sup>101</sup> UNICEF, 'Independent Institutions Protecting Children's Rights', *Innocenti Digest No. 8*, 2001, p16.

development is threatened and their stability compromised because they feel that their rights are neither recognised nor respected. The Office reviews the complaint and, if it appears justified, notifies the appropriate legal or social aid authorities. Some cases are referred to the Mediator of the French Republic. The Ombudsman is constantly kept informed of proceedings.<sup>102</sup>

- 3.44 The Office must identify and bring to light any ‘collective dysfunctions’ of which it learns and which have adverse effects on minors. It is responsible for verifying that the rights of children are effectively considered and respected in a wide variety of contexts: schools, hospitals, institutions and prisons.<sup>103</sup> The Office promotes children’s rights and organises information campaigns on this theme, particularly on November 20 each year, the French, National Children’s Rights Day. Children themselves are the prime targets of this type of information, which is presented in a simple and easily understandable form so as to help them to comprehend the fact that they are bearers of rights and that these rights protect them. The Office also provides information and training specifically designed for professionals who, in a variety of ways, deal with children. The Ombudsman, Ms Claire Brisset stated that “...*all too often, these professionals have received training that did not include sufficient information on the existence, the nature and the effects of children’s rights.*”<sup>104</sup>
- 3.45 The Ombudsman is responsible for ensuring that children’s views are heard concerning matters that affect them directly and situations where their rights have not been respected or properly recognized. The Office may propose texts or modifications in existing laws or regulations which appear to disregard or even contravene the rights of children as set forth in international agreements which France has ratified.
- 3.46 Young people themselves, their legal representatives or child advocacy groups may call on the Office directly and in writing. The Ombudsman may also take the initiative and intervene in situations where it appears that children’s rights have not been respected. Every year, on Children’s Rights Day, the Ombudsman presents a report on the activities of the Office to the President of France and to the French Parliament.
- 3.47 Another aspect of the work of the Ombudsman for Children is to establish structures for information and training concerning the existence and effective respect of children’s rights. It is in this framework that in 2000, the Ombudsman for Children took the following initiatives:

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<sup>102</sup> Report to the European Network of Ombudsmen for Children. Website <http://www.ombudsnet.org/Ombudsmen/France/France>, (viewed on March 22 2004).

<sup>103</sup> According to the Children’s Rights Alliance for England, *The Case for a Children’s Rights Commissioner for England* January 2003, p13, the French Ombudsman secured a change in the law whereby no child can now be placed in a psychiatric ward without the medical authorisation of a psychiatrist outside the institution.



- A poster with the slogan: “I have a right to my childhood”, designed to heighten public awareness of children’s rights. One hundred thousand copies were printed in collaboration with several French ministries, and circulated both throughout French schools and in the institutions which depend on the ministries associated with the project. This same poster was discussed in a manual designed for civics classes for children around twelve years of age, and distributed to the schools prior to September 2001.
- A website with content designed to target adults dealing directly with children, parents, teachers, leaders of special activities groups, educators and children. The website provides information concerning all aspects of children’s rights, and serves as a ‘reference centre’ for the public – most particularly teachers and students. It offers practical information about the Office, and legal information about laws, the legal system and other mediator structures. It also includes a glossary of all legal terminology used. In the ten months since it was set up, it has been accessed 49,000 times.<sup>105</sup>

3.48 Between May 3 2000, (the date on which the current Ombudsman, Ms Claire Brisset was appointed for a six year, non renewable term) and August 31 2001, the Office had received close to 4,000 letters. Of these, 922 concerned individual complaints which were investigated. These disputes generally centred on visiting rights and living arrangements when couples have separated, children who have been placed in foster families and disputes as to custody decisions. The enabling legislation stipulates that the Office is to make proposals to improve awareness and respect of children’s rights. In its report to the European Network of Ombudsmen for Children (ENOC) of which France is a member, the Ombudsman claims that after 15 months of activity, the Office had become a normal part of the French institutional landscape. It claims that its relations with the authorities (the French President, the Government and the Parliament), with national and regional bodies and with administrative agencies concerned with children’s welfare are excellent. The Ombudsman’s report to ENOC further claims that the media are taking an increasing interest in the work of the Ombudsman in all that relates to the protection of children in general and her recommendations are listened to and followed by the appropriate authorities.<sup>106</sup>

## THE UNITED STATES OF AMERICA

3.49 The USA has very few formal mechanisms for children’s advocacy at a government level. However, non government organisations provide advocacy for children at both the individual and the systemic level.

<sup>104</sup> *Report to the European Network of Ombudsmen for Children.* Website <http://www.ombudsnet.org/Ombudsmen/France/France>, (viewed on March 22 2004).

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

- 3.50 There is an Office of Children's Ombudsman in the State of Michigan. It is an independent government agency established by *Public Act 204 of 1994*. This Act gives the Ombudsman authority to investigate complaints about children in Michigan's child welfare system. It is essentially an administrative remedy in that it investigates the actions, decisions, policies and protocols of the 'Family Independence Agency' (equivalent to Western Australia's DCD) and child placing agencies as they relate to a particular child. The Ombudsman also makes recommendations to the Governor, Legislature, and the Family Independence Agency for changes in child welfare laws, rules and policies.
- 3.51 Michigan's Children's Ombudsman is appointed by the Governor and is supported by a multi-disciplinary team of investigators. The current Ombudsman is Ms Lynne Martinez who was appointed on March 19 2003. The position of Children's Ombudsman is not subject to Senate confirmation.<sup>107</sup>

## NEW ZEALAND

- 3.52 The *Children, Young Persons and their Families Act 1989* (NZ) established the Office of the Children's Commissioner within the Department of Social Welfare. This means it does not have its own independent Act and the Commission is encapsulated within social welfare legislation for children. The Commissioner combines an ombudsman role of investigating individual complaints with a broad policy and advocacy role on issues relevant to the rights of children.<sup>108</sup> The functions of the Commissioner include research, education and policy development as well as the investigation, monitoring and reviewing of policy and practice under the Act. The Commissioner reports annually to the Minister of Social Welfare and the Parliament. The 4<sup>th</sup> current incumbent is Dr Cindy Kiro, who was appointed in late 2003.
- 3.53 According to the website of the New Zealand Office of the Commissioner for Children, the Commissioner monitors the Act, investigates decisions, monitors welfare practices and procedures and can investigate decisions made about individual children.<sup>109</sup> The Commissioner promotes the welfare of children and young people and ensures that their rights are recognised.<sup>110</sup> She can inquire into any matter affecting children and young people in any service or organisation. She has special responsibilities to investigate matters of child abuse and neglect, youth offending and

<sup>107</sup> Michigan has two Houses. The Senate is the equivalent of Western Australia's Legislative Council.

<sup>108</sup> Australian Law Reform Commission, Paper *Seen and heard: priority for children in the legal process*, 1997, para 7.18.

<sup>109</sup> Website <http://www.occ.org.nz/aboutus/>, (viewed on May 21 2004).

<sup>110</sup> New Zealand became a signatory to the UN Convention on the Rights of the Child in 1993. Article 3 states that all actions concerning the child shall take full account of his or her best interests. This means that a State shall provide its children with adequate care when parents and others charged with that responsibility fail to do so.

the actions of the Department of Child, Youth and Family Services. The Commissioner cannot comment on court decisions.

- 3.54 The Commissioner and her staff promote the Office by visiting schools, child/welfare organisations and government agencies, conducting training sessions about advocacy, involvement and natural justice. The aim is to ensure widespread recognition of child issues and the work of the Office of the Commissioner for Children.
- 3.55 UN Convention on the Rights of the Child principles govern the Act but there is no express reference to it. However, the Committee notes that Ms Moira Rayner, Barrister, has pointed out that the *Children, Young Persons, and their Families Act 1989* was passed before New Zealand signed the UN Convention on the Rights of the Child, and for this reason does not refer to ‘rights’ in that legislation but to the family, and to children in need of care and protection or who have offended.<sup>111</sup> In the Committee’s view, the enabling legislation is essentially, a social welfare model, rather than ‘rights’ based.<sup>112</sup>
- 3.56 Child participation is provided for in section 5 of the Act which states:

*...that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity and culture of the child or young person.*

The Act does not provide for other advisers.

- 3.57 Under section 420(3) the Commissioner’s communications and publications are privileged. Under section 412, the Commissioner enjoys a “*necessary or expedient*” power to enable her to carry out functions. Under section 411(e) the Commissioner can inquire generally into, and report on, any matter, including any enactment or law, or any practice or procedure. The Commissioner has a strong advocacy, ombudsman-type function for monitoring and investigating complaints about services provided to certain children by service providers.

## ICELAND

- 3.58 The *Children’s Ombudsman No.83 Act of 1994* established the Ombudsman for Icelandic Children to “*improve children’s lot*”. The Ombudsman is appointed by the President and reports annually to the Prime Minister, but functions independently of the Executive. It has powers to investigate organisations and individual children.

<sup>111</sup> Moira Rayner, ‘Systemic advocacy for Children in Australia, New Zealand and the UK’, Association of Lawyers for Children Conference, University of Warwick September 20-22 2000.

<sup>112</sup> The object of the Act is expressed in the Long Title as an Act to “*reform the law relating to children and young persons who are in need of care or protection or who offend against the law*” and expressly (d) “*To make provision for the appointment of a Commissioner for Children*”.

Recent initiatives include publishing a statistical profile of Icelandic children, agitating for meals in schools, a conference on school bullying and a report that persuaded the Prison and Probation Administration to place young sentenced offenders aged 15 to 18 years in rehabilitation centres rather than prisons.<sup>113</sup>

*Committee Comment*

- 3.59 The Committee finds that the rapid growth internationally in human rights institutions for children through establishing children's commissions, offices of the child or appointing ombudsmen, reflects a recognition that the community is failing children. It is significant that in the majority of countries discussed in this Chapter, the UN Convention on the Rights of the Child forms the basis of these organisations.<sup>114</sup>

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<sup>113</sup> The Children's Rights Alliance for England, *The Case for a Children's Rights Commissioner for England* January 2003, p13.

<sup>114</sup> UNICEF, 'Independent Institutions Protecting Children's Rights', *Innocenti Digest No. 8*, 2001, Editorial, p1.

## CHAPTER 4

### JUSTIFICATION FOR A CHILDREN'S COMMISSIONER OR INDEPENDENT OFFICE FOR CHILDREN IN WESTERN AUSTRALIA

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#### INTRODUCTION

4.1 In this Chapter, the Committee explores whether a children's commissioner or independent office for children would provide a solution for the perceived state of uncoordinated, ineffective child advocacy in Western Australia.

#### A CASE FOR RETAINING THE STATUS QUO

4.2 The Department for Community Development (**DCD**) argued that:

- current, recent government initiatives such the Office for Children and Youth (**OCY**), which works with all children, not just those at risk, requires more time to become effective. As at June 2004, OCY has only been in operation 18 months and according to Ms Jane Brazier, Director General, DCD, "...*any significant change agenda does not deliver overnight; we are talking here about at least a five year program.*"<sup>115</sup> and
- it is attempting to ameliorate the problems of the past, for example, by restructuring the department and its governance; as well as creating OCY. DCD actively engages with child reference groups and is developing relationships with large research bodies, like the Institute of Child Health Research. It consults with child development centres at Curtin University and the University of Western Australia and child advocates. DCD claims it is genuinely attempting to change its culture as per Machinery of Government Taskforce instructions. Ms Jane Brazier, Director General, DCD, referred to these initiatives as "...*a new way of working*".<sup>116</sup>

4.3 Mr Paul Albert, Director General, Department of Education and Training commented that the Early Years Taskforce chaired by the Director General of DCD has brought together many agencies for the 0-4 years age group. Mr Albert said: "*Insofar as this taskforce reports through to the 'heart of government' through a subcommittee of*

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<sup>115</sup> Ms Jane Brazier, Director General, DCD, *Transcript of Evidence*, December 1 2003, p2.

<sup>116</sup> *ibid*, p1.

*Cabinet ministers, it can be said to be an appropriate advocate for the 0-4 years group. There are plans to involve WACOSS & NIFTeY in its membership.”<sup>117</sup>*

#### 4.4 Other arguments towards retaining the status quo include that:

- organisations working for children and young people could improve their inter agency advocacy mechanisms;<sup>118</sup>
- the active participation of children in decision-making can be achieved without the need for a specialised structure if a good strategy for children can be developed;
- governments should mainstream their responsibilities rather than establish separate structures;<sup>119</sup>
- the money spent on establishing a commission or independent office is just another bureaucracy with the money better spent on direct services for children;<sup>120</sup>
- a commissioner would detract from the rights of parents;<sup>121</sup>
- the *Guardianship and Administration Act 1990* could be amended so that the Public Advocate assumes a focussed role with respect to children and young people similar to the Australian Capital Territory’s Community Advocate;<sup>122</sup>
- current complaint handling bodies could become more accessible to children and young people by developing what the Youth Affairs Council of Victoria (Inc) calls “...*specialist children’s sections and accessible complaint mechanisms*”;<sup>123</sup>

<sup>117</sup> Submission No 40 from Mr Paul Albert, Director General, Department of Education and Training, September 12 2003, p3.

<sup>118</sup> The Association of Childrens Welfare Agencies, Issue Paper, *Towards a Children’s Commissioner*, May 1992, p9.

<sup>119</sup> According to Ms Moira Rayner, Barrister, this argument was used to oppose the creation of the Commonwealth’s Equal Opportunity Commission. See Submission No 24 from Ms Moria Rayner, September 1 2003, p4.

<sup>120</sup> UNICEF, ‘Independent Institutions Protecting Children’s Rights’, *Innocenti Digest No. 8*, 2001, p12.

<sup>121</sup> Robert Ludbrook, ‘Why Australia Needs a Commissioner for Children’, *Discussion Paper 002/94*, National Children’s and Youth Law Centre, p14.

<sup>122</sup> The Community Advocate in the Australian Capital Territory is a statutory officer under its *Community Advocate Act 1991*. Under section 13, the Advocate has a number of broad functions including: section 13(ea) to monitor the provision of services for the protection of children; and section 13(eb) to act as advocate for the rights of children. Section 13(ea) and (eb) were inserted following the proclamation of the Australian Capital Territory’s *Children and Young People Act 1999*.

<sup>123</sup> Youth Affairs Council of Victoria (Inc) , ‘Are you listening to us? The Case for a Victorian Children and Young People’s Commission’, website, (viewed on July 21 2003).

- Cabinet's current format for legislative impact statements could be modified to include an impact on children and young people. Mr Paul Albert, Director General, Department of Education and Training reminded the Committee that all Cabinet submissions are currently prepared to a strict format. Mr Albert said: "*Interalia, the current format requires authors to state what impact the submission has on small business and regional areas of the State. It is conceivable that the format could be adjusted to require authors to state what impact their proposal would have on children.*"<sup>124</sup>; and
- following a worldwide trend towards appointing children's commissioners, ombudsmen or establishing independent offices is insufficient justification, even if three other Australian States have followed suit.

### A CASE FOR CHANGING THE STATUS QUO

4.5 This line of inquiry led the Committee to consider why special or additional representation of children's interests is necessary by either appointing a children's commissioner or establishing an independent office. One way of considering this is to ask - what is so special about children given that governments must be sensitive to all its citizens? Other large and small groups within society may also require special representation.

4.6 The Committee notes the European Network of Ombudsmen for Children<sup>125</sup> (ENOC) list below of a number of elements making out a special case for children:

- Children's healthy development and active participation are uniquely crucial to the healthy future of any society. Alongside priority for children is safeguarding the environment for their benefit.
- Children are individuals - they have equal status to adults as members of the human race - they are not possessions of parents, products of the State, not people-in-the making. Governments at all levels of societies have a moral responsibility to recognise the human rights of children as individual citizens - and at the World Summit for Children in 1990, world leaders committed themselves to high priority, political action at the highest level. With 'child' defined as from birth to 18, as per the UN Convention on the Rights of the Child, they are not a small group - somewhere between a quarter and a third or more of member states' populations.

<sup>124</sup> Submission No 40 from Mr Paul Albert, Director General, Department of Education and Training, September 12 2003, p3.

<sup>125</sup> The ENOC was formally established in June 1997, in Norway. It links independent offices for children from twelve countries in Europe. It aims to encourage the fullest possible implementation of the UN Convention on the Rights of the Child, to support collective lobbying for children's rights, to share information, approaches and strategies, and to promote the development of effective independent offices for children.

- Children begin as totally dependent. They grow towards independence only with the help of adults. Their dependence and developmental state make them particularly vulnerable, so they are more affected than adults by the conditions under which they live, such as poverty, poor housing and environmental pollution.
- Human rights do not stop at the door of the family home for any family member. For most children, parents are normally the first and most vigorous defenders of their human rights. However, parents can and do abuse children's rights. Violence to children within the family is regrettably common in most societies. Traditional attitudes can prevent or delay respect for the child's own views and feelings, for their civil rights - vital to their development as active, participating citizens. In seeking to safeguard the human rights of children, the actions and inactions of parents, families and other carers have to be reviewed as well as those of governments.
- Children are more affected by the actions or inactions of government than any other group. Education policies dominate their waking hours, public health policies target their developing bodies and lifestyles. Child protection is a sizeable industry. Almost every area of government policy affects children to some degree, either directly, or indirectly.
- Children have no vote, no part in the political process. While there may be the beginnings of laws and policies to encourage the involvement of children in decision-making, to listen to children in the family, schools, health services or local communities, they are everywhere still in their infancy. In most countries, the views of children do not touch the actions of central government.
- There are particular difficulties for children using the legal system and courts to protect their rights. Responding to children's concerns and complaints and remedying their rights requires special arrangements.
- There are current changes in many societies which are having a disproportionate impact on children (and generally not a positive impact): changes in family structures, in employment patterns and the introduction of market forces to public services. The state of children is a very sensitive barometer by which to measure the effects of social and economic changes.
- There are costs of failing children. Governments understand from research that what happens to children in the early years, within the family, within other forms of care, and even before birth, in the womb, significantly determines their positive or negative growth and development. This, in turn,



determines their cost or contribution to society spread over the rest of their lives.

- 4.7 With regard to ENOC's last point above, the Committee notes that Dr Robin Sullivan, Commissioner for Children and Young People, Queensland, has referred to Australian studies showing that "...each dollar spent in the early years saves \$7 in remedial services for individuals over 15 in relation to such issues as health, criminality and unemployment."<sup>126</sup>
- 4.8 UNICEF's *Innocenti Digest No1*, points out that the legal and social structures necessary to enable the interests of children to be separately recognised do not exist in many countries. Responsibility for children is usually split among different ministries and departments - "*There is often poor communication or collaboration between these bodies, with a resultant failure to develop integrated services and no overview of their impact on children.*"<sup>127</sup>
- 4.9 Evidence provided to the Committee indicated that although ineffective child advocacy is the impetus for appointing a commissioner or establishing an independent office for children, there are other reasons. These include:

#### **International obligations**

- 4.10 The fact that it is an active response to our international obligation, in this case, to establish human rights institutions for children in Australia. The United Nations Committee on the Rights of the Child has consistently commended the establishment of independent offices for children. In its guidelines for States preparing their periodic reports under the UN Convention on the Rights of the Child, it asks for information on any independent body established to promote and protect the rights of the child, such as an ombudsman or commissioner. Item 28 of the United Nations *Concluding Observations of the Committee on the Rights of the Child: Australia - 1997* said:

*The Committee believes that there is a need for an awareness-raising campaign on the right of the child to participate and express his/her views, in line with article 12 of the Convention.*<sup>128</sup> *The Committee suggests that special efforts be made to educate parents about the importance of children's participation, and of dialogue between*

<sup>126</sup> Dr Robin Sullivan, Commissioner for Children and Young people, Queensland, quoted this from the Principal Policy Officer, Federal Minister for Children and Youth Affairs, Australian Research in Early Childhood Education Conference, Canberra, January 25 2002, in an address to the Annual General meeting of the Brisbane Diocese in March 2003.

