

**Child Protection in NSW: A
Review of Oversight and
Supervisory Agencies**

by

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EXECUTIVE SUMMARY

The purpose of this paper is twofold: first, it presents an overview of the major legislative changes in the field of child protection in recent years; secondly, it sets out the structures, powers and functions of the relevant oversight or supervisory agencies, with a view to producing something like a 'snap-shot' of the system currently in place. Both the paper's description of that system, as well as its analysis of the reforms which have occurred in recent years, are set against the background of the recommendations made by the historic Wood Royal Commission paedophile inquiry, which reported in August 1997. A more immediate background issue is the current debate about the child protection jurisdiction of the Community Services Commission and the proposal to merge the Commission with the Ombudsman's Office. The paper's main findings are as follows:

- The Wood Royal Commission found that a multitude of agencies and organisations existed in NSW with an interest in child protection and that the relationship between these bodies could be bewildering in its complexity. The Royal Commission's key response to this finding was its recommendation that a supervisory agency be created in the field of child protection, in the form of a Children's Commission, which should have 'actual and perceived independence from government and the relevant departments and agencies delivering services, so that it can report fearlessly and objectively on matters within its field'. This proposed Children's Commission 'would take over the functions previously carried out by the Community Services Commission (as they relate to children) and all of the existing functions of the Child Protection Council' (pages 9-11).
- As established in July 1999 under the *Commission for Children and Young People Act 1998*, the **NSW Children's Commission** is not the organisation envisaged by the Royal Commission, neither in terms of the scope of its powers, nor in respect to its independence from Ministerial control. Where it most closely approximates the Wood model is in its employment screening functions, as well as in its general advisory, advocacy and educational role. As a co-ordinating and watchdog body over the child protection system generally, or as an investigatory and research agency, the Children's Commission is quite different to the Royal Commission model (pages 28-29).
- Closer to the Wood Royal Commission model is the Queensland Commission for Children and Young People, established under the *Commission for Children and Young People Act 2000* (Qld). Unlike its NSW equivalent, the Queensland model incorporates the receipt and investigation of complaints (pages 26-28).
- At present, the **Child Death Review Team**, which was established in 1995, is constituted under Part 7A and Schedule 2A of the *Children (Care and Protection) Act 1987*. As amended in 1998, this Part is almost identical to the equivalent but as yet uncommenced provisions under the *Children and Young Persons (Care and Protection) Act 1998* (Chapter 11 and Schedule 1). The Children's Commissioner is the Team Convenor and the Commission now provides research and other support to the Child Death Review Team. The Minister for Community Services has asked the Children's Commission to conduct a legislative review of the Child Death Review Team (page 29).
- Since the Minister for Community Services received advice from the Crown Solicitor's

Office in November 2000, calling into question the jurisdiction of the **Community Services Commission** over child protection matters, this area of law has been in a state of disarray. With the release to stakeholder organisations of plans to merge the Commission with the Ombudsman's Office, it seems that change is imminent (pages 34-36).

- The position many in the community services sector now find themselves in is that, having successfully argued against the absorption of the Community Services Commission into the Children's Commission in 1998, they must now formulate a view on its potential merger with the Ombudsman's Office. Some of the sector's concerns in this respect are canvassed. In terms of powers, a key issue is whether, as a division of the Ombudsman's Office, the reformed Community Services Commission would have the full inquiry powers granted under the Ombudsman Act (page 42).
- The Wood Royal Commission recommended the establishment of a **Children's Guardian** to operate as part of its proposed Children's Commission. This integrated model has not been adopted. Instead, the Children's Guardian is established as a statutory office holder under Chapter 10 of the *Children and Young Persons (Care and Protection) Act 1998*. The Office of the Children's Guardian was established in December 2000 and, shortly thereafter, the first Children's Guardian, Linda Mallett, was appointed in January 2001. However, although a Children's Guardian has been appointed, the Office's functions have yet to be proclaimed to commence (pages 43-44).
- The role played by the **Ombudsman** in child protection has altered significantly with the insertion of Part 3A into the *Ombudsman Act 1974*, which was proclaimed to commence on 7 May 1999 (page 48).
- The child-related employment screening scheme – the **Working with Children Check** - is established under 4 pieces of legislation: (a) the *Child Protection (Prohibited Employment) Act 1998*, which commenced on 3 July 2000, sets out which persons are prohibited from working in positions of child-related employment, the duties and penalties applying to employees and employers, plus the mechanisms in place for exemption and appeal; (b) the *Child Protection (Offenders Registration) Act 2000* applies to the extent that a 'registrable person' under this Act is also a 'prohibited person' under the *Child Protection (Prohibited Employment) Act 1998* and cannot therefore work in a child-related employment; (c) Part 7, 'Employment screening', of the *Commission for Children and Young People Act 1998*, which sets out the procedures for checking current and future employees and for the issuing of guidelines by the Minister relating to privacy and other matters; and (d) Part 3A, 'Child protection', of the *Ombudsman Act* which sets out the scrutiny and investigation responsibilities of the Ombudsman over the employment screening scheme (pages 49-50).
- The *Child Protection (Offenders Registration) Act 2000* commenced on 15 October 2001. The Act requires persons sentenced for child sex offences (and other specified serious offences against children) to keep local police informed of changes to their name, address, employment and motor vehicle details for a specified period after their release into the community. A register of these offenders is to be established and maintained by the Commissioner of Police. This register is to be referred to as the **NSW Police Service Child Protection Register** (page 60).

1. INTRODUCTION

In NSW, as elsewhere, issues relevant to child protection are a permanent item on the agenda of political debate. Attention in recent times in this State has focused on the release of the Child Death Review Team 2000-01 Annual Report which found, among other things, that '21 children who died of abuse, neglect or [in] suspicious circumstances, came from high risk families and all their families had contact with a combination of health, police or welfare agencies before their deaths'.¹ On the same day the Minister for Community Services, the Hon Faye Lo Po MP, announced that drug addicted parents whose children have been removed by the Department of Community Services [DOCS] will have to undergo drug tests before their children are returned to their care. It was reported that a 12 month trial is to start from early 2002 at two of the State's busiest Children's Courts, in Campbelltown and Newcastle.²

Other recent developments include the decision on 28 August 2001 of the NSW Industrial Relations Commission in "A" v *Commission for Children and Young People*³ which could have serious implications for the operation of the employment screening system under the *Child Protection (Prohibited Employment) Act 1998*. On the other hand, on 7 September 2001 a child sex offender was convicted under the same legislation for falsely signing a statement that said he had no convictions for serious sex offences in order to remain in child-related employment.⁴

More relevant to the Community Services Commission is the debate concerning the Commission's investigatory jurisdiction over child protection matters. The matter was raised in Crown Solicitor's advice received by the Minister for Community Services in November 2000. In a review of the relevant legislation in 1999, the NSW Law Reform Commission had recommended reform.⁵ On 8 March 2001 and again on 11 April 2001 the Opposition spokesman on community services, Brad Hazzard MP, introduced a Private Member's Bill along the lines suggested in those recommendations – the Community Services (Complaints, Reviews and Monitoring) Amendment (Application) Bill 2001. For its part, the Government opposed the Bill on the ground that the jurisdictional matter generally is the subject of review by Cabinet Office. Further to this, a proposal to merge the Community Services Commission with the Ombudsman's Office has been released to stakeholder organisations.

The purpose of this paper is twofold: first, it presents an overview of the major legislative

¹ NSW Commission for Children and Young People, *Media Release*, 'Domestic violence, drugs and alcohol key risk factors in child abuse deaths', 31 October 2001.