<sup>127</sup> UNICEF, 'Ombudswork for Children', *Innocenti Digest No1*, 1997, quoting Hodgkin, R and Newell, P, *Effective Government Structures for Children: Report of a Gulbenkian Foundation Inquiry*, Gulbenkian Foundation, London, 1996.

<sup>128</sup> Article 12 deals with the right to freedom of expression on matters affecting the child.

*parents and children. The Committee also recommends that training be carried out to enhance the ability of specialists, especially care givers and those involved in the juvenile justice system, to solicit the views of the child, and help the child express these views.*<sup>129</sup>

### **Powerlessness of children**

- 4.11 UNICEF has observed that increasingly communities and governments are realising that because children are a uniquely vulnerable group, independent mechanisms are needed to protect and promote their rights.<sup>130</sup> For example, it has been claimed that Australia's family law system treats children as objects of concern but denies them the opportunity to present their views in court as part of any mediation process.<sup>131</sup> The Chief Justice of Western Australia, Chief Justice Malcolm, has described how children as young as seven are heard by judges in China, yet in Western Australia, the views of children come through the reports of court experts. Chief Justice Malcolm said those reports "...have been seen as of concern".<sup>132</sup>

- 4.12 The Honourable Alastair Nicholson, Chief Justice, Family Court of Australia in an address to the 2003 Law Association for Asia and the Pacific Conference said:

*The family law system, in my view, still takes a somewhat paternalistic approach to children when it comes to considering their involvement in proceedings that are explicitly concerned with their welfare and care. Such children are rarely seen, yet they are the prime rationale for many mediation sessions. They may be legally represented at final hearings, but a fairly constant criticism is that some child representatives do not consider it necessary to meet with the child before so doing. Children are permitted by the Family Law Act to initiate proceedings on their own behalf, but not surprisingly they very rarely, if ever, do. They are not permitted to give evidence without the leave of the Court, and such leave is rarely granted. Children are rarely seen by judges, regardless of their age or circumstances.*<sup>133</sup>

<sup>129</sup> Sixteenth Session, 'Consideration of Reports Submitted by States', 1997. These reports are due every five years. The Sixteenth Session is outdated but is the only one available.

<sup>130</sup> UNICEF, 'Ombudswork for Children', *Innocenti Digest No1*, 1997.

<sup>131</sup> Robert Ludbrook, 'Why Australia Needs a Commissioner for Children', National Children's and Youth Law Centre, Discussion Paper 002/94, p5.

<sup>132</sup> Chief Justice Malcolm, Chief Justice of Western Australia, Opening Address at a Conference titled: 'Protecting Abused Children in the Family Court: Towards Best Practice', Perth, October 7 2003. Section 100B(2) of the *Family Law Act 1975* (Cth) states: "A child must not be called as a witness in, or be present during proceedings in the Family Court...unless the court makes an order allowing the child to be called as a witness or to be present."

<sup>133</sup> Law Association for Asia and the Pacific Conference, 'Children and Children's Rights in the Context of Family Law', Children and the Law: Issues in the Asia Pacific Region, Brisbane, June 21 2003.

- 4.13 This powerlessness of children was reinforced by Dr Barbara Meddin, Senior Professional Officer, DCD, who explained at a conference, that the *Family Law Act 1975* (Cth) now focuses on parental responsibility as opposed to rights and that the child, "...the least powerful person in the process will get lost in the adversarial, emotionally charged family court process. The risk is the child's voice is not adequately heard".<sup>134</sup>
- 4.14 Ms Alison Hay, Social Worker, Relationships Australia, speaking at a conference about her research into perceptions of abused children in the family court process, found that children do not feel heard in family court proceedings. According to Ms Hay, children feel "...their voice is filtered and that they [the judges] should ask directly. The message never gets to the top".<sup>135</sup> This results in what Ms Hay describes as 'systems abuse' of children as well as abuse from parents.
- 4.15 Ms Jane Brazier, Director General, DCD, said: "...you get a different perspective when you hear what children have to say directly rather than having everything in their lives filtered by adults. The real challenge...is developing a raft of strategies relevant to children to enable their voices to be heard."<sup>136</sup>
- 4.16 Ms Moira Rayner, Barrister, speaking of her experiences as Director of the former *Office of the Children's Rights Commissioner for London*, said that one of the most rewarding aspects of the office was witnessing, over a period of time, "...the young people, who had no experience of public life, had tremendous skills and were building them on a week by week basis through experience."<sup>137</sup>
- 4.17 In the Committee's view, a commissioner with children and young people actively involved in the management of the organisation can increase the power of such children and young people by providing them with appropriate, relevant experiences.

#### **A commitment to children**

- 4.18 Appointing a commissioner or establishing an independent office is a symbolic demonstration of a Government's commitment to children and young people. It is a formal recognition by Parliament that the needs of children and young people are unique.

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<sup>134</sup> Dr Barbara Meddin, Senior Professional Officer, Department for Community Development, at a Conference, titled: 'Protecting Abused Children in the Family Court: Towards Best Practice', Perth October 7 2003.

<sup>135</sup> Ms Alison Hay, Social Worker, Child and Family Therapist, Relationships Australia, at a Conference, titled: 'Protecting Abused Children in the Family Court: Towards Best Practice', Perth October 7 2003 referring to her exploratory study titled: 'Child Protection and the Family Court of Western Australia: the Experiences of Children and Protective Parents'.

<sup>136</sup> Ms Jane Brazier, Director General, DCD, *Transcript of Evidence*, December 1 2003, p5.

<sup>137</sup> Ms Moria Rayner, Barrister, *Transcript of Evidence*, November 17 2003, p.2.

- 4.19 The view has been expressed that if a Government is to be judged in part on whether or not it has improved the lives of children and young people, it needs to show that it has responded to what they want and to “...*what those working with and for them say is necessary.*”<sup>138</sup> This sends an “...*important signal to children themselves that government is taking them seriously.*”<sup>139</sup> Failure to give children a high priority, means they remain largely invisible to Government. Children are seldom seriously considered when Governments develop social and economic policies because they have no vote, play no part in the political process and therefore cannot express dissatisfaction with Government policy.<sup>140</sup>
- 4.20 Effective policy for children must be based on a detailed understanding of children’s needs and how they can best be met. This was demonstrated at the Western Australian Youth Affairs Conference, held in Perth in October 2003, when the Minister for Community Development was questioned by delegates about the absence of a discrete youth health policy. The Minister acknowledged that although this was non existent, the matter would be canvassed as soon as possible.
- 4.21 The 2003 Youth Media Survey revealed that only 15% of the 11,000 children who filled in the survey think the Western Australian government takes the views of young people seriously. This was reinforced by members of the Youth Panel at the Western Australian Youth Affairs Conference. The Panel said: “...*politicians did not focus on us as being adults of the future but they will listen to us when we vote*”.<sup>141</sup> It may be the case that a children’s commissioner might offer an opportunity for children to be heard by acting as a conduit for the voice of children and young people.

#### *Committee Comment*

- 4.22 The Committee is encouraged by France’s claim that after 15 months of activity, its Office of the Défenseur des Enfants has become a “...*normal part of the French institutional landscape.*”<sup>142</sup> The Committee considers that a children’s commissioner or independent office embedded in Western Australia’s institutional landscape, would be reflective of a continuing commitment to our children and young people.

#### **Participation**

- 4.23 Experience from overseas jurisdictions with either a commissioner or independent office insitu shows an increased rate of child participation in decision-making. UNICEF point out that promoting respect for the views and experiences of children,

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<sup>138</sup> Ms Cherie Booth, QC, ‘Journal of Local Government Law’, Issue 2, 2003, p23.

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid.*, p21.

<sup>141</sup> Western Australian Youth Affairs Conference, Perth, October 1-3 2003.

<sup>142</sup> *Report to the European Network of Ombudsmen for Children.* Website <http://www.ombudsnet.org/Ombudsmen/France/France> (viewed on March 22 2004).

by devising structures for participation, is a fundamental building block in the process of rendering children visible in society.<sup>143</sup>

- 4.24 Mr Peter Clarke, the Children's Commissioner for Wales, commented on this in his annual 2003 *Reports and Accounts*. Mr Clarke said he was "...continuously surprised at the expectation that we have of 18 year olds to be fully engaged in our representative processes when we have not given them any real experience of decision making in the things that affect them most."<sup>144</sup> According to Mr Clarke, an increase in children's participation in decisions assists them to gain confidence as citizens.
- 4.25 This view was reinforced by Ms Moria Rayner, Barrister, who said: "*If we do not encourage children to participate and we do not get used to having children participate in decisions, then they will not do it as young adults either.*"<sup>145</sup>
- 4.26 Those jurisdictions with either a commissioner or independent office have recognised that the participation of children and young people is a particularly challenging feature of their work. Many and various methods have been used including child reference groups, surveys, internet, focus groups and dedicated telephone lines. The benefit of participation may be demonstrated in the following example.
- 4.27 Mr Peter Clarke, the Children's Commissioner for Wales, found from speaking to children during 2001, that the main, single issue with which children have been unhappy was the state of school toilets.<sup>146</sup> As a result, Mr Clarke saw addressing this issue as being his main priority and described it as "...a glorious opportunity for adults to make a clear signal that we do respect children and young people." It is arguable that, given the numerous social problems in Wales, this matter from an adult perspective is insignificant. However, the Committee noted that the very ideology behind having a children's commissioner or independent office is a commitment to making representations on behalf of children.<sup>147</sup> The chronic poor state of school toilets was regarded as indicative of the disrespect with which society treats young people.<sup>148</sup>

<sup>143</sup> UNICEF, 'Ombudswork for Children', *Innocenti Digest No1*, 1997, p10.

<sup>144</sup> Peter Clarke, Children's Commissioner for Wales, *Reports and Accounts*, 2002-2003, October 2003, p1.

<sup>145</sup> Ms Moria Rayner, Barrister, *Transcript of Evidence*, November 17 2003, p7.

<sup>146</sup> There is medical evidence suggesting that children's consequent reluctance to use these toilets can adversely impact upon their health and well-being.

<sup>147</sup> Osian Rees, "Beyond the Hype - A Year in the Life of the Children's Commissioner for Wales", Department of Law, University of Wales, Aberystwyth.

<sup>148</sup> Ms Cherie Booth, QC, *Journal of Local Government Law*, Issue 2, 2003, p24. The NSW Commission for Children & Young People in its *Feedback 2003* magazine also commented on how "*children and young people have told us that clean and safe toilets are important to them.*" As a result the Commissioner asked University of NSW students to conduct a survey of some school students and found that over 80% did not like using school toilets; 56% felt they were unsafe; many were dangerous due to poor lighting, ventilation, water on floors or no seats; privacy was a problem due to broken locks and low doors; and bullying can happen in toilets.

### An investment for the future

- 4.28 The Australian Association of Social Workers points out that “...as a nation we have become increasingly aware of the challenges the ageing of our population is going to present over the next decade. The importance of investing in our children has never been more apparent.”<sup>149</sup> A commission or independent office may be seen as one means of investing in our children.
- 4.29 In the area of health care, the need for investment in children is particularly apparent. Dr Trevor Parry, Director, State Child Development Centre and Chair of NIFTeY WA, commented on the global epidemic in the western world of obesity where “...ultimately, many more people will die from the effects of obesity in childhood unless measures are taken to address this significant health problem.”<sup>150</sup>
- 4.30 Ms Patmalar Ambikapthy, Commissioner for Children, Tasmania, quoted statistics from studies both overseas and in Tasmania which “...consistently demonstrate that early investment in children can result in a more growth orientated economy, where citizens are less dependent on welfare benefits and the State does not have accelerating expenses on criminal justice administration.”<sup>151</sup> Ms Ambikapthy concluded by stating that “We need to realise that it is in our self interest to prioritise children.”<sup>152</sup>
- 4.31 Professor Fiona Stanley, Chief Executive Officer of the Australian Research Alliance for Children and Youth, reinforced the necessity for early intervention programs. *The Australian* newspaper quoted Professor Stanley as stating that although Australia is economically prosperous, “...alarm bells have been sounding in the suburbs - witness increases in divorce, child abuse, family violence, homelessness, working hours and social isolation.”<sup>153</sup> The newspaper article continues with Professor Stanley noting that it is distasteful to justify, in purely economic terms, the need to address serious issues such as asthma, diabetes, obesity, behavioural disorders, substance abuse and others facing children, but “...if the hip pocket is indeed what hurts most, then we’re in for a lot of pain in the very near future unless we invest in all our futures”.<sup>154</sup>

<sup>149</sup> The Australian Association of Social Workers, ‘Submission to the Australian Labor Party regarding the proposal to establish a National Commissioner for Children and Young People’, Kingston, Australian Capital Territory, August 2002, p2.

<sup>150</sup> Associate Professor Trevor Parry, Director, State Child Development Centre, *Transcript of Evidence*, November 10 2003, p3.

<sup>151</sup> Ms Patmalar Ambikapthy, Commissioner for Children, Tasmania, ‘Investment in Today’s Children-Growth for Tomorrow’s Economy’, Office of the Commissioner for Children, August 7 2002, p8.

<sup>152</sup> *ibid*, p10.

<sup>153</sup> Professor Fiona Stanley, Chief Executive Officer of the Australian Research Alliance for Children and Youth, *The Australian*, November 21 2003, p1.

<sup>154</sup> *ibid*, p2.

### **A structure for all children**

- 4.32 A commissioner or office will work for all children not merely those 'at risk'. Ms Moira Rayner, Barrister, commented that unlike Scandinavian countries, which have a very long tradition of community responsibility for children, "...in Australia, and particularly, Western Australia, there is a strong tradition of individualism and the privacy of the family unless there is a need to intervene for protection reasons."<sup>155</sup> A commissioner or independent office could overcome the State's history of reactive intervention with 'at risk' children.

#### *Committee Comment*

- 4.33 Evidence provided to the Committee suggested a commissioner or independent office could overcome the limitation of reactive intervention in cases of children at risk by addressing the underlying or predisposing factors causing those children to be at risk.
- 4.34 The Committee considers that a commissioner or independent office could work for all children and that it should neither be a replacement structure for the protective services industry nor "...get involved in the minutiae of child protection at all." As WACOSS summarised, establishing a commissioner "...should not be seen as criticism of current government policy, services or functions."<sup>156</sup> Rather a commissioner or independent office would be a useful adjunct.
- 4.35 Many submissions suggested that it is preferable to establish a proactive commissioner or independent office that advocates for children but which does not have its genesis in child abuse inquiries such as occurred in Queensland and NSW.

### **CHILDREN'S COMMISSIONER OR INDEPENDENT OFFICE FOR CHILDREN**

- 4.36 Evidence provided to the Committee supported the case for a specialist child advocacy structure and indicated a range of views on the question of whether to appoint a commissioner for children or alternatively, establish an independent office for children. Some witnesses supported a hybrid of both,<sup>157</sup> whilst others were ambivalent about the structure.<sup>158</sup> Another suggestion was a 'children's commission'.
- 4.37 There are semantic differences between the terms: 'commission', 'commissioner' and 'office'. A commission is an authority from the Governor in the form of a document

<sup>155</sup> Ms Moria Rayner, *Transcript of Evidence*, November 17 2003, p10.

<sup>156</sup> Submission No 13 from the Western Australian Council of Social Service Incorporated, September 1 2003, p1.

<sup>157</sup> For example, the State Child Development Centre. See Submission No.17, p2.

<sup>158</sup> For example, Dr Phillip King, Chairman, Kidsafe WA suggested an 'Advocate for Children and Children's Interests' but is ambivalent about whether the role is established as a Children's Commissioner, Children's Ombudsman or in the form of an Office for Children.

- sealed with the public seal of the State granted for a particular action or function. NSW for example, has a 'Commission for Children & Young People' with a Commissioner heading the commission. Queensland has a similar arrangement. This is characteristic of commissions established under stand alone Acts of Parliament.
- 4.38 By comparison, an 'Office of the Commissioner' is the arrangement existing in Tasmania and New Zealand. This title describes a level of bureaucracy whereby a commissioner co-exists inside a government department or agency.
- 4.39 Aside from semantic differences, UNICEF point out that the use of the term 'commissioner' rather than 'commission' is significant in that it defines the role as a person and not just a bureaucratic office. It implies a person who belongs to or is working for children directly.<sup>159</sup> The term 'office' implies either a nexus with or attachment to a government department. An example is the Office for Children and Youth established and operating inside the DCD.
- 4.40 Dr Judith MacDonald, Member, State Management Committee (WA), Save the Children Australia, commented that it had been the policy of Save the Children for many years to support the appointment of a commissioner for children and "*...an independent office which does not form part of an existing department.*"<sup>160</sup> However, Dr MacDonald suggested such an office, for staffing and budgetary purposes "*... be established with a link to another independent office and incorporate the existing Children's and Young People's Policy Unit so as to avoid duplication.*"<sup>161</sup>
- 4.41 The National Association for Prevention of Child Abuse and Neglect (WA) (Inc) (NAPCAN (WA)) favours establishing a "*...commissioner for children both nationally and in each State.*"<sup>162</sup> It claims that State and Federal services are poorly integrated with those State government departments providing child protection services, constantly walking a tightrope of balancing a child's interest with a family focus.
- 4.42 Ms Lisa Baker, Executive Director, WACOSS commented on the "*...passionate support within the community for the establishment of a Children's Commissioner...We have heard no argument in the community sector against the development of such a Commissioner...*"<sup>163</sup>

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<sup>159</sup> UNICEF, 'Ombudswork for Children', *Innocenti Digest No1*, 1997, p10.

<sup>160</sup> Submission No 2 from Dr Judith MacDonald, Member, State Management Committee (WA), Save the Children Australia, August 14 2003, p1.

<sup>161</sup> *ibid*, p2.

<sup>162</sup> Submission No 10 from Ms Carole Vaughan, NAPCAN (WA), September 1 2003, p3.

<sup>163</sup> Submission No 13 from Ms Lisa Baker, Executive Director, WACOSS, September 1 2003, p1.



- 4.43 Ms Janine Flemmer and Ms Dianne Fraser, Coordinators, Citizen Advocacy Perth West (Inc) *"...applaud the idea of the appointment of a commissioner for children or the establishment of an independent advocacy office for children..."*<sup>164</sup>
- 4.44 The Association for the Blind of WA strongly supports the appointment of a commissioner for children who will *"...afford more directed and targeted attention onto all children, those who have a disability will particularly benefit from these efforts."*<sup>165</sup>
- 4.45 The National Investment for the Early Years: Western Australian Branch (NIFTeY) pointed the Committee to high rates of attention deficit hyperactivity disorder, depression, drug addiction, youth suicide and juvenile offending. In its Vision Statement, NIFTeY stated that it supports the encouraging of democratic advocacy, consultation and communication for children by *"...establishing a Commission for Children and appointing a Commissioner for Children to advocate for children and advise, monitor and report independently to Parliament on the impact and issues for children of government policies."*<sup>166</sup> NIFTeY submits that a practical demonstration of its vision is the right children have to be protected from the excesses of commercial exploitation.
- 4.46 Meerilinga Young Children's Foundation<sup>167</sup> (**Meerilinga**) is in favour of a *"...children's commissioner or ombudsman..."*<sup>168</sup> based on a European model. Mr Bruno Camarri, President, Board of Governors, Meerilinga said the organisation; *"...is of the view that the case has been repeatedly made throughout the developed world for a cultural change in public life that puts children first."*<sup>169</sup> Meerilinga submitted that better government for children depends on effective government institutions for children and hence a 'whole of government' commitment is needed to improve their lives. Mrs Susan Burton, Executive Director, Meerilinga, said the organisation saw the appointment of a commissioner for children as: *"...a key strategy among a range of strategies that will put children on the agenda in Western Australia."*<sup>170</sup>

<sup>164</sup> Submission No 14 from Ms Janine Flemmer and Ms Dianne Fraser, Coordinators, Citizen Advocacy Perth West (Inc), September 1 2003, p1.

<sup>165</sup> Submission No 15 from Ms Carol Solosy, Association for the Blind of WA, September 1 2003, p2.

<sup>166</sup> Submission No 16 from Dr Trevor Parry, Chair, NIFTeY, August 26 2003, p2.

<sup>167</sup> Meerilinga is a public benevolent institute which provides support, information, advice and resources to parents and families. It is a peak organisation and leader in the field of early childhood development.

<sup>168</sup> Submission No 18 from Mr Bruno Camarri, President, Board of Governors, Meerilinga, September 1 2003, p6.

<sup>169</sup> *ibid*, p2.

<sup>170</sup> Mrs Susan Burton, Executive Director, Meerilinga, *Transcript of Evidence*, October 20 2003, p1.

- 4.47 Anglicare WA supports a commissioner for children with a dedicated office, adequately resourced because of the “...*the impact of our size and remoteness...*”.<sup>171</sup>
- 4.48 Moira Rayner, Barrister, supports the concept of a children’s rights commissioner which Ms Rayner defines as “...*an office focussed on the human rights and entitlements of all children to participation, protection and the provision of the best possible services...*”.<sup>172</sup>
- 4.49 Associate Professor Trevor Parry, Director, State Child Development Centre believes it “...*would be for the wellbeing of children’s services in Western Australia if there were an office of the child or the child and young person that contained within it as spokesperson and officer, a commissioner.*”<sup>173</sup>
- 4.50 YouthCARE, whilst supportive of a children’s rights commissioner interestingly suggested that a commissioner could “...*focus on empowering local groups to construct their own children’s rights commissions, which would provide a respected voice for children and young people in their own community.*”<sup>174</sup> YouthCARE sees these local groups as potentially seeding new groups in nearby localities.
- 4.51 The Youth Affairs Council of WA (YACWA) is the peak body representing non government youth organisations. It supports the appointment of a Children’s and Young People’s Commissioner within the framework of an Office of the Commissioner.<sup>175</sup>
- 4.52 Associate Professor David Forbes, School of Paediatrics and Child Health, University of Western Australia, supports both the appointment of a commissioner and the establishment of an office for children.<sup>176</sup>
- 4.53 The Australian Family Association, Western Australian Division, strongly favours a ‘commissioner for children’ and an office titled: *The Office for Children and Young Persons and their Families*. However, the organisation does not support the title: *Commissioner for Children’s Rights*.<sup>177</sup>

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<sup>171</sup> Submission No 23 from Mr Ian Carter, Chief Executive Officer, Anglicare WA, September 1 2003, p3.

<sup>172</sup> Submission No 24 from Ms Moira Rayner, Barrister, September 1 2003, p2.

<sup>173</sup> Associate Professor Trevor Parry, Director, State Child Development Centre, *Transcript of Evidence*, November 10 2003, p2.

<sup>174</sup> Submission No 25 from Ms Jill Clements, Field Officer, YouthCARE, September 1 2003, p3.

<sup>175</sup> Submission No 28 from Ms Midge Turnbull, Executive Officer, Youth Affairs Council of WA, September 1 2003, p2.

<sup>176</sup> Submission No 31 from Associate Professor David Forbes, School of Paediatrics and Child Health, University of Western Australia, September 1 2003, p2.

<sup>177</sup> Submission No 37 from Mr John Barich, Australian Family Association Western Australian Division, September 5 2003, p12.

- 4.54 The WA Police Service is supportive of either a commissioner or office but does not have a position on the exact structure of the concept. The WA Police Service suggested an alternative, that of extending the role of the Ombudsman to oversee the provisions of services to children.
- 4.55 The National Heart Foundation of Australia (WA Division) was supportive of any *"...Government initiatives to improve programs, services and environments that impact on the health and well being of Western Australia's children."*<sup>178</sup>
- 4.56 Staff of the Child Study Centre Clinic, University of Western Australia, School of Psychology, are of the view that an independent office for children is the most appropriate means of establishing an effective advocate for children. The Child Study Centre Clinic assesses and provides intervention services for children with learning, language or behaviour difficulties. It conducts education and support services for parents and teachers of these children. It also carries out basic and applied research. Staff of the Child Study Centre Clinic are convinced of the need for an Office.<sup>179</sup>
- 4.57 The Youth Legal Service Inc Western Australia (YLS) supports the establishment of a *"...children's commission..."*.<sup>180</sup> It believes Western Australia needs a child focussed voice and is critical of the State's response to the UN Convention on the Rights of the Child. The YLS stated: *"...our history is littered with examples of the abuse of children's rights as indicated in the Gordon Inquiry (2002), the Commission of Inquiry into Abuse of Children in Queensland Institutions, the National Inquiry into the Separation of Aboriginal and Torres Strait Island Children from Their Families (1997) and so on."*<sup>181</sup> The YLS believes that those inquiries show a *"...lack of processes and an agency to co-ordinate policy development and service delivery for children and young people."*<sup>182</sup>
- 4.58 Youth Advisory Councils (YACs) are established by local governments and the DCD. They comprise young people, generally aged between 12 and 25 who are elected by their peers to represent their communities. Ms Kirsty Shalders, Youth Services Coordinator, Youth Advisory Council Coordinator, City of Bunbury pointed out that *"...Youth Advisory Councils are not always a representative group of young people within some locations. These are students that are considered to be well adjusted with*

<sup>178</sup> Submission No 7 from Mr Maurice G Swanson, Chief Executive, National Heart Foundation of Australia (WA Division), August 25 2003, p1.

<sup>179</sup> Submission No 44 from Dr Janet Fletcher, Dr Robin Harvey and Dr Stephanie Heath, School of Psychology, Child Study Centre Clinic, University of Western Australia, School of Psychology, undated, p1.

<sup>180</sup> Submission No 32 from Ms Cheryl Vernon, Youth Legal Service Inc Western Australia, September 3 2003, p6.

<sup>181</sup> *ibid.*

<sup>182</sup> *ibid.*

*supportive backgrounds, the group does not represent youth at risk...*<sup>183</sup> The Committee found that overall, the YACs were supportive of the concept of a commissioner for children rather than an independent office for children.

- 4.59 The Aboriginal Legal Service of Western Australia (Inc) (ALSWA) stood alone in its opposition to an ‘office’ structure, regardless of whether or not it was independent. For reasons of accountability, the ALSWA prefers “...a person rather than an office...”<sup>184</sup> ALSWA commented on the lack of a coordinating body addressing social issues it has identified as impacting on Aboriginal children. These include negative mythology and stereotypes, lower prospects in education and work, exposure to family feuding, sniffing solvents, boredom and young parenthood. Further, ALSWA is of the view that when Aboriginal children come into contact with organisations designed to assist them, their very structure generally promotes assistance to individual children rather than designing systems addressing these issues on behalf of all affected children. Hence ALSWA’s strong position that an ‘office’ structure is not preferred.

#### *Deputy Commissioner*

- 4.60 The Committee found support for the concept of a deputy commissioner from two sources. The Hon David Malcolm AC, Chief Justice of Western Australia, said a deputy would be useful because of the commissioner’s numerous functions.<sup>185</sup> The YLS said it endorses recommendation 145 of the Gordon Inquiry Report which proposed a “...*Deputy Children’s Commissioner with responsibility for issues in relation to Aboriginal children.*”<sup>186</sup>

#### *Title of an advocacy structure*

- 4.61 There was significant consensus from a number of organisations and young people themselves that if a commissioner for children were appointed, the title itself should be reconsidered. Members of the City of Stirling YAC, preferred the title ‘Commissioner’ to include ‘Youth’ or ‘Young People’ because “...*teenagers do not feel that the term ‘children’ represents them.*”<sup>187</sup> This view was reinforced by:

<sup>183</sup> Email Letter from Ms Kirsty Shalders, Youth Services Coordinator, Youth Advisory Council Coordinator, City of Bunbury, December 1 2003, p1.

<sup>184</sup> Submission No 9 from Mr Dennis Eggington, Chief Executive Officer, Aboriginal Legal Service of Western Australia (Inc), August 28 2003, p7.

<sup>185</sup> Submission No 39 from Hon David Malcolm AC, Chief Justice of Western Australia November 10 2003, p2.

<sup>186</sup> Gordon, S, Hallahan, K & Henry, D (2002) *Final Report, Putting the picture together. Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, Department of Premier and Cabinet WA, July 31 2002.

<sup>187</sup> Email letter from Ms Trudi Rossingh, Youth Services Coordinator, Youth Advisory Council Coordinator, City of Stirling, December 1 2003, p1. This accords with the Department of Community Development’s view of the importance of terminology to children.

- Anglicare WA who preferred the title: 'commissioner for children and young people' to more adequately encompass the diverse needs of this demographic group.
- YACWA who suggested a 'Children and Young People's Commissioner' to work in interests of people aged 18 years and under. YACWA said that incorporating young people in the title acknowledges the diversity of the target group.
- Mr Ray Willis, Youth Worker, ESCARE, Esperance who preferred 'young people' to 'youth'. Mr Willis is of the view that the term 'youth' has negative connotations in small regional towns in Western Australia.<sup>188</sup>
- Relationships Australia, who suggested a 'Commissioner for Children and Young People'. This organisation sees the promoting of rights and well-being within the context of the family as becoming increasingly important as social and legislative trends result in young people aged 18 to 25 become more dependent on their families. A commissioner is needed to support this age group who are disadvantaged by the lack of a supportive family.
- The Australian Family Association, Western Australian Division who suggested the title: 'Commissioner for Children and Young Persons' with the supporting Office being named the 'Office for Children and Young Persons and their Families.'

*Committee Comment*

- 4.62 The Committee found considerable support for the concept of a children's commissioner rather than an independent office for children. This may be partly attributable to the perception that the term 'commissioner' indicates an official of high status and independence being answerable to Parliament. The Committee supports the argument from the ALSWA that an 'office' structure is inappropriate for indigenous children.
- 4.63 The Committee also found support for the proposal that the work of a Western Australian commission should be consistent with the UN Convention on the Rights of the Child.<sup>189</sup>

<sup>188</sup> Delegate at the Youth Affairs Council of WA Conference, October 1-3 2003.

<sup>189</sup> For example, Submission No 2 from Dr Judith MacDonald, Member, State Management Committee (WA) Save the Children Australia, August 14 2003, p1. Submission No 9 from Mr Dennis Eggington, Chief Executive Officer, Aboriginal Legal Service of Western Australia, August 28 2003, p7. Submission No 2 from Ms Marilyn Kilvington, Private Citizen, September 1 2003, p1. Submission No 32 from Ms Cheryl Vernon, Youth Legal Service, August 8 2003, p7.

- 4.64 The Committee, while recognising the particular disadvantages experienced by Aboriginal children and young people, rejected the call for a deputy commissioner to specifically represent them. The Committee resolved that a commissioner for all children was the best option.
- 4.65 The Committee found that the formal title of a children's commissioner is important to advocacy organisations and more particularly, children and young people. Hence, the title should reflect community preference and especially take into consideration the views of those working directly with children and young people as well as children and young people themselves.

## CONCLUSION

- 4.66 The Committee's evidence suggests that the appointment of either a commissioner for children or the establishment of an independent office for children would overcome the continuous, perceived problem of uncoordinated, ineffective child advocacy for all the diverse reasons listed in paragraphs 2.26 to 2.40.

**Recommendation 1: The Committee recommends that the Government:**

- (a) establish a Commission for Children and Young People; and
- (b) appoint a Commissioner for Children and Young People.

**Recommendation 2: The Committee recommends that the work of the Commission for Children and Young People be consistent with the United Nations Convention on the Rights of the Child.**

## CHAPTER 5

### ISSUES AFFECTING CHILDREN AND YOUNG PEOPLE

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#### INTRODUCTION

- 5.1 The concept of a Commissioner for Children and Young People is popular not only with those within the advocacy sector but also children and young people. The Committee actively sought the views of children and young people and considered those issues of particular importance to them, before deciding the breadth and scope of the responsibilities and duties a commissioner might undertake.
- 5.2 The Committee regrets that it was unable to consult widely with children and young people and that the following material is sourced from a small sample.

#### ISSUES THAT MATTER TO CHILDREN AND YOUNG PEOPLE

##### Youth Advisory Councils

- 5.3 The Committee heard evidence from Youth Advisory Council (YAC) members of the Shires of Swan and Cambridge that the following matters were important to them:
- the lack of specific recreational space for young people. Mr Blair Main, YAC Chairperson, City of Swan, commented that “...*some children do not feel comfortable being at home, whether it is because of family issues or problems with their parents...Not having space for kids to go to...They need to be able to hang out and relax away from home. You can relax at home but only to a certain degree.*”<sup>190</sup>
  - the need for support from youth development officers. People “...*that we can talk to or who are there just to be a friend. That is a really important thing. It is not sitting down for a formal chat; just to interact.*”<sup>191</sup>
  - the problem of transport. “*Transport is a big one. We have tried looking at changing transport routes of buses and things. It is a big problem because kids want to do most of these things at night or in the evening - not late night. Even though buses run at night it is not a very secure thing to drop a kid off 10 blocks away and he has to walk 10 blocks late at night. Unless a person is with a group of friends it is quite risky.*”<sup>192</sup> Ms Tiffany Rowe, YAC Member,

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<sup>190</sup> Mr Blair Main, Chairperson, City of Swan, Youth Advisory Council, *Transcript of Evidence*, October 29 2003, p3.

<sup>191</sup> *ibid*, p2.

<sup>192</sup> *ibid*, p3.

City of Swan, explained the problem in Ellenbrook. *“Buses run every three hours finishing at six o’clock. Parents do not want to drive their kids to places any more. They have to make their own way there. ... Where I live is a two to three-hour walk to where the movies are. There are no lights and there are no houses. It is a rural area. Where I live there is a lot of help. The community is very much involved, and things are happening. It is just the cost, and things are happening too slowly.”*<sup>193</sup>

- sporting groups using public space and then young people being unable to access a park. *“Some parks are not lit at night so you cannot go down at night and have a kick. That is always something to do with mates. Usually your mates work or are at school so you do that in the evening, but it gets dark at six. If lights came on, but then, that is an expensive thing. It all comes down to cost and placement”*;<sup>194</sup> and
- not being heard, for example, by local government. Mr Blair Main, Chairperson, City of Swan, commented that young people *“...just get the ‘okay, that’s nice’ sort of thing. But we have been getting the mayor coming along to our meetings. He is showing a bit of interest, which is good, and hopefully that will bring more attention to the sort of topics that need to be addressed.”*<sup>195</sup>

5.4 The Shire of Northam YAC emailed the Committee the following list of matters of greatest concern to its members:

- how laws affect youth;
- how children have complaints heard;
- coping with difficulties at home and school;
- the high importance of sports and physical activity;
- reduced social skills due to the amount of time watching television and using computers;
- the extremes of children’s rights; for example, whilst some youth are receiving little respect, others are not respecting others in the community and over exerting their claims;

<sup>193</sup> Ms Tiffany Rowe, Member, City of Swan, Youth Advisory Council, *Transcript of Evidence*, October 29 2003, p4.

<sup>194</sup> Mr Blair Main, Chairperson, City of Swan, Youth Advisory Council, *Transcript of Evidence*, October 29 2003, p3.

<sup>195</sup> *ibid*, p5.



- peers disregarding the experiences and wisdom of older people;
- a lack of public transport; and
- ready, direct access to the commissioner whilst making the young population aware that the position exists.<sup>196</sup>

### **The Youth Affairs Council of WA**

5.5 As stated previously at paragraph 4.51, the Youth Affairs Council of WA (YACWA) is the peak, non government youth organisation in Western Australia. Its website states that it aims to be a united, independent and active advocate for the non government youth sector serving the young people of Western Australia and acts as a lobby group for the non government youth sector.<sup>197</sup> One of its roles is to encourage active participation of young people in identifying and dealing with issues important to them.

5.6 A conference in October 2003 attracted approximately 160 delegates from across the State. A group of 20 Woodvale Senior High School students at the conference identified the following issues as important to them:

- the poor reputation young people have in the community;
- young people entering shops in groups being considered suspicious; and
- an emphasis in schools on sports rather than theatre arts.

5.7 A Youth Panel of five young people from rural and metropolitan Western Australia at the YACWA Conference identified the following matters as important to young people:

- a lack of services for those aged 18 to 25 in country regions;
- the fly in/fly out effect on communities - feelings of being deserted;
- the crisis in country mental health services, especially the need for 24 hour services;
- accommodation;
- the feeling that government does not focus on young people as adults of the future;

<sup>196</sup> The Shire of Northam Youth Advisory Council consists of around 11 active members ranging in ages from 12 to 19.

<sup>197</sup> The Youth Affairs Council of WA website, <http://www.yacwa.org.au/>, (viewed on April 22 2004).

- those who are advocating for or assisting a young person to leave home involve the family in the process, but this is ineffective. Those assisting misunderstand that a young person is trying to escape the family;
- the need for any positive role model in the lives of young people, especially in dysfunctional families;
- road trauma; and
- youth debt, for example young people being unable to obtain a driver's licence because of Westrail fines.

### Kids Helpline

5.8 In 1991, the De La Salle Brothers<sup>198</sup> established Kids Helpline as a free and confidential national telephone and web-based counselling service based in Brisbane for young people aged five to 18 years. Its website states that it collects, analyses and disseminates non-identifying information which contributes to research and reflects the issues and problems of Kids Help Line clients. It also advocates on behalf of a child where their interests are ignored, minimised or unrepresented.<sup>199</sup> The main reasons why children contacted the Helpline in 2003 were stated as being:<sup>200</sup>

- relationships with family, friends and partners;
- bullying;<sup>201</sup>
- child abuse;<sup>202</sup>
- emotional or behavioural management;
- drug or alcohol use;
- pregnancy;
- mental health; and

<sup>198</sup> The De La Salle Brothers is a religious congregation of men within the Catholic Church. It was founded in France in 1684 by a priest and scholar, John Baptist De La Salle, to live and work in association (with one another) in order to serve the poor through education. In doing so, De La Salle founded the first non-clerical male religious congregation, in the Catholic Church. It was (and still is) a religious congregation with a specific apostolate, education.