² 'Parents face drug tests', *The Daily Telegraph*, 31 October 2001.

³ [2001] NSWIRComm 194.

⁴ NSW Commission for Children and Young People, *Media Release*, 7 September 2001.

⁵ NSW Law Reform Commission, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)*, Report 90, July 1999, p 117.

changes in the field of child protection in recent years; secondly, it sets out the structures, powers and functions of the relevant oversight or supervisory agencies, with a view to producing something like a 'snap-shot' of the system currently in place. Both the paper's description of that system, as well as its analysis of the reforms which have occurred in recent years, are set against the background of the recommendations made by the historic Wood Royal Commission's paedophile inquiry, which reported in August 1997.

The present publication builds on and consolidates the work of those papers already published by the NSW Parliamentary Library which discussed several reforms, prior to their enactment, arising from the Wood Royal Commission.⁶ The emphasis in this paper is on the nature and operation of these reforms now they have been enacted and proclaimed to commence.

2. BACKGROUND AND OVERVIEW

2.1 Recent administrative and legislative reforms

In a media release of 4 September 2001, the Minister for Community Services confirmed the Carr Government's commitment to child protection, stating:

Our commitment to the children and families of NSW is unequivocal. Not only have we given an unprecedented increase in total funding to DOCS and non-government agencies, we have introduced innovative reforms and new legislation, which will continue to make a positive difference for years to come.⁷

The Minister also outlined the Carr Government's achievements in the field of child protection. Among the administrative initiatives noted by the Minister were the following:

- provision of recurrent funding for the permanent establishment of 9 co-located Joint Investigative Response Teams (JIRTS) made up of specially trained police and DOCS caseworkers;
- creation of the NSW Police Service Child Protection Enforcement Agency to conduct criminal investigations of allegations of serious child abuse;
- establishment of the Helpline to provide a centralised State-wide assessment and referral service 24 hours a day; and
- allocation of \$54.2m for a new whole-of-government early intervention/preventative strategy called Families First, which aims to strengthen and extend the skills of parents

⁶ M Swain, *Registration of Paedophiles*, No 12/1997; R Simpson, *Initial Responses to the Wood Royal Commission Report on Paedophilia*, No 8/1998; R Simpson, *The Commission for Children and Young People Bill 1998 and other child protection initiatives*, No 14/1998; and R Simpson, *'Megan's Law' and Other Forms of Sex-offender registration*, No 22/1999; and M Swain, *Teacher Registration*, No 6/2000.

⁷ Minister for Community Services, *Media Release*, 'Carr Government remains committed to child protection', 4 September 2001.

with children under 8 years. The strategy includes early intervention initiatives such as Volunteer Home Visiting Services, Supported Playgroups, Family Worker Services and Family Centres.⁸

In recent years the system of child protection in NSW has indeed been the subject of substantial legal and administrative reform. A Commission for Children and Young People has been established, as has a system for employment screening in child related employment. Also in operation since 15 October 2001 is a Child Protection Register, the first of its kind in Australia, containing information on persons convicted of child sex offences, as well as certain other offences where the victim was a child.

2.2 Two landmark reports

Two landmark reports stand behind these and other 'child protection' reforms. Particularly influential in the making of the *Children and Young Persons (Care and Protection) Act 1998* was the December 1997 report of the Community Welfare Legislation Review, headed by Associate Professor Patrick Parkinson. That report was the culmination of three years of consultation into the legislation governing child care and protection in NSW. Most other recent reforms can be traced back to the findings and recommendations of the historic Wood Royal Commission's paedophile inquiry, which reported in August 1997.

That both these reports tapped into an already existing debate about children's rights and child protection in NSW and beyond should not be ignored. For example, in 1992 the Usher Report recommended the creation of a position of Children's Guardian⁹ and, two years on, the NSW Child Protection Council sought to have a Commissioner for Children appointed.¹⁰ In September 1996 the NSW Legislative Council Standing Committee on Social Issues reported on its inquiry into children's advocacy and recommended, among other things, that an Office of the Status of Children and Young People be established within the Premier's Department.¹¹ Then, in September 1997, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission released their broad ranging report into children and the legal process. The field of children's rights and child protection is, in fact, thick with inquiries and recommendations.

Nonetheless, the reports of the Community Welfare Legislation Review and the Wood Royal Commission were undoubtedly the major catalysts for reforming the system of child

⁸ Minister for Community Services, n 7.

⁹ Ministerial Review Committee, *Review of Substitute Care Services in NSW, A Report to the Minister for Health and Community Services, the Hon JP Hannaford, MLC*, January 1992.

¹⁰ NSW Child Protection Council, *Systems Abuse: Problems and Solutions*, February 1994.

¹¹ Parliament of NSW Legislative Council, Standing Committee on Social Issues, *Inquiry into Children's Advocacy*, Report No 10, September 1996. The Committee also recommended that the Premier urge the Prime Minister to create the position of Children's Commissioner within the Human Rights and Equal Opportunity Commission.... Note that the Office of Children and Young People was established in April 1997 and is located within the Cabinet Office.

protection in this State. The Wood Royal Commission inquiry into paedophilia, in particular, has resulted in a raft of legislative and administrative initiatives.

2.3 Overview of the child protection system in NSW in 2001

Producing a 'snap-shot' of the child protection system is never easy, in part because it is so multi-faceted, but also because it appears to be in a permanent state of flux and review. In the modern world, where the state plays the central role in child protection, providing the services and assistance required by children in these circumstances is a huge and complex undertaking involving a plethora of government and non-government agencies. No less daunting is the task of supervising this provision of services and assistance.

The Wood Royal Commission had a very clear idea of the organisational model required to achieve this purpose, in the form of a powerful co-ordinating body called a Children's Commission, with robust investigative, advocacy and monitoring powers and functions. That model did not gain the approval of stakeholders in the community services sector and it is not reflected in the present legislative arrangements. Instead, there is a combination of oversight and supervisory agencies working in this child protection field. In effect, a principle of functional division of labour has been applied in the post Royal Commission carve-up of responsibilities in the child protections field. The Children's Commission is an advocate body for children generally; the Children's Guardian works on behalf of children in out-of-home care; the Child Death Review Team has jurisdiction over systemic research into child deaths; prior to November 2000 when Crown Solicitor's advice to the contrary was received, it was assumed that the Community Services Commission had retained its complaints investigation jurisdiction in the area of child protection; and the NSW Ombudsman has also acquired jurisdiction in that area, at least as far as employment screening is concerned. True to the protean nature of the child protection system, there is currently in place a Cabinet Office proposal under which the Community Services Commission would cease to be an independent agency and would be incorporated into the Ombudsman's Office.

Other bodies with function-specific duties in this field include the Health Care Complaints Commission. Of these various organisations, the Ombudsman, the Community Services Commission and the Health Care Complaints Commission all have the complaints investigation powers required to characterise them as 'watchdog' bodies. The other organisations are harder to characterise in this way. They have certain oversight, supervisory and advocacy roles to play on behalf of their defined clientele. For the purposes of this paper, all the agencies discussed here are characterised in these broad terms.