<sup>199</sup> KidsHelpline website, <http://www.kidshelp.com.au/AboutUs/history.HTM>, (viewed on April 22 2004).

<sup>200</sup> Kids Helpline define a child as between five and 18 years, Kids Helpline 2003 InfoSheet.

<sup>201</sup> Kids Helpline 2003 InfoSheet states the proportion of calls concerning bullying has tripled since 1998 accounting for over 10% of calls from the State and 25% higher than the national rate.

<sup>202</sup> Kids Helpline 2003 InfoSheet states 90% of calls related to physical or sexual abuse.

- sexual activity.

## ISSUES THAT MATTER TO THOSE ADVOCATING FOR CHILDREN AND YOUNG PEOPLE

- 5.9 For those advocating in the child and youth sector, whilst there are similarities, there are differences. The Committee considered a number of peak organisations and individuals to ascertain the breadth of views.

### **Professor Fiona Stanley**

- 5.10 Professor Stanley is the Chief Executive Officer of the Australian Research Alliance for Children and Youth. This is a national organisation, formally constituted in June 2002 to improve the health and well-being of young Australians.
- 5.11 In a National Press Club address, Professor Stanley described how problems such as low birth weight, child abuse and neglect, behavioural problems, educational problems, mental health problems, substance abuse, unemployment and juvenile crime are an increasing pattern in younger children. Professor Stanley said suicides have increased four fold in 15 - 19 year old males since the 1970s. Nearly 20% of teenagers have a mental health problem and obesity has increased from 10% in 1985 to 25% today. Cerebral palsy data reveals the rise in irreversible brain damage due to non accidental injury (shaken baby syndrome) from 4% to 18%.<sup>203</sup>
- 5.12 Professor Stanley claims evidence indicates that if we neglect the early years of child development, then there can be a profound effect on a wide range of problems. Professor Stanley noted that research in neuroscience demonstrates the importance of early social environments in successful brain development. Childhood exposure to abuse and less severe levels of stress can change the brain through the switching on of genes which influence other biological processes governing brain responses, for example, how we self regulate. Professor Stanley claims there is strong evidence that providing a more nurturing social environment from birth is a powerful factor to prevent problems and enhance resilience.

### **NIFTeY**

- 5.13 The National Investment for the Early Years: Western Australian Branch, (**NIFTeY**) was established as an outcome of a meeting of academics, practitioners and government officials held in Canberra in March 1999. The Western Australian branch although lacking a formal structure, is a partnership of more than 15 departments, not-for-profit and professional bodies functioning as a collaborative interest group.

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<sup>203</sup> Professor Fiona Stanley AC, Chief Executive Officer, Australian Research Alliance for Children and Youth, National Press Club Address, August 6 2003, pp3-5.

- 5.14 Similar to the position of Professor Stanley, NIFTeY, according to its website, refers to mounting evidence from a broad research base in health, developmental psychology, neuroscience, education and criminology, of the importance of promoting optimum family and community experiences for young children during the earliest years of childhood and particularly the first three years.
- 5.15 NIFTeY claims that there is a growing body of research and evaluation data, predominantly from overseas, that highlights the cost-effectiveness of early intervention initiatives during the early years of life that aim to enhance family support and children's early learning experiences. In NIFTeY's view, these initiatives have been shown to return benefits that exceed program costs in several domains including improved school performance, reduced criminality within children and reduced notifications of child abuse and neglect.<sup>204</sup> In its submission, NIFTeY refers to the need to be proactive in those early years to increase a child's well-being.<sup>205</sup>

### **NAPCAN**

- 5.16 Established in 1987, the National Association for Prevention of Child Abuse and Neglect (NAPCAN) is an independent Australian charity committed to stopping child abuse. In its submission to the Committee, it pointed to levels of child poverty, youth homelessness and poor mental health in children as areas of critical concern. NAPCAN also highlighted Aboriginal and Torres Strait Islander children and young people whose position in terms of health, living conditions, education, police harassment and incarceration has created an "...*underprivileged subculture within Australian society*."<sup>206</sup>

### **Meerlinga**

- 5.17 Meerilinga has been providing services to teachers, carers, parents and the wider community since 1911 when it was established as a kindergarten training college. It serves as an authority on children and early childhood. Similar to Professor Stanley, and NIFTeY, Meerilinga's focus is on early intervention to improve the quality of children's lives in Western Australia. In its submission, Meerilinga listed the following as matters of critical concern:
- promoting children's effective participation in civil society by consulting them and taking their views into account;
  - making children more visible in government; and

<sup>204</sup> Website of NIFTeY, <http://www.NIFTeY.cyh.com/webpages/stategroups/wa/westaustframe.htm>, (viewed on April 22 2004.)

<sup>205</sup> Submission No 16 from Dr Trevor Parry, Chair, NIFTeY, August 26 2003, p4.

<sup>206</sup> Submission No 10 from Ms Carol Vaughan, State President, NAPCAN (WA), September 1 2003, p2.

- providing a strategy for children based on appropriate principles and the UN Convention on the Rights of the Child.<sup>207</sup>

### **Professor Trevor Parry**

5.18 Associate Professor Trevor Parry, Director, a developmental paediatrician with the State Child Development Centre pointed to matters such as the protection of children from excessive commercial exploitation and the global epidemic in the western world of obesity as areas of enormous concern.

5.19 Dr Parry said the content of Nintendo and other palm-held devices, for example:

*...give strong, confusing messages about maleness and femaleness, let alone respect for people's race and the issues of violence. These are very big picture issues that are predominant in the early years - understanding what happens with neuronal connections and pathways of perception and understanding not only facts and knowledge, but also self-regulation, respect and empathy, which, in their own right, have a neuro-chemical link to health and wellbeing.*<sup>208</sup>

5.20 *The West Australian* newspaper recently highlighted the quantum of time children spend watching television. Dr Michael McDowell, Director, Child Development Program, Royal Children's Hospital, Brisbane and member of the paediatric policy committee of the Royal Australian College of Surgeons was quoted in *The West Australian* newspaper as stating:

*Overseas studies had shown children who watched more media violence were less likely to intervene on behalf of a victim, were more likely to believe violence was inevitable and acceptable, and to view the world as a violent place, promoting anxiety and mistrust.*<sup>209</sup>

5.21 The Royal Australasian College of Physicians Health and Social Policy Unit referred to an Australian study which found that children started watching television soon after they were born. It claims Sydney children only four months old watched an average of 44 minutes of television per day, 12 month old children around 60 minutes per day, and 30 month old children were watching an average of 84 minutes. By four years the average time had increased to over 2.5 hours per day.<sup>210</sup> Another article notes that in

<sup>207</sup> Submission No 18 from Mr Bruno Camarri, President, Board of Governors, Meerilinga, September 1 2003, p2.

<sup>208</sup> Associate Professor Trevor Parry, Director, State Child Development Centre, *Transcript of Evidence*, November 10 2003, p5.

<sup>209</sup> *The West Australian* newspaper, Wednesday, May 19 2004.

<sup>210</sup> Cupitt, M, et al. *Infants and Television*. Sydney: Australian Broadcasting Authority, 1998.

the United Kingdom, by the age of 18 years the average child has spent more time watching television (14,000 hours) than attending school (12,000 hours)<sup>211</sup>.

### **The Youth Affairs Council of WA**

5.22 Youth workers at the YACWA conference (described at paragraph 5.5) listed the following as matters concerning their practice:

- assisting those young people with diverse sexuality and gender expression to access supported accommodation services;<sup>212</sup>
- funding to transport children from country areas to functions in Perth;
- the need for community buses and, if given, the need for money to run them;
- a less complex and streamlined means of applying for grants for programs for young people;
- the highly mobile youth worker industry who remain in a community for only two or three years;
- getting children to attend school, for example, in Port Hedland;
- accommodation; and
- the lack of a youth health policy.

### **Student bodies**

5.23 The Committee received only one submission from a high school. This was Iona Presentation College on behalf of its student body. Iona referred to school children with psychiatric disorders and a lack of adolescent mental health services as a problematic area.

#### *Committee Comment*

5.24 Evidence provided to the Committee indicates that children and young people identify similar issues of concern to those identified by their advocates, such as mental health, substance abuse and lack of public transport. However, there are differences. For instance, children and young people identified coping with difficulties at home, bullying at school and youth debt. There is a convergence of views as to what is required in a commissioner by both groups. This is for a high profile, accessible

<sup>211</sup> Luke C. *Constructing the Child Viewer: An historical study of the discourse on television and children*, London, Falmer Press, 1992.

<sup>212</sup> This term is inclusive of young people who identify as gay, lesbian, bisexual or queer.

commissioner who will actively listen to children and young people regarding their views on specific matters and genuinely consult with them and act on what is heard. Those who advocate, tend to see a commissioner as tackling more systemic matters related to all children not especially those children at risk.

- 5.25 The Committee acknowledges that a disproportionate number of Aboriginal children and young people in Western Australia suffer from ill-health, poor housing and irregular school attendance.





## CHAPTER 6

### CHARACTERISTICS OF A COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

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#### APPOINTING A COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

- 6.1 Commissioners, ombudsmen or special advocates for children have been created under various models. These include:
- via a special Act of Parliament (such as Queensland and NSW, France, Norway, Iceland and Scotland);
  - under child welfare legislation (such as New Zealand, Tasmania and Sweden);
  - within existing public bodies (such as Israel's Pupil's Ombudsman in 1990; Denmark's Children's Council; the Australian Capital Territory's Office of the Community Advocate<sup>213</sup>); and
  - those run by non government organisations such as the (now defunct) London Children's Rights Commissioner's Office, Finland's Mannerheim League for Child Welfare, and Israel's Ombudsman for Children and Youth run by the National Council for the Child.
- 6.2 A consistent theme from Committee evidence was that a Western Australian commissioner should be appointed under an Act of Parliament. Debate then focused on whether the appointment should be encapsulated in current child welfare legislation or stand alone legislation.<sup>214</sup>
- 6.3 The Tasmanian model encapsulates its commissioner within child welfare legislation but the commission is not referred to in the Long Title of the *Children Young Persons and their Families Act 1997*. In the Committee's view, this omission is important because the Long Title in any Act is intended to encompass the general purpose of an Act. Tasmania's legislation states that it is "*An Act to provide for the care and protection of children and for related purposes.*" In the Committee's view, the

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<sup>213</sup> The Australian Capital Territory's Community Advocate has specific responsibility to promote the protection of children from abuse and exploitation, to protect their rights and to represent their best interests in relation to government services and before courts and tribunals. The Advocate has the capacity to intervene in departmental decision-making processes. This includes seeking reviews of decisions by the Director of the Family Services Branch and recommending that orders be continued or changed as appropriate. The Advocate has a range of powers including the capacity to access departmental files, investigate complaints and appear before courts and tribunals.

<sup>214</sup> Such as in NSW under the *Commission for Children and Young People Act 1998*. Also, Queensland under its *Commission for Children and Young People Act 2000*.

appointment of a commissioner is thereby minimised and constitutes only a minor component of what is primarily child welfare legislation.<sup>215</sup>

- 6.4 By contrast, New Zealand legislation relating to its commissioner, (which, like Tasmania encapsulates its Commissioner under child welfare legislation), has expressed in its Long Title that the *Children, Young Persons, and their Families Act 1989* is, amongst other things, “*To make provision for the appointment of a Commissioner for Children.*” In the Committee’s view, the New Zealand model ascribes due significance to the appointment of a commissioner in the legislative scheme.

#### *Committee Comment*

- 6.5 The Committee’s view is that a commissioner appointed under a stand alone Act of Parliament is crucial to ensuring the independence of a children’s commissioner.

### **FEATURES OF THE ROLE OF THE COMMISSIONER**

- 6.6 Before considering the responsibilities and duties of a commissioner, the Committee examined a number of characteristics a commissioner requires in order to perform the role. Many suggestions were received and the Committee considered a number of these against the legislative backdrop of the three existing Australian commissioners in NSW, Queensland and Tasmania as well as the New Zealand Commissioner.

#### **Independent of government**

- 6.7 Independence from government is seen as essential by the vast majority of submissions and those who provided oral evidence at hearings. Ms Moira Rayner, Barrister, pointed out that a commissioner must be able to act as a “*...fearless advocate...through legal means or policy articulation, without political redress, and be protected from the usual bureaucratic punishment for being a squeaky wheel: budget cuts and administrative restructures.*”<sup>216</sup>
- 6.8 UNICEF’s *Innocenti Digest No1* states commissioners “*...must not only be free to advocate forcefully for...children but, if they are to gain the confidence of children, they must also be seen to have that freedom.*”<sup>217</sup>

<sup>215</sup> Only Part 9 deals with the appointment of the Commissioner, the remainder is the equivalent of Western Australia’s *Community Services Act 1972*.

<sup>216</sup> Article by Ms Moria Rayner, then Director, London Children’s Rights Commissioner’s Office, ‘Children’s Rights Commissioners Systemic advocacy for Children in Australia, New Zealand and the UK’, included as an attachment to the Meerilinga Submission, Submission No 18, September 1 2003, p14.

<sup>217</sup> UNICEF, ‘Ombudswork for Children’, *Innocenti Digest No1*, 1997, p10.

6.9 The Committee notes that the issue of independence from government is seen as a problem in the Tasmanian model. There, the commissioner is legislatively restricted to functions that the Minister has with respect to ‘requesting’ the commissioner compared with functions the commissioner can independently exercise. Although section 79(a) of the *Children Young Persons and their Families Act 1997* uses the term ‘requests’ it is arguable that this is a euphemism for ‘directs’. This appears to be supported by the Commissioner, Ms Patmalar Ambikapathy herself, using the term ‘direct’ in an article she wrote titled: *Office of the Commissioner for Children, An Introduction to the Office of the Commissioner for Children*, July 2001. There, Ms Ambikapathy refers to three headings under which the functions of the Commissioner fall. These are:

- functions that the Minister has with respect to ‘directing’ the Commissioner;
- functions of the Minister to ‘direct’ the Commissioner or for the Commissioner to act on her own initiative; and
- the function the Commissioner has to act on her own initiative.<sup>218</sup>

6.10 In 2001, Ms Ambikapathy noted:

*...the location of the office under the Minister of Health and Human Services can and does create a perception of lack of independence. It is a problem of perception to be located within any Ministry, but this Office functions under the provisions of the Act and is not guided by Government policy. The actual independence of the Office is just as important, as the perception, in any objective assessment of independence of the Office. It is an issue that needs to be managed on a daily basis to safeguard this independence.*<sup>219</sup>

6.11 In the 2003 Annual Report, Ms Ambikapathy in commenting once again on the issue of independence and how it has been challenging, said she “...has at all times strenuously endeavoured to maintain not only the independence of the commissioner but also the perception of independence.”<sup>220</sup>

6.12 Further, under the Tasmanian model, although the Governor appoints the commissioner, that person may hold that office in conjunction with other state service

<sup>218</sup> Ms Patmalar Ambikapathy, Commissioner for Children, Tasmania, *Office of the Commissioner for Children, An Introduction to the Office of the Commissioner for Children*, July 2001, p4. The function is pursuant to section 83 of the *Children Young Persons and their Families Act 1997*.

<sup>219</sup> Ms Patmalar Ambikapathy, Commissioner for Children, Tasmania, *Office of the Commissioner for Children, An Introduction to the Office of the Commissioner for Children*, July 2001, p6.

<sup>220</sup> Ms Patmalar Ambikapathy, Commissioner for Children, Tasmania, ‘Office of the Commissioner for Children Annual Report 2002-2003, p22.

employment.<sup>221</sup> Under section 6 of the *Children Young Persons and their Families Act 1997*, the Governor (who appoints the commissioner) removes the commissioner but “...*first on the recommendation of the Minister*”.

- 6.13 In Queensland, the original, enabling Act had the Office attached to the Department of Families, Youth and Community Care for administrative support. It also reported to the responsible Minister. A review of the Act in 1998<sup>222</sup> claimed that this created the perception of dependence and as a result, the Commission was re-established as an independent statutory body attached to the Premier’s portfolio.
- 6.14 Lack of independence from government is also seen as a problem in New Zealand. The New Zealand commissioner is appointed under an express provision in child welfare legislation. However, the Commissioner is appointed by the Governor-General on the recommendation of the Minister.<sup>223</sup> Further, the Commissioner is subject to an annual performance agreement with the Minister of Social Welfare, who is also responsible for the department whose work the Commissioner must monitor. The Commissioner is not an officer of the Parliament (as, for example, the Ombudsman is) and the budget is administered by the department he or she monitors.
- 6.15 Ms Moria Rayner, Barrister, who is a critic of Australian and New Zealand models, concedes that despite this lack of autonomy, the then third New Zealand commissioner, Mr Roger McClay had operated successfully. Ms Rayner commented that Mr McClay (who retired in 2003) “...*undoubtedly listens with sincere sympathy to the complaints of children and sees it as a high priority to work cooperatively with government, rather than in adversarial mode.*”<sup>224</sup>
- 6.16 By comparison, in Scotland, the commissioner is an individual appointed by the Queen on the nomination of the Parliament.<sup>225</sup>
- 6.17 The Chief Justice of Western Australia, Hon David Malcolm AC, prefers the Tasmanian model as a template for a Western Australian commissioner.<sup>226</sup>

<sup>221</sup> Section 78(1A) of the *Children Young Persons and their Families Act 1997* (Tas).

<sup>222</sup> The Review of the Queensland’s Children’s Commissioner and Children’s Services Appeals Tribunals Act 1996, an Issues Paper.

<sup>223</sup> Section 410(2) of the *Children, Young Persons, and their Families Act 1989* (NZ).

<sup>224</sup> Article by Ms Moria Rayner, then Director, London Children’s Rights Commissioner’s Office, ‘Children’s Rights Commissioners Systemic advocacy for Children in Australia, New Zealand and the UK’, included as an attachment to the Meerilinga Submission, Submission No 18, September 1 2003, p16.

<sup>225</sup> Section 2(1) of the *Commissioner for Children and Young People (Scotland) Act 2003*.

<sup>226</sup> Submission No 39 from Hon David Malcolm AC, Chief Justice of Western Australia, November 10 2003, p1.

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*Committee Comment*

6.18 In the Committee's view, it is undesirable that a commissioner be a public servant answerable to a Minister such as occurs in Tasmania. The Committee also considers that it is vital a commissioner be independent of government to avoid the constraints of the legislation encountered by the Tasmanian commissioner. The Committee is of the view that a lack of independence, whether perceived or actual, may be circumvented by stand alone legislation establishing a commission and appointing a commissioner such as occurs in the Queensland and NSW models. The Committee considers the Tasmanian model to be problematic and unsuitable for Western Australia for the following reasons:

- there is a lack of recognition for the appointment of a commissioner in the Long Title of Tasmania's *Children Young Persons and their Families Act 1997*. In the Committee's view, this omission indicates that the commission is not at the heart of government;
- the experience of the Tasmanian Commissioner indicates to the Committee that it should not be necessary to safeguard on a daily basis, the independence of an office. In the Committee's view, it is clearly preferable to provide for the commissioner's independence through express legislative provisions in a discrete Act;
- a scenario where a person can hold the office of commissioner in conjunction with other state service employment, has the potential for a conflict of interest. Similarly, the New Zealand experience of a commissioner being subject to an annual performance agreement with the Minister, who is also responsible for the department whose work is being monitored, is fertile ground for conflicts of interest; and
- the method of appointment and removal determines the importance of the commissioner in the eyes of the Parliament and the community. For legislation to provide for the relevant Minister to recommend the removal of a commissioner can be inhibiting to the commissioner's independence.