These oversight, supervisory and advocacy agencies are really the tip of a very large iceberg which constitutes the complex and multi-faceted system of child protection in NSW. The best overview of that system is found in the 2000 edition of the NSW Interagency Guidelines for Child Protection Intervention which sets out the roles and responsibilities of the various agencies concerned. The 'lead responsibility' in providing and co-ordinating the response where intervention is necessary for the care and protection of children lies with DOCS. However, the Guidelines also recognise that this lead role does not detract from the

‘joint responsibility’ of all other relevant agencies.¹²

In summary, the roles played by the various agencies can be divided into 4 categories: (a) policy advice and formulation; (b) policy application and provision of services, assistance etc; (c) oversight, supervision and advocacy functions in respect to the child protection system; and (d) resolution of legal disputes. The main agencies which attach to these categories are as follows:

(a) *Policy advice and formulation*
Office of Children and Young People (Cabinet Office)

(b) *Application of policy and provision of services etc*¹³
Department of Community Services
NSW Police Service
NSW Health
Department of Education and Training
Department of Corrective Services
Department of Juvenile Justice
NSW Department of Sport and Recreation

(c) *Oversight and supervision of the child protection system*¹⁴
Commission for Children and Young People
Children’s Guardian
Child Death Review Team
Community Services Commission
NSW Ombudsman

(d) *Resolution of legal disputes*¹⁵
Children’s Court
Local, District and Supreme Courts
Administrative Decisions Tribunal
NSW Industrial Relations Commission

The focus in this paper is on those agencies in category (c). The multifaceted interface of government agencies is represented diagrammatically at Appendix A.

¹² *NSW Interagency Guidelines for Child Protection Intervention*, 2000 edition, p 4.

¹³ The various Departmental responsibilities include the provision of practical assistance to children at risk, plus reporting and investigation duties.

¹⁴ As noted, through its work of investigating and promoting health care, as well as in the resolution of complaints, the Health Care Complaints Commission also has a limited supervisory role to play in the child protection system. That role is not considered in detail in this paper.

¹⁵ Also significant in this process is the Director of Public Prosecutions who conducts criminal and related proceedings in respect to sexual and other serious offences against children.

3. TIME LINE OF MAJOR EVENTS IN THE CHILD PROTECTION REFORM PROCESS

- January 1992 Release of *A Report to the Minister for Health and Community Services, the Hon JP Hannafor MLC*, from the committee set up to review Substitute Care Services in NSW, commonly known as *The Usher Report*.
- April 1993 *Community Services (Complaints, Reviews and Monitoring) Act 1993* assented to. The Act established the Community Services Commission which commenced operation in October 1994.
- December 1994 The terms of reference of the Wood Royal Commission into the NSW Police Service were extended to include an investigation of the activity and protection of paedophiles.
- June 1996 The Child Death Review Team established by the *Children (Care and Protection) Amendment Act 1995*. The impetus for reform came from a 1995 NSW Child Protection Council report, *Preventing Child Homicide*.
- September 1996 The Legislative Council Standing Committee on Social Issues released *Report No 10, Inquiry Into Children's Advocacy*.
- April 1997 The Office of Children and Young People established in the Cabinet Office to provide, among other things, expert policy advice on issues relevant to children.
- May 1997 Release of the Wood Royal Commission final report into police corruption.
- August 1997 Release of the Wood Royal Commission final report into paedophilia
- November 1997 The Ombudsman Amendment (Child Protection and Community Services) Bill and the Child Protection (Prohibited Employment) Bill were introduced into Parliament as part of the Government's response to the Royal Commission's recommendations on employment screening.
- December 1997 Release of the report of the Community Welfare Legislation Review, headed by Associate Professor Patrick Parkinson, titled *Review of the Children (Care and Protection) Act 1987: Recommendations for Law Reform*.
- December 1997 A Green Paper – *A NSW Children's Commission* – was released by the Office of Children and Young People in the Cabinet Office. This resulted in 160 written submissions from such bodies as the Council

of Social Services NSW (NCOSS), the Community Services Commission (CSC), the Child Protection Council (CPC) and the NSW Police Association.

- July 1998 Slightly revised versions of the Ombudsman Amendment (Child Protection and Community Services) Bill and the Child Protection (Prohibited Employment) Bill were introduced into Parliament as part of a package of draft exposure Bills which also included the Commission for Children and Young People Bill.
- August 1998 The period of public comment which followed included the holding of a Public Forum on the proposed legislation in the Parliament House Theatre.
- 21 October 1998 Three cognate Bills were introduced into Parliament – the Commission for Children and Young People Bill (No 2); the Child Protection (Prohibited Employment) Bill (No 3); and the Ombudsman Amendment (Child Protection and Community Services) Bill (No 3).
- 11 November 1998 Also a part of this reform process was the introduction into Parliament on 11 November 1998 of the Children and Young Persons (Care and Protection) Bill which included a proposal to establish the position of a Children’s Guardian.¹⁶
- 8 December 1998 The *Commission for Children and Young People Act 1998*, the *Child Protection (Prohibited Employment) Act 1998*; and the *Ombudsman Amendment (Child Protection and Community Services) Act 1998* assented to but not proclaimed to commence.
- 14 December 1998 The *Children and Young Persons (Care and Protection) Act 1998* assented to but not proclaimed to commence.
- 7 May 1999 The *Ombudsman Amendment (Child Protection and Community Services) Act 1998* proclaimed to commence, together with the Ombudsman Regulation 1999 for the purpose of prescribing certain health bodies as designated agencies under Part 3A (Child Protection) of the Act.¹⁷
- 31 May 1999 The *Commission for Children and Young People Act 1998* proclaimed to commence, except for Part 7 (Employment Screening)

¹⁶ NSWPD, 11 November 1998, p 9758.

¹⁷ The Regulation was subsequently amended on 1 September 1999 and 14 April 2000, further prescribing certain bodies or persons as designated government or non-government agencies for the purpose of Part 3A of the Act.

- and Schedule 2.2 (Amendment of other Acts and Regulations).
- July 1999 Release of the NSW Law Reform Commission's Report No 90, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)*.
- 17 April 2000 Staged commencement of the *Children and Young Persons (Care and Protection) Act 1998* begins.
- 1 June 2000 The Child Protection (Offenders Registration) Bill introduced into Parliament.
- 21 June 2000 The Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill 2000 introduced into Parliament by the Minister for Community Services. Although the Bill proceeded through the Second Reading stage, the Minister emphasised that it was intended as an Exposure Draft to stimulate public debate. The Bill would have amended the *Children and Young Persons (Care and Protection) Act 1998* to place greater emphasis on the need for permanency planning for abused and neglected children who have been removed from their birth parents. The Bill was withdrawn on 27 June 2001 when the Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill 2001 (No 2) was introduced.
- 27 June 2000 The *Child Protection (Offenders Registration) Act 2000* assented to but not proclaimed to commence.
- 3 July 2000 The *Child Protection (Prohibited Employment) Act 1998* proclaimed to commence. Also, uncommenced provisions (Part 7 and Schedule 2.2) of the *Commission for Children and Young People Act 1998* proclaimed to commence. Commencing on the same day was the Commission for Children and Young People Regulation 2000 relating to hearings for special inquiries undertaken by the Commission, plus excluding vexatious, false or misconceived allegations from the definition of disciplinary proceedings for the purpose of Part 7 of the Act (Employment screening).
- 15 September 2000 Commencement of the provisions of the *Child Protection (Offenders Registration) Act 2000* that amend the *Commission for Children and Young People Act 1998* so as to enable the Commission to compel production by government agencies of information relevant to the assessment of whether applicants under certain Acts pose a risk to the safety of children. In effect, section 14A of the *Commission for Children and Young People Act 1998* was proclaimed to commence.
- 17 November 2000 Section 178 (Appointment of Children's Guardian) of the *Children*

and Young Persons (Care and Protection) Act 1998 proclaimed to commence.

November 2000 Crown Solicitor's advice to the Minister for Community Services questioning the Community Services Commission's jurisdiction.

December 2000 Office of the Children's Guardian established and the first Children's Guardian, Linda Mallett, was appointed in January 2001. However, the key sections of the *Children and Young Persons (Care and Protection) Act 1998*, setting out the powers and functions of the Children's Guardian, are yet to commence.

20 June 2001 The Child Protection (Offenders Registration) Amendment Bill 2001 introduced into Parliament.

27 June 2001 The Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill 2001 (No 2) introduced into Parliament.

17 July 2001 The *Child Protection (Offenders Registration) Amendment Act 2001* assented to but not proclaimed to commence.

15 October 2001 The *Child Protection (Offenders Registration) Act 2000*¹⁸ and the *Child Protection (Offenders Registration) Amendment Act 2001* proclaimed to commence.

4 December 2001 The Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill 2001 (No 2) passed through both Houses of Parliament.

4. THE COMMISSION FOR CHILDREN AND YOUNG PEOPLE

4.1 Overview of the findings of the Wood Royal Commission inquiry into paedophilia

The terms of reference of the Wood Royal Commission into the NSW Police Service were extended in December 1994 to include an investigation of activity and protection of paedophiles. Later extensions to these terms of reference removed any doubt concerning the Royal Commission's authority to

inquire into the adequacy of the existing laws and of the investigatory and trial processes to deal with crimes involving paedophilia and pederasty, and into the sufficiency of the monitoring and screening processes of government departments

¹⁸ Except for Schedule 1.2 [2].

and agencies to protect children in their care or under their supervision from sexual abuse.¹⁹

In May 1997, in Volume I of its final report on corruption, the Royal Commission found that

a very disturbing picture of neglect, indifference and concealment has emerged during the investigation extending to almost every aspect of the preventative, investigative and prosecution process. Serious deficiencies in existing structures and procedures for the protection of children by those agencies and institutions responsible for their care have been highlighted along with an appalling lack of co-ordination of effort or commitment.²⁰

In August 1997, in Volume IV of its paedophile inquiry report, the Royal Commission concluded in summary that while

the problem of child abuse is itself complex and very serious, the system for its management and for the protection of children is enormously complicated and fragmented, notwithstanding the Interagency Guidelines²¹ which were designed to establish an integrated case plan for individual cases.²²

The Royal Commission proceeded to outline a number of 'system deficiencies' and 'complicating factors', stating that 'the nature and extent' of these deficiencies were a 'matter for very deep concern'. One deficiency noted by the Royal Commission was

the absence of any single agency having a responsibility or capacity to oversight the interests of all the agencies and institutions, governmental or otherwise, having an involvement with children, and the lack of a legislative interface between child protection and juvenile justice.²³

In effect, the Royal Commission found that a multitude of agencies and organisations

¹⁹

Royal Commission into the NSW Police Service, *Final Report Volume IV: The Paedophilia Inquiry*, August 1997, p 570.

²⁰

Royal Commission into the NSW Police Service, *Final Report Volume 1: Corruption*, May 1997, p 12.

²¹

The reference is to guidelines produced by the NSW Child Protection Council in 1991 and updated in February 1997. There is now a 2000 edition of the *NSW Interagency Guidelines for Child protection Intervention*.

²²

Royal Commission into the New South Wales Police Service, n 19, p 606.

²³

Royal Commission into the New South Wales Police Service, n 19, p 607.

existed with an interest in child protection and that the relationship between these bodies could be bewildering in its complexity. As it was pointed out in an earlier Briefing Paper, the Royal Commission found that is was 'difficult sometimes to determine which organisation carries out which function, and who supervises whom'.²⁴ The Royal Commission's key response to this finding was its recommendation that a supervisory agency be created in the field of child protection, in the form of a Children's Commission. This Commission was to have

appropriate powers and capacity to oversee and co-ordinate the delivery of service for the protection of children from abuse (including sexual, physical and emotional abuse and neglect). It should be set up in the context of rationalisation of the roles of existing agencies and it should have more than a mere advisory role...Importantly, the Commission should have actual and perceived independence from government and the relevant departments and agencies delivering services, so that it can report fearlessly and objectively on matters within its field.²⁵

In terms of the rationalisation of the bureaucratic structure of the child protection system in place in NSW, the Royal Commission recommended that the proposed Children's Commission 'would take over the functions previously carried out by the Community Services Commission (as they relate to children) and all of the existing functions of the Child Protection Council'.

4.2 The structure, power and functions of the Children's Commission as recommended by the Wood Royal Commission

The Royal Commission considered three organisational models for the Children's Commission and recommended the third of these, as follows:

A separate Children's Commission be established, with responsibility for co-ordinating child protection activities, but with [child protection and disciplinary] investigative functions...being vested in other agencies.

The Royal Commission believed that this option would best enable the Children's Commission to fulfil its functions by

preserving the necessary independence and authority to monitor and advise on the performance of the relevant departments and agencies involved in child protection, to assist in policy development, to collect intelligence, to

²⁴

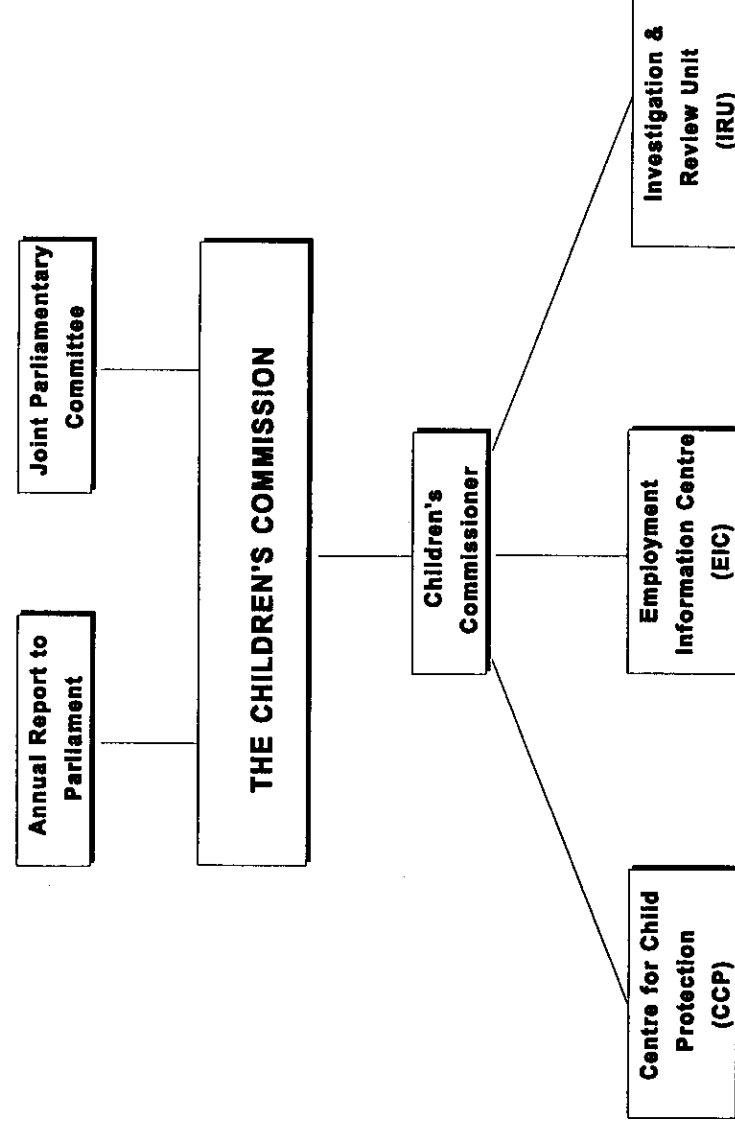
R Simpson, *Initial Responses to the Wood Royal Commission Report on Paedophilia*, NSW Parliamentary Library Research Service Briefing Paper No 8/1998, p 5.