6.19 The Committee considers that there is merit in the Scottish model described at paragraph 6.16 but a commissioner nominated and able to be removed by the Parliament is unnecessary in Western Australia. The Committee considers it acceptable for the Governor to appoint and remove the commissioner on the recommendation of the Premier who consults with the leader of each political party with at least five members in either House in the Parliament. The Committee considers that this method of appointment will keep children and young people at the heart of government.

- 6.20 The Commissioner must have an organisational structure, supporting his or her role and functions. This structure could engage employees who are then subject to the *Public Sector Management Act 1994* but the commissioner should have direct control of the structure. This could be expressly provided for in the enabling legislation as has occurred in Queensland.<sup>227</sup> The Committee has already concluded that the organisational structure be a ‘commission for children and young people.’
- 6.21 In the Committee’s view, with the requisite independence provided for in an enabling Act, the ability of the commissioner to speak freely and with candour to the media on matters pertinent to children and young people, similar to the Auditor General or the Ombudsman, is then assured. More importantly, as UNICEF pointed out, independence will enhance confidence in the commission on the part of children and young people.

### Accountable to Parliament

- 6.22 A common theme of evidence provided to the Committee was that the commissioner should report directly to Parliament. A problem identified by the Committee with the Tasmanian model is that the annual report of its Commissioner must first be sent to the responsible Minister and the Secretary of the department.<sup>228</sup> The Minister then tables the report in the Parliament. This reinforces that the Commissioner is not truly independent of the relevant department.
- 6.23 In comparison, Queensland provides that its Commissioner is accountable to the Parliament, with section 17(1)(b) of the *Commission for Children and Young People Act 2000* expressly stating that the commissioner is “...not under the control or direction of the Minister.” Although the Minister tables the annual report, significantly, section 89(3) states “To remove doubt, it is declared that the Minister may not require the commissioner to change the contents of the report before it is tabled, other than by including the Minister’s comments.”<sup>229</sup> Under section 62 the Commissioner can ask the Minister to table a confidential report. In the Committee’s view, all these provisions reinforce the independence of the Commissioner from the relevant department and Minister.
- 6.24 In New Zealand under section 415(1) of the *Children, Young Persons, and their Families Act 1989*, the Commissioner has the right to report at any time. However, the Minister acts as a conduit for any reports the Commissioner may make. The Commissioner (subject to the requirement not to make any comment that is adverse to any person unless the person has been given an opportunity to be heard) is required to furnish the Minister with an annual report on the exercise of the Commissioner’s

<sup>227</sup> Section 13 of the *Commission for Children and Young People Act (Qld) 2000*.

<sup>228</sup> Section 83(1) of the *Children Young Persons and their Families Act (Tas) 1997*.

<sup>229</sup> This is absent in the Tasmanian legislation.

functions. The Minister, not the Commissioner, lays a copy of the report before the House of Representatives.

- 6.25 In NSW the Commissioner presents an annual report to the presiding officers of each House of Parliament. Under section 25(1) of the *Commission for Children and Young People Act 1998*, the Commissioner is to provide the Minister with a draft of each report. If the Minister comments, then under 25(5) and similar to Queensland, the Commissioner is not bound to amend its report in light of any comments made by that Minister. However, before finalising its report, the Commissioner must consider any comments and the results of further consultation before the report is furnished to the Presiding Officers.
- 6.26 Section 23(2)(c) of NSW's *Commission for Children and Young People Act 1998*, provides that the Commissioner's annual report to the Parliament "...must include any recommendations for changes in the laws of the State, or for administrative action, that the Commission considers should be made as a result of the exercise of its functions." The work of the NSW Commissioner is later evaluated by a special parliamentary committee. This is called the "Joint Committee on Children and Young People" which is reappointed under each new Parliament.

#### *Committee Comment*

- 6.27 Queensland has clearly tightened its accountability provisions following the repeal of its earlier attempt at a children's commissioner - the *Children's Commissioner and Children's Services Appeals Tribunals Act 1996*. The *Commission of Inquiry into Abuse of Children in Queensland Institutions*,<sup>230</sup> highlighted the need for major systemic change to the entire child protection sector in Queensland.<sup>231</sup> NSW has a unique reporting mechanism. In the Committee's view, Tasmania lags behind those initiatives although its Act is currently being reviewed.
- 6.28 The Committee finds that the direct accountability of a commissioner to Parliament ensures the commissioner's independence from government.
- 6.29 The Committee further finds that a special, joint parliamentary committee overseeing the work of a commissioner, has considerable merit. It is arguable that such a proposal is a means of keeping children and young people at the heart of government. Conversely, the Committee notes that a special, joint parliamentary committee is unnecessary in a Western Australian context. The demand for an overseeing mechanism in NSW arose within the specific context of the *Wood Royal*

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<sup>230</sup> Reported June 1999.

<sup>231</sup> Also the 1999 Forde Inquiry.

*Commission into the New South Wales Police Service, the Paedophile Inquiry, (Wood Royal Commission).*<sup>232</sup>

- 6.30 In the event the Government proceeds with its plan to establish a children's commission, a majority of the Committee comprising Hon Barbara Scott MLC and Hon Giz Watson MLC recommend that the government give due consideration to the provisions in Part 6 of the *Commission for Children and Young People Act 1998* (NSW) attached as Appendix 3 to this Report. Hon Kate Doust MLC does not support this recommendation for the reason that an oversighting mechanism is already in place in the form of the Legislative Council's Standing Orders that apply to the Legislative Council Public Administration and Finance Committee, which currently provide for that committee to consult regularly with the Parliamentary Commissioner for Administrative Investigations, the Auditor General, the Public Sector Standards Commissioner, the Information Commissioner, and (relevantly) "...any person holding an office of a like character."<sup>233</sup>

**Comprehensive statutory powers**

- 6.31 All witnesses agreed that a commissioner requires sufficient statutory power in order to effectively carry out his or her responsibilities and duties. This is the point at which international and interstate models for commissioners diverge. Some legislatures, for example, Tasmania<sup>234</sup> New Zealand<sup>235</sup> and Queensland<sup>236</sup> provide a general 'necessary or convenient to do all things' type of power whilst others provide extensive lists of express powers. An example of the latter is the *Commissioner for Children and Young People (Northern Ireland) Order 2003* where the list includes the power to:

- undertake, commission or provide financial or other assistance for research or educational activities;
- issue guidance on best practice;
- conduct investigations;

<sup>232</sup> Royal Commission into the New South Wales Police Service, the Paedophile Inquiry, Vol. IV, V and VI (1997). There were six volumes of the Final Report. Vols I-III and IV-VI were tabled separately. Vols. IV-VI dealt with the Paedophile Inquiry. The volumes were titled as following. Vol. I Corruption, Vol. II. Reform, Vol. III Appendices, Vol. IV The Paedophile Inquiry, Vol. V. The Paedophile Inquiry, Vol. VI The Paedophile Inquiry Appendices. Should the Government decide to provide for a parliamentary oversight committee, the majority of the Committee considers four Members of Parliament to be sufficient.

<sup>233</sup> Legislative Council Standing Orders, Schedule 1, p140.

<sup>234</sup> Under section 80(2) of Tasmania's *Children Young Persons and their Families Act 1997*, the Commissioner also has an express power to "...require any person to answer questions or to produce documents."

<sup>235</sup> Under section 412 of the *Children, Young Persons and their Families Act 1989* (NZ), the Commissioner has a "necessary or expedient" power to enable him/her to carry out functions.

<sup>236</sup> Section 16 of the *Commission for Children and Young People Act 2000*.



- publish on any matter;
- intervene in any proceedings involving law or practice concerning rights or welfare;
- act as *amicus curiae*; and
- enter and inspect premises.

6.32 Meerilinga suggested a number of express powers for a Western Australian commissioner including the power to access records; to be provided with official data and statistical information; as well as to investigate and receive reports. The NSW model for example, is replete with these types of powers. Both NAPCAN<sup>237</sup> and the Association for the Blind of WA<sup>238</sup> suggested providing a commissioner with power to hold public inquiries, require public officials to appear before the commissioner and produce documents. The Committee observes that this is similar to a parliamentary committee.

*Committee Comment*

- 6.33 There are reasons why a particular legislature might choose to provide a lengthy list of express powers for its commissioner or conversely, a single, more general power to perform duties. The Chief Justice of Western Australia prefers the Tasmania's general, "*necessary or convenient*" power.<sup>239</sup>
- 6.34 The Committee observes that from a statutory interpretation perspective, it is important to keep in mind the interpretive rules applying to an express list of powers in a legislative instrument. One rule provides that an express list is exhaustive and implies that no other powers are permitted.<sup>240</sup> On the other hand, a more general power can cause debate about whether a commissioner might be exceeding his or her authority.

<sup>237</sup> Submission No 10 from Ms Carole Vaughan, State President, NAPCAN (WA), September 1 2003, p6. This is a feature of the Tasmanian model. See section 80(2) of the *Children Young Persons and their Families Act 1997*.

<sup>238</sup> Submission No 15 from Ms Carol Solosy, Association for the Blind of WA, September 1 2003, p2.

<sup>239</sup> Submission No 39 from Hon David Malcolm AC, Chief Justice of Western Australia November 10 2003, p5.

<sup>240</sup> This is known as the *expressio unius* rule of statutory interpretation. It translates as "to expressly include one thing in a provision is to impliedly exclude another." It is applied where a statutory proposition might have covered a number of matters but in fact mentions only some. Unless these matters are mere examples, the rest are taken to be excluded from the proposition.

- 6.35 However, the Committee acknowledges that in the light of the High Court of Australia (**High Court**) judgment in *Coco v The Queen*,<sup>241</sup> it will be necessary to provide the commissioner with an express power to enter and inspect residential and other sites,<sup>242</sup> similar to that in the Northern Ireland model. This is because the High Court has held that the right to exclude others from entering private property is so fundamental and well established at common law, that any statutory diminution of such a right must be in the most unambiguous of terms.<sup>243</sup> It is also imperative that enabling legislation include an express power for the commissioner to delegate duties.
- 6.36 The Committee prefers a commissioner to have express powers in combination with a more general, 'necessary or convenient' power to perform functions.

### **Receptive, committed and accountable to children and young people**

- 6.37 UNICEF sees a commissioner as committed to not only being self informed but also establishing opportunities for the views of children and young people to be properly and directly represented to other bodies. This can be achieved through many means, such as the commissioner consulting with community advisory boards or child reference groups. This has been provided for in legislation supporting the commissioners of NSW<sup>245</sup> and Tasmania.<sup>246</sup>
- 6.38 Queensland operates differently. Section 80 of the *Commission for Children and Young People Act 2000* provides the Commissioner with discretion to establish child and young person advisory committees.<sup>247</sup> Thus, even though section 18(b) of that Act mandates that the Commissioner "...must listen to, and seriously consider, the concerns, views and wishes of children", there is no compulsion to form advisory

<sup>241</sup> (1994) 179 CLR 427. This case examined the issue of power of entry in the context of the installation and use of a listening device on premises under the *Invasion of Privacy Act 1971* (Qld). The court held in that case that although the legislation expressly empowered the use of such devices by law enforcement officers in specified circumstances, in the absence of an express authorisation to enter upon premises to install such a device, such a power of entry could not be implied.

<sup>242</sup> Such as detention centres and authorised mental health services facilities.

<sup>243</sup> In their joint judgement Mason CJ, Brennan, Gaudron and McHugh JJ stated that: "*The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.*" At p437.

<sup>244</sup> Such as the power to summon witnesses and documents; the power to examine on oath.

<sup>245</sup> NSW's legislation is flexible. Section 13(1) of its *Commission for Children and Young People Act 1998*, states the Commissioner "...must develop means of consulting with children."

<sup>246</sup> Under Tasmania's *Children Young Persons and their Families Act 1997*, the Commissioner must establish the 'Children and Young Persons Consultative Council' as well as the 'Children and Young Persons Advisory Council'.

<sup>247</sup> The 2002-03 Annual Report of the Commission indicates the Commissioner established only one group—the "Early Years Advisory Group" with a limited tenure.

committees as a medium through which listening to children and young people can occur.

*Committee Comment*

- 6.39 The Committee prefers not to fetter a Western Australian commissioner by legislating for mandatory community advisory bodies or child reference groups. Rather, the Committee prefers to leave the means by which the commissioner develops methods of consultation and participation with children and young people, to the initiative of the Commissioner.
- 6.40 The commissioner could utilise community advisory bodies or child reference groups to empower children and young people to effectively participate in the work of the commission and provide advice, but the Committee prefers giving the commissioner flexibility in this matter. The Committee agrees with Ms Jane Brazier, Director General, Department for Community Development, that a reference group is “...*but one of a raft of mechanisms [needed] to have in place to ensure that children’s voices are accessed...*”.<sup>248</sup>

*The profile of a children’s commissioner*

- 6.41 A number of witnesses commented on the personal approach of an incumbent commissioner as being a critical factor in the efficacy of a commission.<sup>249</sup> UNICEF point out that ideally, the individual appointed should be someone who will bring status and public and political respect to the task and have a high public profile, enhancing the status and visibility of children. Hence, it has been submitted that the selection process is an important part of the appointment. The legislative framework of a commission should include express eligibility criteria like that mandated in NSW and Queensland.
- 6.42 Under section 21 of Queensland’s *Commission for Children and Young People Act 2000*, the Commissioner must have knowledge, and experience working with children, in a relevant subject area and a demonstrated commitment to upholding the principles underlying the Act. Under section 21(3), a candidate must consent to a criminal history check before the appointment and cannot be appointed if previously convicted of an indictable offence. There is no such criteria in the Tasmanian model.

*Committee Comment*

- 6.43 The Committee finds that it is vital to keep any supporting legislation sufficiently flexible so that a commissioner can be creative in obtaining the views of children and

<sup>248</sup> Ms Jane Brazier, Director General, DCD, *Transcript of Evidence*, December 1 2003, p4.

<sup>249</sup> For example, Ms Moira Rayner, Barrister, in an attachment to Submission No 18 from Mr Bruno Camarri, President, Board of Governors, Meerilinga, September 1 2003. Also, Associate Professor Trevor Parry, Director, State Child Development Centre, *Transcript of Evidence*, November 10 2003, p3.

young people to be fully informed. Such an approach means the commissioner is not reliant on presumptions about what children and young people may think and feel.

6.44 The Committee further finds that a number of principles to guide the work of a commissioner would be useful in legislation supporting the establishment of a commission. These guiding principles could refer to how:

- children and young people are valued members of society;
- the family<sup>250</sup> has the primary responsibility for the upbringing and development of its children and young people, and should be supported in that role;
- in decisions involving children and young people-
  - (i) the interests of children and young people is the paramount concern; and
  - (ii) the children and young people's views and wishes should be taken into account in a way that has regard to their views, age and maturity;
- children and young people are entitled-
  - (i) to be treated in a way that respects their dignity and privacy;
  - (ii) to be cared for in a way that protects them from harm and promotes their wellbeing;
  - (iii) to express their concerns and grievances and to have them dealt with in a way that is fair and timely and promotes their participation;
  - (iv) to receive information and help to enable them to exercise their entitlements; and
  - (v) to have access to services necessary to meet their needs; and
- a co-operative relationship between children and young people and their families, and between children and young people and their community, is important for the safety and well-being of children and young people.<sup>251</sup>

6.45 The Committee also finds that the level of prescription in the selection process provisions in the Queensland and NSW models could be replicated in any Western Australian legislation. Such prescription would be reflective of Parliament's commitment to the gravity of the position and keep the commissioner at the heart of government.

<sup>250</sup> The Committee recognises the diversity of Western Australian families and for the purposes of this Report, provides the following definition of 'the family': 'Parents, legal guardians, or other individuals legally responsible for the child, or where applicable, the members of the extended family or community as provided for by local custom who have the primary responsibility for the upbringing and development of the child'. This definition derives from a combination of Articles 3, 5 and 18 of the UN Convention on the Rights of the Child.

<sup>251</sup> The Committee compiled this list of guiding principles by reference to the *Commission for Children and Young People Act (Qld) 2000* and *Commission for Children and Young People Act 1998* (NSW).

6.46 The Committee observed that the length of the appointment of commissioner varies considerably both internationally and within Australia. The Committee noted:

- Wales - a seven year non renewable term of office,
- Northern Ireland - a four year term of office which can be renewed once,
- Scotland and Sweden - five years with a maximum of two terms of office;
- France - a six year term of office.
- NSW - the commissioner is appointed for a five year term and may not be appointed for more than two successive terms of office;
- Queensland - the term of office must not be longer than five years although the commissioner is eligible for reappointment; and
- Tasmania - where the Commissioner's term cannot exceed three years.

6.47 The Committee recommends that the Government consider a five year term of office for a Western Australian commissioner, renewable once.

#### **Accessible to children and young people**

6.48 UNICEF point out that being accessible is essential if a commissioner is to acquire the confidence and trust of children and young people.<sup>252</sup> For this reason, the organizational structure supporting a commissioner and how it operates on a daily basis becomes relevant. UNICEF take the view that publicity and a range of age related materials and strategies for information dissemination, produced in many languages, will ensure accessibility.<sup>253</sup> Ms Dawn Wellam, Executive Director, Yorganop Child Care Aboriginal Corporation, WA Indigenous Child Care Agencies Council, suggested that the staffing for the commission “...*should fairly represent the cultural backgrounds of the children for whom it exists.*”<sup>254</sup> The Committee supports that view.

6.49 Meerilinga suggests that children and young people should be involved in the commission's “...*day to day activities and management.*”<sup>255</sup> In the Committee's view, such a scheme is feasible, given the remark of Mr Brady Williams, WA Coordinator and National Publicity Coordinator for the ‘Year of the Child 2003’, that

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<sup>252</sup> UNICEF, ‘Ombudwork for Children’, *Innocenti Digest No1*, 1997, p10.

<sup>253</sup> *ibid.*

<sup>254</sup> Submission No 34 from Ms Dawn Wellam, Executive Director, Yorganop Child Care Aboriginal Corporation, WA Indigenous Child Care Agencies Council, undated, p3.

<sup>255</sup> Submission No 18 from Mr Bruno Camarri, President, Board of Governors, Meerilinga, September 1 2003, p11.

*“Children often have profound, simple and practical answers, particularly to issues directly affecting them.”*<sup>256</sup> Dr Robin Sullivan, Commissioner for Children and Young People, Queensland, said that in many areas of social science or social service delivery, expert advice has frequently been sought only from academics or practitioners in the areas while the clients are forgotten as a source of expert advice.<sup>257</sup>

**Recommendation 3: The Committee recommends that the Commissioner and the Commission for Children and Young People be independent from Government. Accordingly:**

- (a) the Commission for Children and Young People be established by a separate, dedicated Act of Parliament;
- (b) the Commission be autonomous, and free from Government direction and control;
- (c) the Commissioner be appointed by the Governor on recommendation of the Premier after consultation with the leader of each political party with at least five members in either House; and
- (d) the Commissioner be accountable directly to the Parliament, including, but not limited to, a requirement to table annual reports.