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Royal Commission into the New South Wales Police Service, *Final Report Volume V: The Paedophilia Inquiry*, August 1997, pp 1293-1294.

assist in the dissemination of information concerning suspected child abuse and offenders, and to perform an important role in making administrative decisions as to whether a person working, or seeking work in positions involving close contact with children, are suitable for that purpose, without being diverted by an investigative/disciplinary role.²⁶

The Royal Commission's preferred structure of the Children's Commission was represented diagrammatically as follows:²⁷



The proposed **Centre for Child Protection (CCP)** was to have had responsibility for matters such as research, education and training, community awareness, and co-ordination of the activities of the various departments and agencies involved in child protection, and for acting as a child's advocate in relation to matters of policy and planning. The proposed **Employment Information Centre (EIC)** was to have had responsibility for administering the child-related employment screening scheme, including the issuing of unacceptable risk certificates to persons seeking paid or voluntary work in positions prescribed by regulation, or already occupying such positions, in each case involving the care or supervision of children. The proposed **Investigation and Review Unit (IRU)** was to have had responsibility for monitoring systemic issues and complaints concerning the care and protection of children, as well as reviewing the position of children in foster or substitute

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Royal Commission into the New South Wales Police Service, n 25, p. 1296.

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Royal Commission into the New South Wales Police Service, n 25, p. 1298.

care and providing assistance to the EIC with investigations. As a part of the total restructure, the Royal Commission proposed that departmental investigation into allegations of child sexual abuse in relation to Department of Community Services, Department of Juvenile Justice, Department of Sport and Recreation employees, as well as Department of School Education employees (unless a Teacher Registration Authority with disciplinary and investigative powers was created) was to be transferred to the Office of the Ombudsman.

The Royal Commission proposed that the Children's Commissioner have authority to perform the role of a Special Guardian in relation to children in care to ensure that their needs are properly addressed. This Special Guardian was to have standing to appear in the Children's Court in relation to any relevant application, as well as the right to seek a review of any orders made.²⁸ The foundation of an Advisory Committee for the Children's Commission, including experts drawn from relevant disciplines, was also proposed.

4.3 The Government's response to the recommendations of the Wood Royal Commission

The process of consultation which accompanied the Government's response to these recommendations of the Royal Commission was discussed in detail in the NSW Parliamentary Library Briefing Paper No 14/1998 entitled, *The Commission for Children and Young People Bill 1998 and other child protection initiatives*. In December 1997 a Green Paper – *A NSW Children's Commission* - was released by the Office of Children and Young People in the Cabinet Office which noted that there were some potential problems with a Children's Commission as proposed by the Royal Commission. Particular concern was expressed about the proposed investigation and review functions of a Children's Commission, including potential conflicts involved in locating advocacy and complaints handling functions within the same organisation. The Green Paper observed:

While an advocate promotes the needs and interests of the group it represents, the impartiality of a complaints handler must be beyond doubt. For a complaint to be properly handled, the agency must be completely impartial and know the potential strengths of any argument from both the complainant and the agency. Locating the two functions within the same body could compromise the performance of one or both of the important advocacy and complaints handling functions. This could potentially undermine the overall effectiveness and credibility of the Children's Commission.²⁹

Further, while recognising the potential benefit of a 'one stop shop' for children, the Green Paper questioned the effectiveness of a complaints handling system based on what it called

²⁸ Royal Commission into the New South Wales Police Service, n 25, p. 1302.

²⁹ The Office of Children and Young People, *A Children's Commission for NSW – Green Paper*, December 1997, p 18.

'population groups' (children), as against one based on service systems (for example, children with disabilities). If the investigations and review functions were allocated to the Children's Commission, the Green Paper said 'it would cut across the operations' of such existing bodies as the Ombudsman, the Community Services Commission and the Health Care Complaints Commission, all of which have jurisdictions based on service delivery. Moreover, given the complexity of the services at issue, the Green Paper said it was 'arguable that knowledge of a particular system provides a stronger basis for understanding and resolving complaints'.

The Green Paper then outlined its preferred option for configuring investigation and review functions of the proposed Children's Commission, as follows:

to retain existing arrangements and streamline their inter-relationship. Under this option, the Community Services Commission would keep its existing jurisdiction, but would be overseen by the Ombudsman. This would enable the Ombudsman to handle those complaints which cross jurisdictions.³⁰

It was this option which was set out in the Ombudsman Amendment (Child Protection and Community Services) Bill, introduced into Parliament on 25 November 1997. A slightly revised version of the Bill was introduced on 1 July 1998 as part of a package of draft exposure Bills which also included the Child Protection (Prohibited Employment) Bill (No 2) and the Commission for Children and Young People Bill.

Summarising the Government's response, Associate Professor Patrick Parkinson commented that, while the Premier had announced in September 1997 his in-principle acceptance of the Royal Commission's recommendation for a Children's Commission, 'his advisers were rather more reluctant to endorse the Wood model'. Parkinson explained:

The government rejected the idea that the Children's Commission should have a range of functions in the investigation of complaints about child protection services and in the review of the situation of children in care. Instead, the Community Services Commission was retained and various investigatory functions in relation to child abuse allegations against employees were given to the Ombudsman. For the first time, the Ombudsman was given a role in relation to non-government services... Instead of having specific functions in relation to child protection, the Commission for Children and Young People is given a broad function to 'promote and monitor the overall safety, welfare and well-being of children in the community' as well as numerous other functions including to promote the participation of children in the making of decisions that affect their lives. The government resisted the notion that there should be a special centre for child protection within the

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The Office of Children and Young People, n 29, p 19.

commission to continue the work of the Child Protection Council...but the Council will be abolished and its staff transferred to the commission.³¹

4.4 The Commission for Children and Young People Act 1998 [CCYP Act]

The Commission for Children and Young People [the Children's Commission] commenced its operations in June 1999, with Gillian Calvert appointed as the first Commissioner. This followed the passing of the *CCYP Act* through Parliament, with bipartisan support. In its first annual report, the Children's Commission described itself as an 'independent organisation that reports directly to the Parliament of NSW'.³² It also acknowledged the Royal Commission's report as the major catalyst for the establishment of the Children's Commission. As the Minister had acknowledged in her Second Reading speech, 'the proposed commission varies somewhat from that recommended by the Royal Commission. These variations are largely the result of the views put during consultations over the past nine months'.³³ While supporting the Bill, the Opposition described the proposed Children's Commission as 'a compromise of various viewpoints'.³⁴

Although the Act is called the *Commission for Children and Young People Act*, express reference to 'young people' is in fact confined to Act's title. Moreover, the word 'children' is defined to mean persons under 18 years of age. This approach is followed in this paper where reference to 'children' can be taken to incorporate 'young people'. Reference is made therefore the NSW Children's Commission.

4.5 Constitution of the Children's Commission – independence and accountability

The Wood Royal Commission envisaged a 'supervisory' body with, among other things, the 'necessary independence and authority to monitor and advise on the performance of the relevant departments and agencies involved in child protection'. It is clear that the Children's Commission does not have the powers proposed by the Royal Commission. What then of its independence?

The Commission is constituted under the *CCYP Act* as a statutory corporation, having the functions conferred or imposed on it 'by or under this or any other Act'.³⁵ The Children's Commissioner is appointed by the Governor for a term of up to 5 years and 'may not be appointed for more than 2 successive terms of office'.³⁶ In other words, a Commissioner

³¹ P Parkinson, 'Child protection law reforms in NSW' (1999) 13 *Australian Journal of Family Law* 1.

³² NSW Commission for Children and Young People, *Annual Report 1999-2000*, p 10.

³³ *NSWPD*, 21 October 1998, p 8740.

³⁴ *NSWPD*, 27 October 1998, p 9076.

³⁵ *Commission for Children and Young People Act 1998*, section 4.

³⁶ *Commission for Children and Young People Act 1998*, section 5 (3). In the original exposure

may serve for a maximum term of 10 successive years. In the original exposure draft the Commissioner's appointment was for no more than 2 successive terms of 3 years (clause 6 (3)); in Bill (No 2) the Commissioner's appointment was for no more than 2 successive terms of 4 years. The extension to a 5 year term was the result of a successful amendment moved by the Greens, in part on the basis that it was consistent with the terms of appointment of other comparable commissioners.³⁷ Security of tenure, essential to independence, is also afforded by a section 5 (4) which provides that the Governor 'may remove the Commissioner from office only for misbehaviour, incapacity or incompetence...'

In some cases, notably in respect to the ICAC, the Ombudsman and the Auditor General, appointment is subject to approval by the relevant Parliamentary Joint Committee. This is not the case for the Children's Commissioner. Nor for that matter is it a condition of appointment for the Health Care Complaints Commissioner.³⁸ The Children's Commissioner's terms of appointment and removal are compared with those for certain other NSW statutory office holders in Table 1 at Appendix B.

Expert Advisory Committee: Consistent with the recommendation 132 of the Wood Royal Commission, the Children's Commission is to be advised by an Expert Advisory Committee consisting of up to 8 members with child-related expertise in the areas of health, education, child protection, child development, disabilities, the law, employment, sport or the arts. Appointment to the Expert Advisory Committee must be 'approved by the Minister on the recommendation of the Commissioner'.³⁹ On the other hand, the Children's Commission can also appoint other advisory committees, the membership of which need not be approved by the Minister.⁴⁰

Reporting to Parliament: In relation to the accountability of the Children's Commission, it is required to report to Parliament annually⁴¹ and is subject to oversight by a joint parliamentary committee.⁴² These arrangements are consistent with those for the major watchdog agencies, the ICAC, the Ombudsman and the Health Care Complaints Commission.

draft the Commissioner's appointment was for no more than 2 successive terms of 3 years (clause 6 (3)); in Bill (No 2) the Commissioner's appointment was for no more than 2 successive terms of 4 years. The extension to a 5 year term was the result of a successful amendment moved by the Greens -- NSWPD, 18 November 1998, p 10107.

³⁷ NSWPD, 18 November 1998, p 10107.

³⁸ That it should be the case for the Community Services Commission was the subject of a recommendation by the NSW Law Reform Commission in its July 1999 report, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)*.

³⁹ *Commission for Children and Young People Act 1998*, section 8 (1) and (2).

⁴⁰ *Commission for Children and Young People Act 1998*, section 8 (3).

⁴¹ *Commission for Children and Young People Act 1998*, section 23.

⁴² *Commission for Children and Young People Act 1998*, sections 27-30.

Administrative arrangements: The Children's Commission is an independent organisation - a Schedule 1 Department under the *Public Sector Management Act 1988* - which reports directly to the Premier. For budgetary purposes it is dealt with under the Premier's Department.⁴³

4.6 Principles governing the Children's Commission – safety, welfare and well-being of children

These are outlined in Part 3 of the *CCYP Act*. Section 10 sets out the 'principles governing' the Commission's work, whereas section 11 sets out its 'principal functions'. As to the principles governing the work of the Children's Commission, these include giving 'serious consideration' to the views of children, as well as recognising the importance of 'co-operative relationships' between children and their families and their community.

Most significant, perhaps, is the principle that 'the safety, welfare and well-being of children are the paramount considerations' in the Commission's work. Inclusion of the words 'safety' and 'welfare' in section 10 was in fact the result of a Legislative Council amendment,⁴⁴ which followed on from widely expressed concerns that the functions of the Children's Commission were being formulated in such a way as to neglect the core concern with 'child protection'. During the Public Forum held in Parliament House on 10 August 1998, for example, it was said that the draft Bill had no focus on child protection which, considering that the Children's Commission grew out of an inquiry into paedophilia in NSW, was considered a surprising omission.⁴⁵ Both before and during the parliamentary debate concern was expressed that the Children's Commission would absorb the work of the Child Protection Council, yet the Commission itself would lack an explicit focus on child protection. According to Associate Professor Parkinson:

There will inevitably be concerns that the Government is abolishing the Child Protection Council without replacing it and these reforms will weaken, rather than strengthen the Government's capacity to protect children from abuse and neglect.⁴⁶

For the Opposition, the Hon Patricia Forsythe MLC said that, while the Children's

⁴³ NSW Treasury, *Budget Estimates 2001-2002, Budget Paper No 3, Volume 1*, pp 14-16. By way of a counsel of perfection, it has been suggested that, ideally, the level of resourcing for an independent Children's Commission should be decided by Parliament 'rather than by administrators within a government department': Youth Affairs Council of Victoria, *Are you listening? The case for a Victorian Children and Young People's Commission*, 2001, p 14.

⁴⁴ NSWPD, 18 November 1998, p 10109.

⁴⁵ R Simpson, *The Commission for Children and Young People Bill 1998 and other child protection initiatives*, NSW Parliamentary Library Briefing Paper No 14/1998, p 14.

⁴⁶ NSWPD, 12 November 1998, p 9841.

Commission fell 'well short of being the powerful watchdog that many people held to be ideal', its establishment was nonetheless a 'big step in achieving a co-ordinated whole-of-government response on children'. She went on to add, however, that without a reference to 'child protection' the Commission 'seems to lack a fundamental goal'.⁴⁷ The case for the relevant amendments to section 10 was made as follows:

It was intended that the Children's Commission would absorb the work of the Child Protection Council and the Child Death Review Team. It is appropriate when dealing with issues such as safety – which is fundamental to the work of the Child Death Review Team – and welfare, which has been fundamental to the work of the Child Protection Council, not simply to use the term 'wellbeing'.⁴⁸

Accepting the amendment on behalf of the Government, the Hon JW Shaw MLC, explained that the Commission was to have a 'broad focus on issues relating to children and young people; its sole focus will not be child protection'. Indeed, no place was found within the Commission for the **Centre for Child Protection** proposed by the Wood Royal Commission. Section 12 of the *CCYP Act*, does provide, however, that 'In exercising its functions, the Commission is to give priority to the interests and needs of vulnerable children'.

4.7 Overview of the principal functions of the Children's Commission

The principal functions of the Children's Commission can be outlined as follows:

- promoting the participation of children in decision making processes and encouraging government and non-government agencies to seek the participation of children;
- promoting and monitoring the overall safety, welfare and well-being of children and monitoring trends in complaints;
- conducting special inquiries into issues affecting children;
- making recommendations to agencies on legislation, policies, practices and services affecting children;
- conducting, promoting and monitoring training, public awareness and research, and promoting the provision of information and advice to assist children;
- monitoring screening for child-related employment, including auditing compliance with the procedures and standards of the Working With Children Check;
- developing and administering a voluntary accreditation scheme for those working with sex offenders.⁴⁹

Information on the work of the Children's Commission in respect to all of these functions is to be found in the Annual Reports for 1999/00 and 2000/01. For example, on the

⁴⁷ *NSWPD*, 12 November 1998, p 9774.