**Recommendation 4: The Committee recommends that a Commissioner be provided with comprehensive statutory powers to perform functions.**

**Recommendation 5: The majority of the Committee recommends that the Government consider a joint parliamentary committee to oversee the Commission and Commissioner and refers the Government to the overseeing legislation in NSW.**

<sup>256</sup> Submission No 21 from Mr Brady Williams, WA Coordinator and National Publicity Coordinator for the ‘Year of the Child 2003’, September 1 2003, p1.

<sup>257</sup> Dr Robin Sullivan, Commissioner for Children and Young People, Queensland, Speech to the Central Queensland Research Forum, June 29 2000.

**Recommendation 6: The Committee recommends that legislation establishing a Commission for Children and Young People should include specific reference to criteria for the eligibility of a person to be appointed as Commissioner for a five year, once renewable term of office.**





## CHAPTER 7

### RESPONSIBILITIES OF A COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

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#### KEY RESPONSIBILITIES OF A COMMISSIONER

- 7.1 The Committee received many suggestions for the responsibilities of a commissioner. The majority of submissions and witnesses agreed on advocacy but a significant point of divergence was whether the commissioner should have an advocacy responsibility for all Western Australian children and young people or just those considered ‘at risk’.

#### **A commissioner for all children and young people?**

- 7.2 Associate Professor Trevor Parry, Director, State Child Development Centre said a commissioner needs to be available “...*comprehensively for all the needs of children, not solely for the specific needs of children. We would not wish to see the role of any agency or person who was representing all of the needs of children being one of pressure or of concern or lobbying and speaking solely for the issue of child protection.*”<sup>258</sup>
- 7.3 Similarly, the Aboriginal Legal Service of Western Australia (Inc) (ALSWA) commented on the need to design “...*systems addressing the issues on behalf of all affected children*”<sup>259</sup> rather than generally promoting assistance to individual children.
- 7.4 The Meerilinga submission commented that a commission model which focuses on the protection of vulnerable children is bound to fail. Mr Bruno Camarri, President, Board of Governors, Meerilinga, said:

*Child protection systems that do not focus on the healthy child in a functioning family within a child friendly community and that promote resilience as - Citizen Child - but on rescue and rehabilitation are bound to be very limited in scope.*<sup>260</sup>

- 7.5 The context for this debate lies in the genesis of children’s commissioners both in Australia and overseas. For example, in NSW the Wood Royal Commission resulted in the inclusion of a large section of the *Commission for Children and Young People*

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<sup>258</sup> Associate Professor Trevor Parry, Director, State Child Development Centre, *Transcript of Evidence*, November 10 2003, p2.

<sup>259</sup> Submission No 9 from Mr Dennis Eggington, Chief Executive Officer, ALSWA, August 28 2003, p6.

<sup>260</sup> Submission No 18 from Mr Bruno Camarri, President, Board of Governors, Meerilinga, September 1 2003, p10.

*Act 1998* focusing on employment screening to exclude unsuitable people from working with children.<sup>261</sup>

- 7.6 The Commission for Children and Young People in Queensland had its genesis in measures addressing child abuse allegations. In November 1996 the Queensland Government commissioned its first Children's Commissioner to write a report about paedophilia in Queensland.<sup>262</sup> The Commission itself was later reviewed after several limitations in the functions and powers of the Commissioner were identified.<sup>263</sup> The 1999 *Forde Commission of Inquiry into Child Abuse in Queensland Institutions (Forde Inquiry)* also added to the case for strengthening the Commission's powers.<sup>264</sup> Part 6 of the *Commission for Children and Young People Act 2000* (Qld) is devoted to employment screening. The Queensland Commissioner has power to access a person's complete criminal history, charges and convictions regardless of when or where they occurred.
- 7.7 Another witness, Ms Moira Rayner, Barrister, argued that an employment screening function is "...essentially a policing function"<sup>265</sup> and a "...retrograde step for the concept of a commissioner for all."<sup>266</sup>
- 7.8 However, the Chief Justice of Western Australia, Hon David Malcolm AC, requested an employment screening function for a Western Australian commissioner.

#### *Committee Comment*

- 7.9 In the Committee's view, it is not surprising that the Australian states with children's commissioners are focussed on child protection and children at risk, given that NSW established a children's commission as a response to the Wood Royal Commission and Queensland revitalised its children's commission after the Forde Inquiry. The website of Queensland's Commission for Children and Young People states that it

<sup>261</sup> The Wood Royal Commission examined the way government, and non government organisations responded to allegations of paedophilia. Justice Wood found there was no single voice speaking out for the interests of children and young people in NSW and recommended the establishment of a commission to oversee their safety, welfare and promote their well-being.

<sup>262</sup> D Alford, Commissioner, *Paedophilia in Queensland, Report of the Children's Commission of Queensland*, August 5 1997. Tabled August 19 1997.

<sup>263</sup> This was the *Review of the Queensland Children's Commissioner and Children's Services Appeals Tribunals Act 1996: An Issues Paper*.

<sup>264</sup> The Forde Inquiry examined whether there had been any abuse, mistreatment or neglect of children in Queensland institutions. It found that unsafe, improper and unlawful care or treatment of children had occurred in Queensland institutions.

<sup>265</sup> Ms Moira Rayner, Barrister, 'Systemic advocacy for children in Australia, New Zealand and the UK', delivered at the Association of Lawyers for Children Conference, University of Warwick, September 20-22 2000, p9.

<sup>266</sup> *ibid*, p7.

gives priority to the needs and interests of children who are disadvantaged because of a disability, geographic isolation, homelessness or poverty.<sup>267</sup>

- 7.10 The Committee prefers that a Western Australian commissioner have responsibility for all children and young people, not just those considered to be at risk.
- 7.11 The Committee is of the unanimous view that employment screening to minimise a child's risk of abuse is necessary and believes the commissioner should have the power to oversight and review such a screening function. A majority of the Committee, comprised of Hon Barbara Scott MLC and Hon Kate Doust MLC support an employment screening function for the commissioner provided it does not overwhelm the work of the commission. However, Hon Giz Watson MLC is of the view that such a function is a matter for the Police Service and would distract from the intention that the commissioner should advocate for all children and young people.
- 7.12 The Committee suggests that a Western Australian commissioner be involved in drafting guidelines and advising organisations employing persons to work with children, on risk strategies. However, should the Government proceed with its plan to establish a children's commission with an employment screening function, the Committee recommends that consideration be given to the provisions in Part 7 of the *Commission for Children and Young People Act 1998* (NSW) and Part 6 of the *Commission for Children and Young People Act 2000* (Qld).

### **A conduit to investigate complaints from individual children and young people?**

- 7.13 A second responsibility considered by the Committee was whether a commissioner should act as a complaint mechanism for individual children and young people. Evidence provided to the Committee indicated a range of views.
- 7.14 WACOSS, for example, sees a commissioner investigating individual complaints but important as this is, "...it is essential that the focus of the commissioner be broader and more proactive than complaint investigation and reporting."<sup>268</sup> Others, such as the United Nations Association of Australia (WA Division), see a commission specifically investigating "...complaints regarding breaches of the Convention on the Rights of the Child".<sup>269</sup> Dr Judith MacDonald, Member, State Management Committee (WA) Save the Children Australia, commented that the commissioner's

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<sup>267</sup> Website of the Commission for Children and Young People, (viewed on February 13 2004). This is consistent with section 18(e)(i) of the *Commission for Children and Young People Act 2000* (Qld).

<sup>268</sup> Submission No 13 from Ms Lisa Baker, Executive Director, WACOSS, September 1 2003, p6.

<sup>269</sup> Submission No 20 from Ms Leanne Pech, Children's Issues Convenor Office, United Nations Association of Australia (WA Division), September 2 2003, p2.

*“...office should be available to the public to raise concerns about children’s issues including complaints about Government departments”.*<sup>270</sup>

- 7.15 NAPCAN would prefer a commissioner to have a flexible role, *“...not restricted to an adjudicative or investigative approach.”*<sup>271</sup> Youth Legal Service Inc Western Australia (YLS) take a similar position emphasising that a commissioner should be free to comment on wider policy issues, thus allowing neither a legal nor welfare approach to dominate the work of the commission. Hence, a commissioner should not become involved in individual complaints or family conflicts as this will *“...bog down the Commission”*<sup>272</sup> and severely constrain it. It should not be *“...acting as a specialist children’s Ombudsman for complaints solely against the Department for Community Development.”*<sup>273</sup>
- 7.16 The CREATE Foundation, suggested a commissioner conduct individual advocacy and complaints investigation for young people in care because they are the most vulnerable group of children in the community. However, the CREATE Foundation suggest quarantining the complaints investigation function or if not possible, then to create a *“...Children’s Guardian to take on this role, similar to the NSW model.”*<sup>274</sup>
- 7.17 Ms Sarah Dewsbury, Criminal Law Solicitor, commented that an advocate in the criminal justice system is constrained by the rules and the adversarial nature of criminal proceedings. After 13 years experience with Legal Aid WA in the youth law team, Ms Dewsbury, is of the view that in certain circumstances the commissioner could intervene and take on the role of an advocate in specific cases.<sup>275</sup>
- 7.18 Ms Terina Koch, Solicitor, ALSWA stated that ALSWA wanted some discretion to investigate individual complaints, but that this should only be done if there is no other service provider able to adequately conduct an investigation.<sup>276</sup>
- 7.19 The debate on whether or not a commissioner should investigate complaints from individual children and young people is reflected in enabling legislation for commissioners or ombudsmen both within Australia and overseas.

<sup>270</sup> Submission No 2 from Dr Judith MacDonald, Member, State Management Committee (WA) Save the Children Australia, August 14 2003, p2.

<sup>271</sup> Submission No 10 from Ms Carole Vaughan, State President, NAPCAN (WA), September 1 2003, p5.

<sup>272</sup> Submission No 32 from Ms Cheryl Vernon, Manager, YLS, September 3 2003, p9.

<sup>273</sup> *ibid.*

<sup>274</sup> Submission No 45 from Ms Michelle Townsend, National Coordinator, CREATE Foundation, October 13 2003, p2. The NSW Children’s Guardian evolved from the Usher Report into substitute care services in 1992. That Report recommended that instead of a Minister having responsibility for State wards, the government establish an office with a similar function to that of the Public Guardian for adults.

<sup>275</sup> Ms Sarah Dewsbury, Criminal Law Solicitor, *Transcript of Evidence*, April 5 2004, p5.

<sup>276</sup> Ms Terina Koch, Solicitor, ALSWA, *Transcript of Evidence*, November 17 2003, p3.

7.20 There is an express prohibition in the NSW model against investigating complaints or concerns of children.<sup>277</sup> Section 16 of the *Commission for Children and Young People Act 1998* states:

*(1) The Commission does not have the function of dealing directly with the complaints or concerns of particular children.*

*(2) The Commission may, despite subsection (1), provide children and their families, friends and advocates with information about and referral to government and non-government programs and services.*

7.21 The rationale for section 16(1) is that other mechanisms are available in NSW to complain, for example, the Ombudsman, the Health Care Complaints Commission or the Independent Commission Against Corruption. However, the Commissioner may, under section 16(2), refer complaints onto an appropriate agency.

7.22 A prohibition also exists in Scotland. Section 7(3)(b) of the Commissioner for Children and Young People (Scotland) Act 2003, states that the Commissioner may not carry out an investigation if it would relate only to a particular child or young person.

7.23 By comparison, Queensland's Commissioner is provided with ombudsman functions.<sup>278</sup> However, only a very small part of commission staff is allocated to complaint work. The emphasis is on helping children access already existing complaint mechanisms.

7.24 Under section 411 of the *Children, Young Persons, and their Families Act 1989* (NZ), the New Zealand commissioner can investigate any decision or recommendation made, or any act done or omitted, in respect of any child or young person. In Iceland the Ombudsman for Icelandic Children has powers to investigate organisations and individuals to "improve children's lot".<sup>279</sup> The Northern Ireland Commissioner can, under section 12 of the *Commissioner for Children and Young People (Northern Ireland) Order 2003*, investigate individual complaints from children but the Commissioner has to take account of any existing complaints mechanisms first. The Swedish Children's Ombudsman does not take on individual complaints but the City of Madrid Children's Ombudsman has that capacity.

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<sup>277</sup> Section 16(1) of the *Commission for Children and Young People Act 1998* (NSW) states: "The Commission does not have the function of dealing directly with the complaints or concerns of particular children."

<sup>278</sup> Under section 15(a), of the *Commission for Children and Young People Act 2000* (Qld), the Commission can receive, seek to resolve, monitor and investigate complaints about services provided to certain children by service providers.

<sup>279</sup> The Act on Children's Ombudsman No.83 of 1994.

7.25 It appears to the Committee that providing a commissioner with ombudsman-type responsibility is predicated on a particular jurisdiction's complaint handling mechanisms being either intact or absent. This led the Committee to explore the Western Australian public sector complaint and review mechanisms for children and young people. The across government submission provided a list. These are the:

- Ombudsman;
- State Administrative Tribunal;<sup>280</sup>
- Office of Health Review;
- Office of the Public Advocate; and
- Guardianship and Administration Board.

7.26 Mr Paul Albert, Director General, Department of Education and Training, in his submission, added:

- the Complaints Management Unit in his department; and
- the Department of Community Development's (DCD) consumer advocacy service and the (non statutory) Case Review Board.<sup>281</sup>

#### *The Ombudsman*

7.27 The Committee sought the views of the Ombudsman as to whether children and young people lodge complaints. Ms Deirdre O'Donnell, Ombudsman, advised that although in theory, age is no barrier to complaining under the *Parliamentary Commissioner Act 1971*, the reality is that children in Western Australia rarely lodge complaints. Ms O'Donnell based this advice on the fact that the Ombudsman's Office has only been collecting statistics on the age of a complainant since January 2000 and the fact that complaints must be in writing. Clearly the latter is a difficulty for children and young people and for that reason, Ms O'Donnell would like section 17(1) of the *Parliamentary Commissioner Act 1971* amended to include oral complaints.

7.28 Ms O'Donnell stated that the complaints from adults are about issues "...which affect specific children and almost always prompted by adults seeking to pursue their own interest which may or may not be the same as those of the child concerned." Ms O'Donnell further added:

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<sup>280</sup> As at the date of this Report the bill establishing the State Administrative Tribunal was not enacted.

<sup>281</sup> Its role will be taken over by the State Administrative Tribunal.

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*I understand that other complaint mechanisms in WA receive very few complaints from children and this suggests there may be a general lack of awareness about complaint handling agencies on the part of children.*<sup>282</sup>

- 7.29 When children do complain, the Ombudsman focuses on whether government employees have acted in accordance with provisions of the relevant legislation and if their actions were procedurally fair and otherwise reasonable. Ms O'Donnell said aggrieved persons access the internal complaints systems of the agency, for example if it is DCD, then the consumer advocacy service and/or the (non statutory) Case Review Board. If the agency is the Department of Education and Training, then this would be the Complaints Management Unit.

*The State Administrative Tribunal*

- 7.30 The reference in the across government submission to the State Administrative Tribunal is premature. At the time of this Report, the legislation supporting the creation of a State Administrative Tribunal has not yet been enacted. However, a perusal of the State Administrative Tribunal Bill 2003 reveals that it does not especially focus on children and young people. In fact, neither 'child' nor 'young person' is expressed in the Bill.

*The Office of Health Review*

- 7.31 The Committee noted a recent assessment of the Office of Health Review in June 2003, which commented how "...very few people under the age of twenty four years complain to the Office about health and disability services. (Many complaints about services received by young people under the age of eighteen are made by parents or guardians)."<sup>283</sup> The Review noted three suggestions from seven Perth metropolitan Youth Advisory Councils. These were to preserve anonymity in the initial stage of the complaint; provide for an ability to lodge complaints by email or telephone; and place a youth worker in the Office of Health Review. The Committee observes that none of these translated into recommendations and indeed the Office of Health Review website currently states: "*All complaints need to be in writing.*"<sup>284</sup>

*The Guardianship and Administration Board and the Public Advocate*

- 7.32 The Guardianship and Administration Board (**Board**) is an independent statutory tribunal established under the *Guardianship and Administration Act 1990*. The Board decides whether a person has a decision-making disability, whether the person needs a

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<sup>282</sup> Submission No 38 from Ms Deidre O'Donnell, Ombudsman, September 5 2003.

<sup>283</sup> D Karasinski, *Report of the Review of the Office of Health Review*, June 2003, p67.

<sup>284</sup> However, recommendation 23 refers to improving access to the Office of Health Review and its services for, amongst others, young people.

guardian or administrator and, if so, who should be appointed. The Long Title to the Act states, in part, that it is “*An Act to provide for the guardianship of adults.*” The Public Advocate, who is also appointed under the same Act, is an independent statutory officer providing advocacy at hearings of the Board and in the community. The annual reports of both the Board and the Public Advocate indicate that each is focussed on adults and their work is of little relevance to children and young people. This is in marked contrast to the role of the Australian Capital Territory’s Community Advocate as discussed at paragraph 4.4.

#### *Department of Community Development*

- 7.33 Ms Jane Brazier, Director General, DCD, referred to a number of mechanisms for internal review of decisions. Ms Brazier said the consumer advocacy positions are “...quite at arms length from any of our field operatives.”<sup>285</sup> However, Ms Dawn Wellam, Executive Director, Yorganop Child Care Aboriginal Corporation, WA Indigenous Child Care Agencies Council, disagrees:

*...Under the existing state of affairs, problems brought to the attention of the Consumer Advocate (who is employed by DCD) necessarily leads to an in house solution which raises the potential for a conflict of interest. The situation currently exists where the office of the consumer advocate could tend to resolve issues to meet the policy and administrative demands of the DCD, rather than children. This risk would be eliminated by the appointment of a commissioner...*<sup>286</sup>

- 7.34 The Committee observes that the lack of independent review of DCD’s decisions can be a significant weakness but acknowledges that the State Administrative Tribunal, if established, will provide the requisite degree of independence.

#### *The Complaints Management Unit*

- 7.35 Mr Paul Albert, Director General, Department of Education and Training reinforced the Ombudsman’s view that children rarely complain. Mr Albert disclosed that in the past 18 months, “...it is notable that the clear majority of the complaints submitted are from staff in relation to other staff. The number of complaints from parents/children while small as a proportion of the total are treated as matters of critical importance.”<sup>287</sup>

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<sup>285</sup> Ms Jane Brazier, Director General, DCD, *Transcript of Evidence*, December 1 2003, p10.

<sup>286</sup> Submission No 34 from Ms Dawn Wellam, Executive Director, Yorganop Child Care Aboriginal Corporation, WA Indigenous Child Care Agencies Council, undated, p3.

<sup>287</sup> Submission No 40 from Mr Paul Albert, Director General, Department of Education and Training, September 12, p5.



- 7.36 The Committee noted the Ombudsman's argument that there is an inherent conflict for an organisation which attempts to perform both an impartial complaint handling function as well as an advocacy function. The Ombudsman, Ms Deirdre O'Donnell said: "*The traditional notion of the Ombudsman is founded upon its independence and impartiality which is not in harmony with an advocacy function.*" Ms O'Donnell said: "*In fact we often specifically comment in letters to complainants & agencies that our role is not to be an advocate or apologist for either party.*"<sup>288</sup>
- 7.37 The Committee observes that it is very difficult to assess whether children and young people simply do not lodge complaints or whether they are unaware of complaint handling mechanisms and/or lack skills on how to access those agencies. Statistics from the national organisation, *Kids Helpline* reveal that 100,018 calls were made to the Help Line from Western Australian children aged five to 18 years, during 2003 with counsellors responding to 53,723 calls. The majority of calls concerned relationships with family, friends or partners and this was consistent with what had been described by *Kids Helpline* in 2002 as "...*matters of pressing concern.*"<sup>289</sup> (See paragraph 5.8 for the type of matters). In the Committee's view, these statistics indicate that children seek assistance from counsellors because the mechanism of complaint, a national freecall telephone number, is child friendly. This is not the case with government agencies.
- 7.38 In the Committee's view, overnment agencies need to become more accessible to children and young people. This could be achieved by developing what the Youth Affairs Council of Victoria (Inc) calls "...*specialist children's sections and accessible complaint mechanisms.*"<sup>290</sup> NAPCAN sees a role here for a commissioner who would ensure that "...*review and appeal processes are in place in Government and non-government agencies that have children as a client group.*"<sup>291</sup>
- 7.39 Amendments to the *Guardianship and Administration Act 1990* providing for the Public Advocate to assume advocacy or complaints investigation responsibilities similar to the Australian Capital Territory's Community Advocate, is also a means of improving the access of children and young people.

## CONCLUSION

- 7.40 The Committee considers the primary task of a Western Australian commissioner is systemic advocacy for all children and young people. However, the Committee has

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<sup>288</sup> Submission No 38 from Ms Deirdre O'Donnell, Ombudsman, September 5 2003, p3.

<sup>289</sup> Kids Helpline Western Australia 2002 InfoSheet, p1.

<sup>290</sup> Youth Affairs Council of Victoria (Inc), "Are you listening to us?", website of the Case for a Victorian Children and Young People's Commission, (viewed on July 21 2003).

<sup>291</sup> Submission No 10 from Ms Carole Vaughan, State President, NAPCAN (WA), September 1 2003, p4.

proposed that the commissioner be provided with discretion to investigate a complaint from an individual child or young person in exceptional cases.

- 7.41 The Committee suggests a commissioner have the discretion to initiate investigations into any agency or organisation if, in the commissioner's view, it is in the public interest.
- 7.42 The Committee also supports the Youth Affairs Council of Victoria (Inc) proposal that a commissioner should comment on the adequacy of complaints handling systems in agencies.
- 7.43 The Committee considers that section 16(2) of NSW's *Commission for Children and Young People Act 1998*, concerning the referral of a child or young person to an appropriate agency, should be replicated in legislation for a Western Australian commissioner.

**Recommendation 7: The Committee recommends that a Commission and Commissioner for Children and Young People have responsibility for the interests of all children and young people, not just those considered at risk.**

**Recommendation 8: The majority of the Committee recommends that, if the Government is to provide an employment screening function, then it have regard to the employment screening legislation in NSW and Queensland. The Committee recognises the importance of an employment screening function, but cautions that it must not overwhelm the Commission's other functions.**

**Recommendation 9: The Committee recommends that:**

- a) the primary task of a Commissioner be the provision of systemic advocacy for all children and young people;
- b) the Commissioner have the discretion to investigate a complaint from an individual child or young person in exceptional cases; and
- c) the Commissioner consider and provide comment on the adequacy of complaints handling systems in government agencies to ensure that they are accessible to children and young people and meet their needs.

## CHAPTER 8

### DUTIES OF A COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE

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#### SPECIFIC DUTIES OF A COMMISSIONER

- 8.1 The Committee received many suggestions for what should constitute the duties or functions of a commissioner for children and young people. Consistently, the evidence indicated the commissioner perform the following duties.

##### **Advocate for children and young people**

- 8.2 The Committee has already stated, at paragraph 7.10, its preference for a commissioner to be a voice for all Western Australian children and young people.

##### **Prepare legislative impact statements**

- 8.3 The Committee recommends that a commissioner monitor the introduction into the Parliament of any legislation relevant to children and young people and prepare impact statements on the legislation that in the commissioner's opinion affect children and young people. An impact statement should accompany such bills, ideally at the commencement of the second reading debate in each House of the Parliament.<sup>292</sup> This is a means of ensuring that the commissioner's views are not diluted by departmental or Cabinet interference and keeps children and young people at the heart of government.

- Dr Philip King, Chairman, Kidsafe WA, said this function is analogous to the field of product safety which prepares risk impact statements when considering legislative or regulatory changes related to particular consumer products.<sup>293</sup> Dr King suggested a child advocate develop impact statements concerning proposed legislation and policy.
- In other jurisdictions cost recovery impact statements and environmental impact assessments currently accompany proposed legislation, whereas the format for Cabinet submissions in Western Australia only requires authors to state what impact the submission has on small business and regional areas of the State.<sup>294</sup>

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<sup>292</sup> The *Explanatory Memorandum* is prepared by a departmental officer.

<sup>293</sup> Submission No 29 from Dr Philip King, Chairman, Kidsafe WA, September 1 2003, p3.

<sup>294</sup> Submission No 40 from Mr Paul Albert, Director General, Department of Education and Training, September 12, p3.

- 8.4 The duty to survey existing written laws and alert the Government to any deficiencies that require correction could be part of the commissioner's annual reporting to the Parliament. Again, this would have the effect of keeping the Parliament focused on children and young people.

**Prepare public statements on Government initiatives and community issues**

- 8.5 The Committee sees a commissioner having the discretion to make submissions on any Government initiatives and publicly comment on community issues relevant to children and young people.

**Publicly comment on issues concerning children and young people**

- 8.6 The Chief Justice of Western Australia, Hon David Malcolm AC, suggested a commissioner be "*...in the same position as an Attorney General so far as comments regarding court decisions are concerned*".<sup>295</sup> By convention, the Attorney General has the capacity to comment on court decisions, the primary reason for this being the desire to avoid having the judiciary involved in public debate. There is a view that public comment by judges severely compromises the judiciary's independence.<sup>296</sup> The Committee agrees with the Chief Justice that a commissioner speak out on court decisions.

**Gather and publish information**

- 8.7 The Committee considers that a commissioner should have the discretion to write and circulate educational material on how children and young people can become involved in the decision-making of the commission and contribute to its management and daily activities. This will empower children and young people to understand how they can more effectively access assistance from service providers.

**Develop mechanisms to encourage participation of children and young people**

- 8.8 The Committee envisages a commissioner having the duty to develop structures and processes that foster and enable children and young people to participate in the establishing of the commission as well as its ongoing operations. Administratively, this could involve the commissioner establishing child reference groups or a young persons' advisory committee.

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<sup>295</sup> Submission No 39 from Hon David Malcolm AC, Chief Justice of Western Australia November 10 2003, p4.

<sup>296</sup> However, the former Attorney General of the Commonwealth, Mr Darryl Williams QC is of the view that this is "*an outmoded notion*" and he or she should not allow himself to become the defacto representative of the courts.

### Conduct research

- 8.9 The Committee envisages a commissioner conducting research. The Committee agrees with Associate Professor David Forbes, University of Western Australia, School of Paediatrics and Child Health, that a commissioner have “...a proactive role in commissioning research into the needs of children and in shaping the communities views on the needs of children and of their rights.”<sup>297</sup>

### Facilitate and coordinate partnerships between agencies

- 8.10 Evidence provided to the Committee indicated that inter agency cooperation to facilitate better services for children and young people was of paramount concern. The Committee sees the task of coordinating partnerships as being the commissioner’s most crucial and challenging duty. The Committee envisages the commissioner initiating, for example, inquiries into a particular agency’s methodology of dealing with a child or young person and making recommendations for improvements.

### Establish and maintain a database of information

- 8.11 NAPCAN suggested that a commissioner should establish a database of laws, regulations and policy documents relating to children and young people.<sup>298</sup> The Committee agrees with NAPCAN that there is considerable merit in a database of information, as this will assist the commission’s corporate memory. However, the Committee sees this as purely an administrative matter, the implementation of which can be left to the discretion of the commissioner.

### Act as *amicus curiae*

- 8.12 The Committee has considered this role as it appears in the Northern Ireland model. The Youth Affairs Council of Victoria Inc, which is currently agitating for a children’s commissioner, is particularly interested in the *amicus curiae* function.<sup>299</sup> The Chief Justice of Western Australia also suggested this duty.
- 8.13 The role of an *amicus curiae* was enunciated by Chief Justice Brennan in *Levy v State of Victoria & Ors.*<sup>300</sup> His Honour said:

*The hearing of an amicus curiae is entirely in the Court’s discretion.  
.... The footing on which an amicus curiae is heard is that that  
person is willing to offer the Court a submission on law or relevant*

<sup>297</sup> Submission No 31 from Associate Professor David Forbes, School of Paediatrics and Child Health, University of Western Australia, September 1 2003, p3.

<sup>298</sup> Submission No 10 from Ms Carole Vaughan, State President, NAPCAN (WA), September 1 2003, p4.

<sup>299</sup> The Youth Affairs Council of Victoria Inc, *Are you listening to us? The Case for a Victorian Children and Young People’s Commission*, 2002.

<sup>300</sup> (1997) 189 CLR 579.

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*fact which will assist the Court in a way in which the Court would not otherwise have been assisted.*

- 8.14 An *amicus curiae* is generally not a party to the proceedings, does not file pleadings or lead evidence and may not lodge an appeal. An *amicus curiae* ensures that the court is properly informed of matters which it ought to take into account in reaching its decision, particularly where the judgment may have wider implications than the case itself.
- 8.15 The Committee suggests that the *amicus curiae* duty is consistent with the commissioners of the Human Rights and Equal Opportunity Commission (**HREOC**) who have the function of assisting the Federal Court or Federal Magistrates Service as *amicus curiae* in discrimination matters.
- 8.16 The Committee considers that the matters described in paragraphs 4.11 to 4.14 concerning the powerlessness of children and young people in family law court processes, could involve an *amicus curiae*.

#### **Act as Intervener**

- 8.17 The Committee considered an Intervener function for a Western Australian commissioner.<sup>301</sup> An Intervener may be distinguished from that of an *amicus curiae* function.<sup>302</sup> An Intervener is a person who seeks to intervene as a party in proceedings to protect their interests where those interests are different from those of the existing parties. An Intervener once given leave to intervene, becomes a party to the proceedings and can appeal, tender evidence and make submissions. Intervention by a private party or stranger may only be permitted under statute or rules of the court. There is no inherent power for a court to allow a stranger to intervene.<sup>303</sup>
- 8.18 HREOC commissioners have an ability to intervene, with leave of the Court, in proceedings that involve issues of race, sex and disability discrimination, human rights issues and equal opportunity in employment. Where a relevant human rights or discrimination issue arises in a case, HREOC could provide expert assistance that would otherwise not be available to the Court.
- 8.19 A majority of the Committee comprising Hon Giz Watson MLC and Hon Kate Doust MLC did not recommend an intervener function for a Western Australian children's commissioner. However, the Chairman, Hon Barbara Scott MLC supports this function.

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<sup>301</sup> Submission No 10 from Ms Carole Vaughan, State President, NAPCAN (WA), September 1 2003, p7, suggested this function.

<sup>302</sup> *US Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520; 83 ALR 79.

<sup>303</sup> *Re Great Eastern Cleaning Services Pty Ltd* [1978] 2 NSWLR 278; 3 ACLR 886.

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**Enter and inspect facilities**

- 8.20 The Committee noted that neither the NSW nor Tasmanian childrens commissioner legislation provides for an express power of entry for their respective commissioners. In contrast, section 15(k) of the *Commission for Children and Young People Act 2000* (Qld) permits the commissioner to “...to conduct independent inspections of visitable sites...”. There, visitable sites are defined as residential facilities, detention centres and authorised mental health services under the *Mental Health Act 2000* (Qld).
- 8.21 The Committee considers that, during the course of an investigation, an express power should be provided for the commissioner to enter and inspect visitable sites, similar to that in the Queensland model.
- 8.22 The Chief Justice wants a commissioner to be able to access Commonwealth detention centres and the Committee subscribes to this view, despite the jurisdictional difficulties.<sup>304</sup> The rationale for the Committee’s position is best explained by the HREOC’s recent report into children in Australian immigration detention centres. The *National Inquiry into Children in Immigration Detention Report - A Last Resort?* tabled on May 12 2004, describes how children have suffered numerous and repeated breaches of their human rights. The two year inquiry found that:

*...the mandatory detention system breached the UN Convention on the Rights of the Child. It failed, as required by the Convention, to make detention a measure of “last resort”, for the “shortest appropriate period of time” and subject to independent review.*<sup>305</sup>

- 8.23 The HREOC Report further claims that Australia’s immigration detention policy has failed to protect the mental health of children, failed to provide adequate health care and education and failed to protect unaccompanied children and those with disabilities.

**Advise on employment screening practices**

- 8.24 The Committee envisages a commissioner advising agencies and private firms on employment screening best practice.

**Referring individual complaints**

- 8.25 The Committee envisages a commissioner referring the majority of individual complaints to the relevant agency. However, as was stated as paragraph 7.40, the

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<sup>304</sup> This could only occur through an inter-governmental agreement or Memorandum of Understanding between Federal and State agencies.

<sup>305</sup> <http://www.hreoc.gov.au/HREOC/> (viewed on May 20 2004).

Committee recommends a commissioner have the discretion to investigate an individual complaint in cases of exceptional circumstances.

**Implement strategies for the prevention of child abuse**

- 8.26 The Committee envisages a commissioner having the discretion to advise on strategies for the prevention of child abuse.

**Provide annual reports to Parliament**

- 8.27 The Committee considers that a commissioner have the duty to report directly and annually to both Houses of Parliament on matters arising from the responsibilities and duties of the commission. Similar to Scotland and Northern Ireland, the Committee recommends that the commissioner publish child and young person 'friendly versions' of the annual report to the Parliament.

**Conduct special inquiries**

- 8.28 The Committee considers that a commissioner should have the discretion to conduct special inquiries and table reports on those inquiries in both Houses of Parliament. The Committee recommends the Government consider the following powers:

- a power to summon witnesses and documents;
- the power to examine on oath; and
- a power to inspect documents and retain them for a reasonable period.

**OTHER CONSIDERATIONS**

- 8.29 The Committee agrees with the Chief Justice of Western Australia, Hon David Malcolm AC, that any legislation supporting a commissioner should provide for the situation where a party wilfully obstructs the commissioner in the performance of the prescribed duties. The Chief Justice suggested this be treated as a contempt of court rather than a criminal offence.<sup>306</sup>

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<sup>306</sup> Submission No 39 from Hon David Malcolm AC, Chief Justice of Western Australia November 10 2003, p5.



**Recommendation 10: The Committee recommends that legislation expressly provide for the Commissioner to have the powers and duties as outlined in Chapter 8 of this Report. Such matters to include, but not limited to:**

- (a) the preparation of legislative impact statements on legislation, introduced into Parliament, that in the opinion of the Commissioner affects children and young people;**
- (b) the revision and monitoring of existing legislation to assess its impact on children and young people, with any comments being included in reports to Parliament;**
- (c) the making of submissions on community issues relevant to children and young people;**
- (d) the power to initiate inquiries into any government agency which impacts on children or young people;**
- (e) the referring of a child or young person to an appropriate agency for an investigation of a complaint;**
- (f) an ability to act as *amicus curiae*;**
- (g) the power to enter and inspect visitable sites during the course of an investigation;**
- (h) a power to summon witnesses and documents;**
- (i) a power to examine on oath; and**
- (j) a power to inspect documents and retain them for a reasonable period.**



## CHAPTER 9

### BUDGET FOR A COMMISSION

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#### INTRODUCTION

- 9.1 Ms Moira Rayner, Barrister, made the point that in establishing an organisational structure a lot can be done with very little. Ms Rayner described her experience with the Office of the Children's Rights Commissioner for London which was "*...funded in 1999 by a combination of the equivalent of our Lotteries Commission and grants from two of the major children's organisations and small grants from other organisations...*".<sup>307</sup> It operated with five staff for 1.6 million children.
- 9.2 Relationships Australia said a commission need not introduce to government, "*...detrimental levels of bureaucracy and expense.*"<sup>308</sup> Kidsafe Western Australia said a significant factor in helping to maintain the independence of a commission "*...will be the degree to which it is in control of its own budget and human resource management.*"<sup>309</sup>
- 9.3 There are differing views about how a commission should be funded. All agree a commissioner should be funded by government but some critics add, "*...not channelled through a particular government department as is the case in Norway, and New Zealand. It should be appropriated directly by Parliament.*"<sup>310</sup>
- 9.4 Ms Patmalar Ambikapthy, Commissioner for Children, Tasmania, recommends funding be allocated from consolidated revenue with the commissioner reporting to a select committee of Parliament, thus ensuring a whole of government approach and for the office and financial administration to be situated in the Cabinet Office, thus serving to entrench the independence of the commissioner.<sup>311</sup>
- 9.5 The Committee requested information from the three Australian States that have children's commissioners, about their budgets.

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<sup>307</sup> Ms Moria Rayner, Barrister, *Transcript of Evidence*, November 17 2003, p.2. The office was established as a pilot project for three years and it was hoped that it would continue with additional funding from corporate and charitable sources. In 2003, it closed but in December 2003, the United Kingdom Parliament introduced a Bill for a Commissioner for Children in England. This will bring England into line with the three other countries comprising the United Kingdom.

<sup>308</sup> Submission No 33 from Ms Judith Osanne, Counsellor, Children's Services Team, Relationships Australia, September 4 2003, p3.

<sup>309</sup> Submission No 29 from Dr Philip King, Chairman, Kidsafe WA, September 1 2003, p2.

<sup>310</sup> Robert Ludbrook, 'Why Australia Needs a Commissioner for Children', Discussion Paper March 1994, p14.

<sup>311</sup> Letter from Ms Patmalar Ambikapthy, Commissioner for Children, Tasmania, March 5 2004, p1.

## NSW

- 9.6 The NSW Commission for Children and Young People adopts the definition of a child as being persons under the age of 18 years of which there were 1,578,283 on Census night 2001. Ms Gillian Calvert, Commissioner, NSW Commission for Children and Young People said that the budget for the 2002-03 financial year was \$6.163 million with 34 full-time staff.<sup>312</sup> The Commission is funded through consolidated revenue appropriations with the Commissioner having formal administrative and budgetary reporting requirements through the Minister for Youth.
- 9.7 Ms Calvert explained that the Commission itself raised \$85,000 from publication sales, grants, interest and seminar fees. The Chief Executive Officer and all other staff are employed under the *Public Sector Employment and Management Act 2002*.

## TASMANIA

- 9.8 Tasmania's Office of the Commissioner for Children defines a child as being under 18 and a young person as meaning a child who is 16 or 17 pursuant to section 3 of the *Children Young Persons and their Families Act 1997*. For the 2002-03 financial year, funding for the Office of the Commissioner for Children was \$240,000 for 95,000 children with three full-time employees. Funding is allocated through the budget of the Department of Health and Human Services.