⁴⁸ *NSWPD*, 18 November 1998, p 10108.

⁴⁹ *Commission for Children and Young People Act 1998*, section 11.

monitoring and training front, the latest Annual Report notes that the Commission, in conjunction with other agencies, developed the training package to assist in the implementation of the *CCYP Act*,⁵⁰ in regard to making recommendations about legislation and policy, the Commission reported that it made submissions on 14 NSW Bills and that a number of its suggestions were adopted, including the recommendation that children in care should be able to sign their care plans was adopted as part of the Regulations under the *Children and Young Persons (Care and Protection) Act 1998*.⁵¹ The Commission's work in relation to a number of its functions can be explored in more detail.

Child-related employment screening and the Children's Commission: The system of child-related employment screening which is now in place is discussed in detail in a later section of this paper. In summary, the functions the Children's Commission *may* exercise in this regard can be outlined as follows:⁵²

- collection and maintenance of a database of relevant AVOs and completed disciplinary proceedings;
- where there is a memorandum of understanding with the Commission, giving access to information held on that database for the purpose of employment screening by employers (or employer related bodies);
- by agreement, conducting employment screening on behalf of employers;
- making recommendations to the Minister on relevant standards and procedures;
- promoting public awareness and providing training and advice as to standards and procedures; and
- monitoring and auditing compliance with procedures and standards.

The exercise of these functions is subject to Ministerial direction, and the Commission is required to comply with any such direction.⁵³ In its 2000/01 Annual Report the Children's Commission noted that, in July 2000, the Working With Children Check was introduced to implement this system, in the first year of which over 223,000 employment checks were undertaken by the Commission and its Approved Screening Agencies. Sixty seven people were rejected for employment on the basis of these checks and, according to the Annual Report, the Commission's Employment Screening System 'enabled these requests to be processed in a timely manner responding to the needs of individual employers across the State'.⁵⁴ Report is also made of various training, public awareness and monitoring initiatives undertaken by the Commission.

Voluntary accreditation scheme: Under the legislation the Children's Commission may

⁵⁰ The Commission for Children and Young People, *Annual Report 2000-2001*, p 17.

⁵¹ The Commission for Children and Young People, *Annual Report 2000-2001*, p 33.

⁵² *Commission for Children and Young People Act 1998*, section 36 (1).

⁵³ *Commission for Children and Young People Act 1998*, section 36 (2).

⁵⁴ The Commission for Children and Young People, *Annual Report 2000-2001*, p 40.

also develop and administer a voluntary accreditation scheme for those working with sex offenders. According to the 2000/01 Annual Report such a scheme was developed by the Commission in that reporting year and is anticipated to commence in early 2002. The Annual Report explains: 'The accreditation scheme is not an alternative or replacement of existing professional bodies. It is a system to establish and support appropriate professional practice in this highly specialised area of work'.⁵⁵

The Children's Commissioner had previously informed the Parliamentary Joint Committee that the proposed scheme had 3 levels of accreditation: associates' accreditation; clinical accreditation; and supervisors' accreditation. By way of example, applicants in the last 'supervisors' category would have to satisfy all the requirements for the first 2, plus have a minimum of 3 years practice since the date of their 'clinical accreditation'.

4.8 The power to conduct special inquiries

The parliamentary debate: An important feature of the Children's Commission, as formulated under Part 4 of the *CCYP Act*, is the power to conduct 'special inquiries'. To this effect section 17 (1) of the Act provides:

The Minister may require the Commission to conduct a special inquiry into a specified issue affecting children, either at the request of the Commission or on the Minister's own initiative.

During the course of the parliamentary debate for the Act, comment was made about this formulation of the Commission's special inquiries power. In particular, concerns were expressed about the scope of Ministerial control over that power. According to the Opposition, that power 'will still be very much at the will of the Minister',⁵⁶ it was also pointed out that other comparable bodies, notably the Health Care Complaints Commission and the Community Services Commission have the power to conduct self-initiated inquiries without Ministerial approval and that, as a result of section 17, the Children's Commission 'would be a less powerful body than those commissions'.⁵⁷ The Hon Ian Cohen MLC on behalf of the Greens commented:

Special inquiries can only be conducted at the request of or with the approval of the Minister involved... That hardly makes for an independent watchdog... The Minister may not recommend an inquiry, even though one is badly needed, because the Government fears the exposure and political fallout that may result from it.⁵⁸

⁵⁵ The Commission for Children and Young People, *Annual Report 2000-2001*, p 44.

⁵⁶ *NSWPD*, 27 October 1998, p 9076.

⁵⁷ *NSWPD*, 18 November 1998, p 10162.

⁵⁸ *NSWPD*, 12 November 1998, p 9848.

In a similar vein, concern was also expressed by the Independent MLC, the Hon Richard Jones, who said:

Government representatives have advised me that if the Commission is not granted permission to conduct a special inquiry the Commission may report to Parliament under clause 24, advising that its application for a special inquiry was rejected. I do not find this alternative particularly reassuring and I am concerned about the potential for politicisation of the Commission's functions and its ability to conduct far-reaching inquiries....⁵⁹

An amendment moved by the Greens to permit the Children's Commission to conduct special inquiries 'on its own initiative' failed,⁶⁰ the Opposition voting against it on the ground that if the amendment succeeded the Government would abandon the legislation altogether.⁶¹ On the other hand, an amendment to the Children's Commission reporting requirements under section 23, moved by the Hon AG Corbett MLC, was passed with Government support. Its effect is to ensure that Parliament will be informed of any request made by the Commission for a special inquiry which was not approved, along with the reasons given by the Minister for not approving the request.⁶²

In opposing the amendment moved by the Greens, the Government argued that Ministerial oversight of the Commission's special inquiry powers was needed as a result of the 'significant coercive powers' available to the Commission when conducting such inquiries.⁶³ In the Second Reading speech the Minister for Community Services had said in this regard:

The requirement for Ministerial approval has been included because, in undertaking a special inquiry, the Commission may invoke significant coercive powers. These include the powers to conduct hearings, to compel the production of information and documents, and to require individuals to give evidence at hearings. These are major powers and they should not be triggered lightly or used often. But when they are, no government department or non-government agency will be able to ignore or thwart a Commission working with the imprimatur of the Premier.⁶⁴

⁵⁹ NSWPD, 12 November 1998, p 9841.

⁶⁰ NSWPD, 18 November 1998, p 10161.

⁶¹ NSWPD, 18 November 1998, p 10162. The Opposition had in fact proposed an amendment in identical terms which was not moved at the committee stage of the Bill.

⁶² NSWPD, 18 November 1998, p 10165.

⁶³ NSWPD, 18 November 1998, p 10161.

⁶⁴ NSWPD, 21 October 1998, p 8741.