## QUEENSLAND

- 9.9 The Commission for Children and Young People, Queensland adopts the definition of a child as being between the ages of birth to 18 of which there were 917,559 on Census night 2001. The Commission is funded through an annual grant provided by the Queensland Treasury. The Commission is attached to the Department of the Premier and Cabinet. The Commission does raise a component of its own revenue through the charging of a fee for a range of classes of applicants for the "Working With Children Check" (these being paid employees and regulated businesses).<sup>313</sup> In 2002-03, the Commission raised approximately \$880,000 through these user-fees, which it retains to offset the cost of its employment screening program.<sup>314</sup> It is given a separate quantum of funding for its employment screening function. In the 2003-04 financial year this was \$1.6 million.

<sup>312</sup> In the 2002-03 Annual Report of the Commission, 265,798 employment checks were carried out with 411 (0.15%) requiring assessment. Of those 92 or 0.03% were rejected for employment.

<sup>313</sup> According to the 2002-03 Annual Report, only \$5,828,176 came from government grants. Revenue was partly raised from fees charged for employment screening.

<sup>314</sup> In the 2002-03 Annual Report, p38, 105,588 'blue suitability cards' issued. 26 were negative and 126 applicants withdrew after being challenged. There were nine appeals with one decision being overturned. The Commission charges \$40 for a child care card. Volunteers pay nil.

9.10 Below is a chart comparing the three Australian States with children's commissioners.

State	Current Funding	Persons under 18 on Census night 2001	Number of full-time staff	Employment screening function	Per capita allocation
NSW	\$6,163,000	1,578,283	34	Yes	\$3.90
Tasmania	\$240,000	95,000	3	No	\$2.52
Queensland	\$9,347,000	917,559	64	Yes	\$10.18

9.11 The three United Kingdom children's commissioners are represented below.<sup>315</sup>

Jurisdiction	Current Funding	Persons under 18 on Census night 2001	Number of full-time staff	Employment screening function	Per capita allocation
Wales	\$2,500,000	662,779	22	No	\$3.77
Northern Ireland	\$4,750,000	500,153	25	No	\$9.49
Scotland	\$3,000,000	1,224,155	15	No	\$2.45

9.12 The chart at paragraph 9.10 indicates a range of per capita allocation of money on children and young people in the three Australian jurisdictions with commissioners. Evidence from the financial reports of both NSW and Queensland indicates that a significant component of the allocation for these commissions may be accounted for in their respective, labour intensive, employment screening functions.

9.13 For the 502,401 persons under 18 living in Western Australia, the Committee recommends an initial appropriation of \$3.5 million which amounts to approximately \$7 per child. That quantum approximates to the mid-range of the amounts allocated

<sup>315</sup>

The statistical information was obtained from the Children's Rights Alliance for England, *The Case for a Children's Rights Commissioner for England* January 2003, p19. For Wales and Northern Ireland, email correspondence from the respective commissioners, converting pounds to dollars at the exchange rate on May 6 2004. The statistics for Scotland were obtained from The Scottish Parliament, Finance Committee, *1st Report 2003, Commissioner for Children and Young People (Scotland) Bill*.

for both the Australian and United Kingdom jurisdictions with children's commissions.

## CONCLUSION

- 9.14 The Committee recommends a direct allocation of funds from the consolidated fund, rather than as part of a government department's budget as occurs in Tasmania.

**Recommendation 11: The Committee recommends that the Commission be funded by a direct allocation of funds from the Consolidated Fund.**



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**Hon Barbara Scott MLC**  
**Chairman**  
**July 2 2004**

**APPENDIX 1**  
**LIST OF SUBMISSIONS**





## **APPENDIX 1**

### **LIST OF SUBMISSIONS**

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1. Mr Peter Evans  
Private Citizen
2. Dr Judith MacDonald  
Member  
State Management Committee (WA)  
Save the Children Australia
3. Hon Paddy Embry MLC  
Member of the Legislative Council  
Parliament of Western Australia
4. Private Citizen
5. Mr Bill Hewitt  
Acting Chief Executive Officer  
Fire and Emergency Services Authority of Western Australia
6. Mr Greg Martin  
Director General  
Department of Planning and Infrastructure
7. Mr Maurice Swanson  
Chief Executive  
National Heart Foundation of Australia (WA Division)
8. Ms Michele Kosky  
Executive Director  
Health Consumers' Council (Inc) WA
9. Mr Dennis Eggington  
Chief Executive Officer  
Aboriginal Legal Service Western Australia
10. Ms Carole Vaughan  
State President  
NAPCAN (WA)
11. Ms Marilyn Kilvington  
Private Citizen
12. Mrs Anne Taylor  
Deputy Principal - Pastoral Care

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Iona Presentation College

13. Ms Lisa Baker  
Executive Director  
Western Australian Council of Social Service Incorporated
14. Ms Janine Flemmer and Ms Diane Fraser  
Co-ordinators  
Citizen Advocacy Perth West (Inc)
15. Ms Carol Solosy  
Manager  
Library, Information and Research Services  
Association for the Blind of WA (Inc)
16. Dr Trevor Parry FRACP DPH DCH FRACMA  
Chair  
National Investment for the Early Years, WA Branch
17. Dr Trevor Parry FRACP DPH DCH FRACMA  
Head of Department  
Department of Community & Developmental Paediatrics, Women's &  
Children's Health Service  
State Child Development Centre
18. Mr Bruno Camarri  
President  
Board of Governors  
Meerilinga Young Children's Foundation
19. Ms Shirley McInnes  
The Resource Unit for Children with Special Needs
20. Ms Leanne Pech  
Children's Issues Convenor  
United Nations Association of Australia (WA Division)
21. Mr Brady Williams  
WA Coordinator & National Publicity Coordinator  
The Year of the Child 2003
22. Ms Rae Walter  
Executive Director  
Ngala Family Resource Centre
23. Mr Ian Carter  
Chief Executive Officer  
Anglicare WA
24. Ms Moira Rayner  
Moira Rayner & Associates

25. Ms Jill Clements  
Field Officer  
YouthCARE  
The Churches Commission on Education Inc
26. Ms Sofia Elliott  
Senior Lecturer and Coordinator of Early Childhood Teaching Program  
(representative of Dr Peter Tannock, Vice Chancellor)  
University of Notre Dame Australia  
College of Education
27. Ms Anita Ghose  
Chair  
ACROD WA Children and Youth Services Sub Committee
28. Ms Midge Turnbull  
Executive Officer  
Youth Affairs Council of Western Australia
29. Dr Philip King  
Chairman  
Ms Sue Wicks  
Executive Officer  
Kidsafe WA
30. Ms Patricia Powell  
Electorate Officer to Hon Murray Criddle MLC
31. Professor David Forbes  
School of Paediatrics and Child Health  
Faculty of Medicine and Dentistry  
University of Western Australia
32. Ms Cheryl Vernon  
Manager  
Youth Legal Service Inc Western Australia
33. Ms Judith Ozanne  
Counsellor  
Children's Services Team  
Relationships Australia
34. Ms Dawn Wallam  
Executive Director  
Yorganup Child Care Aboriginal Corporation  
Secretariat for WA Indigenous Child Care Agencies Council
35. Ms Anne Bourke  
Acting Area Chief Executive  
Women's and Children's Health Service  
Department of Health

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36. Ms Prue Walsh  
Play Environment Consulting
  37. Mr John R Barich  
Australian Family Association (WA)(AFA WA)
  38. Ms Deirdre O'Donnell  
Ombudsman  
The Ombudsman's Office
  39. Hon David K Malcolm AC Cit WA  
Chief Justice of Western Australia
  40. Mr Paul Albert  
Director General  
Department of Education and Training
  41. Mr Shawn Boyle  
Director  
Social Policy Unit  
Department of Premier and Cabinet
  42. Mr B E Matthews  
Commissioner of Police  
Western Australian Police Service  
Police Headquarters
  43. Ms Shelley Wilkins  
Director  
Citizens Committee on Human Rights Inc
  44. Dr Janet Fletcher, Dr Robin Harvey and Dr Stephanie Heath  
School of Psychology  
Child Study Centre  
University of Western Australia
  45. Ms Michelle Townsend  
National Coordinator  
CREATE Foundation
  46. Hon Jim McGinty MLA  
Minister for Health
  47. Ms Judith Gleeson  
Private Citizen

**APPENDIX 2**  
**LIST OF WITNESSES**



## **APPENDIX 2**

### **LIST OF WITNESSES**

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#### **Monday, October 20 2003**

2.30 pm Ms Raelene Walter, Ngala Family Resource Centre  
3.00 pm Mr Bruno Camarri, Meerilinga Young Children's Foundation  
Ms Sue Burton, Meerilinga Young Children's Foundation  
Ms Patricia O'Sullivan, Merrilinga Young Children's Foundation

#### **Wednesday, October 29 2004**

11.00 am Mr Luke Tressler  
Ms Tiffany Rowe  
Mr Blair Main

#### **Monday, November 10 2003**

2.30 pm Ms Patricia Powell  
3.00 pm Associate Professor Trevor Parry, NIFTeY WA

#### **Monday, November 17 2003**

2.30 pm Ms Katrina Carlisle, Manager, Court Officer Unit, Aboriginal Legal Service of WA  
Ms Tonia Brajcich, Manager, Legal Services, Aboriginal Legal Service of WA  
Ms Terina Koch, Solicitor, Aboriginal Legal Service of WA  
3.00 pm Ms Moira Rayner, Moira Rayner & Associates

#### **Monday, December 1 2003**

2.00 pm Dr David Vicary, Executive Director, Office for Children and Youth  
Ms Jane Brazier, Director General, Department for Community Development

#### **Monday, April 5 2004**

3.15 pm Ms Sarah Dewsbury





**APPENDIX 3**  
**PART 6 OF THE *COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE ACT***  
***1998 (NSW)***



## **APPENDIX 3**

### **PART 6 OF THE *COMMISSION FOR CHILDREN AND YOUNG PEOPLE ACT 1998 (NSW)***

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#### ***Commission for Children and Young People Act 1998 (NSW) No 146***

#### **Part 6 Parliamentary Joint Committee**

##### **27 Constitution of Committee**

- (1) As soon as practicable after the commencement of this Part and the commencement of the first Session of each Parliament, a joint committee of members of Parliament, to be known as the Committee on Children and Young People, is to be appointed.
- (2) The Parliamentary Joint Committee has the functions conferred or imposed on it by or under this Act or any other Act

##### **28 Functions of Committee**

- (1) The Parliamentary Joint Committee has the following functions under this Act:
  - (a) to monitor and review the exercise by the Commission of its functions,
  - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
  - (c) to examine each annual or other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
  - (d) to examine trends and changes in services and issues affecting children, and report to both Houses of Parliament any changes that the Joint Committee thinks desirable to the functions and procedures of the Commission,
  - (e) to inquire into any question in connection with the Committee's functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.
- (2) Nothing in this Part authorises the Parliamentary Joint Committee to investigate a matter relating to particular conduct.

(3) The Commission may, as soon as practicable after a report of the Parliamentary Joint Committee has been tabled in a House of Parliament, make and furnish to the Presiding Officer of that House a report in response to the report of the Committee. Section 26 applies to such a report.

(4) A reference in this section to the Commission includes a reference to the Child Death Review Team.

## **29 Membership of Committee**

(1) The Parliamentary Joint Committee is to consist of 11 members, of whom:

(a) 5 are to be members of, and appointed by, the Legislative Council, and

(b) 6 are to be members of, and appointed by, the Legislative Assembly.

(2) The appointment of members of the Parliamentary Joint Committee is, as far as practicable, to be in accordance with the practice of Parliament with respect to the appointment of members to serve on joint committees of both Houses of Parliament.

(3) A person is not eligible for appointment as a member of the Parliamentary Joint Committee if the person is a Minister of the Crown or a Parliamentary Secretary.

## **30 Provisions with respect to Committee**

Schedule 1 has effect with respect to the Parliamentary Joint Committee.

**Schedule 1 Parliamentary Joint Committee**  
(Section 30)

**1 Vacancies**

- (1) A member of the Parliamentary Joint Committee ceases to hold office:
- (a) when the Legislative Assembly is dissolved or expires by the effluxion of time, or
  - (b) if the member becomes a Minister of the Crown or a Parliamentary Secretary, or
  - (c) if the member ceases to be a member of the Legislative Council or Legislative Assembly, or
  - (d) if, being a member of the Legislative Council, the member resigns the office by instrument in writing addressed to the President of the Legislative Council, or
  - (e) if, being a member of the Legislative Assembly, the member resigns the office by instrument in writing addressed to the Speaker of the Legislative Assembly, or
  - (f) if the member is discharged from office by the House of Parliament to which the member belongs.
- (2) Either House of Parliament may appoint one of its members to fill a vacancy among the members of the Parliamentary Joint Committee appointed by that House.

**2 Chairman and Vice-Chairman**

- (1) There is to be a Chairman and a Vice-Chairman of the Parliamentary Joint Committee, who are to be elected by and from the members of the Parliamentary Joint Committee.
- (2) A member of the Parliamentary Joint Committee ceases to hold office as Chairman or Vice-Chairman of the Parliamentary Joint Committee if:
- (a) the member ceases to be a member of the Committee, or
  - (b) the member resigns the office by instrument in writing presented to a meeting of the Committee, or
  - (c) the member is discharged from office by the Committee.
- (3) At any time when the Chairman is absent from New South Wales or is, for any reason, unable to perform the duties of Chairman or there is a vacancy in that office, the Vice-Chairman may exercise the functions

of the Chairman under this Act or under the *Parliamentary Evidence Act 1901*.

### 3 Procedure

(1) The procedure for the calling of meetings of the Parliamentary Joint Committee and for the conduct of business at those meetings is, subject to this Act, to be as determined by the Committee.

(2) The Clerk of the Legislative Assembly is to call the first meeting of the Parliamentary Joint Committee in each Parliament in such manner as the Clerk thinks fit.

(3) At a meeting of the Parliamentary Joint Committee, 6 members constitute a quorum, but the committee must meet as a joint committee at all times.

(4) The Chairman or, in the absence of the Chairman, the Vice-Chairman (or, in the absence of both the Chairman and the Vice-Chairman, a member of the Parliamentary Joint Committee elected to chair the meeting by the members present) is to preside at a meeting of the Committee.

(5) The Vice-Chairman or other member presiding at a meeting of the Parliamentary Joint Committee has, in relation to the meeting, all the functions of the Chairman.

(6) The Chairman, Vice-Chairman or other member presiding at a meeting of the Parliamentary Joint Committee has a deliberative vote and, in the event of an equality of votes, also has a casting vote.

(7) A question arising at a meeting of the Parliamentary Joint Committee is to be determined by a majority of the votes of the members present and voting.

(8) The Parliamentary Joint Committee may sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament.

(9) The Parliamentary Joint Committee may sit and transact business on a sitting day of a House of Parliament during the time of sitting.

### 4 Reporting when Parliament not in session

(1) If a House of Parliament is not sitting when the Parliamentary Joint Committee seeks to furnish a report to it, the Committee may present copies of the report to the Clerk of the House.

(2) The report:

(a) on presentation and for all purposes is taken to have been laid before the House, and

(b) may be printed by authority of the Clerk, and

(c) if printed by authority of the Clerk, is for all purposes taken to be a document published by or under the authority of the House, and

(d) is to be recorded in the Minutes, or Votes and Proceedings, of the House on the first sitting day of the House after receipt of the report by the Clerk.

## **5 Evidence**

(1) The Parliamentary Joint Committee has power to send for persons, papers and records.

(2) Subject to clause 6, the Parliamentary Joint Committee must take all evidence in public.

(3) If the Parliamentary Joint Committee as constituted at any time has taken evidence in relation to a matter but the Committee as so constituted has ceased to exist before reporting on the matter, the Committee as constituted at any subsequent time, whether during the same or another Parliament, may consider that evidence as if it had taken the evidence.

(4) The production of documents to the Parliamentary Joint Committee is to be in accordance with the practice of the Legislative Assembly with respect to the production of documents to select committees of the Legislative Assembly.

## **6 Confidentiality**

(1) If any evidence proposed to be given before, or the whole or a part of a document produced or proposed to be produced to, the Parliamentary Joint Committee relates to a secret or confidential matter, the Committee may, and at the request of the witness giving the evidence or the person producing the document must:

(a) take the evidence in private, or

(b) direct that the document, or the part of the document, be treated as confidential.

(2) If a direction under subclause (1) applies to a document or part of a document produced to the Parliamentary Joint Committee:

(a) the contents of the document or part are, for the purposes of this clause, to be regarded as evidence given by the person producing the document or part and taken by the Committee in private, and

(b) the person producing the document or part is, for the purposes of this clause, to be regarded as a witness.

(3) If, at the request of a witness, evidence is taken by the Parliamentary Joint Committee in private:

(a) the Committee must not, without the consent in writing of the witness, and

(b) a person (including a member of the Committee) must not, without the consent in writing of the witness and the authority of the Committee under subclause (5),

disclose or publish the whole or a part of that evidence.

Maximum penalty: 20 penalty units or imprisonment for 3 months, or both.

(4) If evidence is taken by the Parliamentary Joint Committee in private otherwise than at the request of a witness, a person (including a member of the Committee) must not, without the authority of the Committee under subclause (5), disclose or publish the whole or part of that evidence.

Maximum penalty: 20 penalty units or imprisonment for 3 months, or both.

(5) The Parliamentary Joint Committee may, in its discretion, disclose or publish or, by writing under the hand of the Chairman, authorise the disclosure or publication of evidence taken in private by the Committee, but this subclause does not operate so as to affect the necessity for the consent of a witness under subclause (3).

(6) Nothing in this clause prohibits:

(a) the disclosure or publication of evidence that has already been lawfully published, or

(b) the disclosure or publication by a person of a matter of which the person has become aware otherwise than by reason, directly or indirectly, of the giving of evidence before the Parliamentary Joint Committee.

(7) This clause has effect despite section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*.

(8) If evidence taken by the Parliamentary Joint Committee in private is disclosed or published in accordance with this clause:

(a) sections 5 and 6 of the the *Parliamentary Papers (Supplementary Provisions) Act 1975* apply to and in relation to the disclosure or publication as if it were a publication of that evidence under the authority of section 4 of that Act, and



(b) Division 5 of Part 3 of, and Schedule 2 to, the *Defamation Act 1974* apply to and in relation to that evidence as if it were taken by the Committee in public.

## **7 Application of certain Acts**

For the purposes of the *Parliamentary Evidence Act 1901* and the *Parliamentary Papers (Supplementary Provisions) Act 1975* and for any other purposes:

- (a) the Parliamentary Joint Committee is to be regarded as a joint committee of the Legislative Council and Legislative Assembly, and
- (b) the proposal for the appointment of the Parliamentary Joint Committee is to be regarded as having originated in the Legislative Assembly.

## **8 Validity of certain acts or proceedings**

Any act or proceeding of the Parliamentary Joint Committee is, even though at the time when the act or proceeding was done, taken or commenced there was:

- (a) a vacancy in the office of a member of the Committee, or
- (b) any defect in the appointment, or any disqualification, of a member of the Committee,

as valid as if the vacancy, defect or disqualification did not exist and the Committee were fully and properly constituted.