In the Legislative Council the Leader of the Government, Hon MR Egan MLC commented:

Those powers should not be invoked without careful consideration or used often. Requiring that the Minister agree to a special inquiry is balanced against potential undue exercise of an individual commissioner's power. It also commits the Minister to considering the commission's recommendations.⁶⁵

The inquiry powers of the Health Care Complaints Commission and the Community Services Commission: A number of questions can be asked at this point. One concerns the inquiry powers of the Children's Commission relative to those of other supervisory/watchdog bodies. It is the case, for example, that both the Health Care Complaints Commission and the Community Services Commission can undertake inquiries on their own initiative. However, the extent to which these are strictly comparable bodies in this context is a matter for debate. This is especially true of the Health Care Complaints Commission which, as its name suggests, has as its *raison d'être* the receiving and investigation of complaints relevant to health practitioners and organisations. The legislation states expressly that Ministerial control does not extend to the Commission's 'investigation of a complaint'.⁶⁶ Whether more general investigations of health services under section 59 of the legislation – an investigation 'which may not be the particular object of a complaint', but arises out of one or more complaints – also lie outside Ministerial control is less clear, although the present understanding is that they do.⁶⁷ It is these general investigations into, among other things, significant issues of 'public health or safety' which, arguably, are more comparable to the kinds of special inquiries envisaged under the *CCYP Act*. Both in relation to specific and general investigations the Health Care Complaints Commission is granted broad coercive investigatory powers, including powers of entry, search and seizure.⁶⁸

Similar 'entry, search and seizure' powers are granted to the Community Services Commission when undertaking specific complaints investigations.⁶⁹ What is unclear is whether such coercive powers also apply where the Commission exercises its more general function to

inquire, on its own initiative or at the request of the Minister for Community Services, the Minister for Aged Services or the

⁶⁵ NSWPD, 18 November 1998, p 10161.

⁶⁶ *Health Care Complaints Commission Act 1993*, section 81.

⁶⁷ *Health Care Complaints Commission Act 1993*, section 59. This is based on telephone advice from the Health Care Complaints Commission.

⁶⁸ *Health Care Complaints Commission Act 1993*, section 33.

⁶⁹ *Community Services (Complaints, Reviews and Monitoring) Act 1993*, sections 12, 36 and 84.

Minister for Disability Services, into matters affecting service providers and persons receiving, or eligible to review, community services.⁷⁰

Recognising the problem in its report on the relevant legislation, the NSW Law Reform Commission recommended that section 84 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* be amended to explicitly provide that the Community Service's Commission's search and entry powers cover all its functions. That is yet to occur, with the result that the application of the coercive powers to self-initiated inquiries remains in doubt. The Law Reform Commission also recognised that the Community Service Commission can only *request* (not require) service providers to produce documents and information further to its powers of search and entry.⁷¹

The special inquiry powers of the Children's Commission: The Children's Commission is not a complaints investigator and its inquiry powers are not equivalent to an agency of that kind. In particular, it has no powers of search and entry. On the other hand, under its special inquiry power it may hold hearings, in relation to which it can require the production of documents and information, as well as the attendance of a person to give evidence.⁷² Legal representation for a person so required to attend is at the Commission's discretion.⁷³ Whether these coercive powers are sufficient to require Ministerial control over the Commission's special inquiry function is arguable. It would be anomalous if a similar controlling power existed in relation to the Ombudsman or ICAC.

Ultimately, perhaps, the scope of Children's Commission investigatory powers, along with the Ministerial control over them, must be judged on their own terms and in relation to the actual use made of them by the Commission. The Leader of the Government suggested that the special inquiry powers should not be invoked 'without careful consideration or used often'. A relevant argument is that, bearing in mind the costs involved in large scale inquiries, it is only reasonable that the Government should seek to have some oversight of any proposal to undertake ambitious projects. Further to this issue, the latest annual report make no mention of the Children's Commission having undertaken any special inquiries over the past 12 months or, for that matter, having been refused permission to do so by the Premier.

When questioned in May 2001 on these matters by the relevant Joint Parliamentary Committee - specifically whether the lack of power to initiate inquiries without Ministerial approval is a 'potential impediment' to the Commission's work - the Children's Commissioner responded that the requirement

⁷⁰ *Community Services (Complaints, Reviews and Monitoring) Act 1993*, section 83 (1)(d).

⁷¹ NSW Law Reform Commission, n 5, pp 121-122.

⁷² *Commission for Children and Young People Act 1998*, section 21. Exemption is made under section 22 for Cabinet documents and other privileged material.

⁷³ Commission for Children and Young People Regulation 2000, clause 6.

relates only to 'special inquiries' using powers to subpoena documents and require people to give evidence. It does not prevent the Commissioner initiating any other inquiries which do not use these powers.⁷⁴

Ms Calvert went on to say that the Minister for Community Services had indicated that the Commission's first inquiry would be into 'the best means to assist children who have no-one to turn to'.⁷⁵ According to the 2000/01 Annual Report, that inquiry is now under way.⁷⁶

4.9 Relationship between the Children's Commission and other NSW child protection agencies

The *CCYP Act* mandates that the Commission, together with other relevant government and non-government agencies, 'must work in co-operation in the exercise of their respective functions'.⁷⁷ This extends to the exchange of information and includes the provision by agencies of information and access to documents.⁷⁸ Another aspect to this issue is the formal relationship that exists between the Commission and certain other agencies, both of an administrative kind and in regard to the legal division of their respective powers. For the sake of clarity, brief note is made here of the relationship between the Children's Commission and 5 other child protection agencies, past and present.

Children's Commissioner and the Child Death Review Team: Under Part 7A of the *Children (Care and Protection) Act 1987*, the Children's Commissioner is the convener of the Child Death Review Team.⁷⁹ As well, the Children's Commission is required to provide administrative support to the Review team. Notwithstanding the intimacy of the relationship between the two bodies, the Minister for Community Services has asked the Children's Commission to conduct a legislative review of the Child Death Review Team.⁸⁰

Children's Commission and the Children's Guardian: Recommendation 136 of the Wood Royal Commission provided that the Children's Commissioner was to perform the role of a Special Guardian in relation to children in care - 'to ensure that their needs are properly

⁷⁴ Committee on Children and Young People, *The First Steps...Review of the First Annual Report of the Commission for Children and Young People, for the 1999-2000 Financial Year*, May 2001, p 44.

⁷⁵ Committee on Children and Young People, n 74, p 45.

⁷⁶ The Commission for Children and Young People, *Annual Report 2000-2001*, p 32.

⁷⁷ *Commission for Children and Young People Act 1998*, section 14 (1).

⁷⁸ *Commission for Children and Young People Act 1998*, section 14 (2).

⁷⁹ *Children (Care and Protection) Act 1987*, Part 7A and Schedule 2A - as amended in 1998. The relevant sections of the *Children and Young Persons (Care and Protection) Act 1998* have not been proclaimed to commence (Chapter 11 and Schedule 1).

⁸⁰ NSW Child Death Review Team, *Annual Report 2000-2001*, p 4.

addressed and to have standing to appear in the Children's Court in relation to any applications made concerning them, as well as the right to seek a review of any orders made'.

This is not in fact reflected in the pared down model of the Children's Commission under the CCYP Act. A Children's Guardian has, instead, been established as a statutory office holder under the *Children and Young Persons (Care and Protection) Act 1998*.⁸¹ However, although a Children's Guardian has been appointed, the office's functions have yet to be proclaimed to commence.

Children's Commission and the Child Protection Council: The Child Protection Council has been absorbed by the Children's Commission. Under this arrangement staff from the Council were initially transferred to the Commission.⁸² As noted, questions have been raised as to whether the Children's Commission has also absorbed the functions of the Child Protection Council. From its establishment in 1985 to its demise in 1999, the Child Protection Council was the body responsible for coordinating and monitoring child protection programs in NSW, as well as for providing independent advice on child protection to the Minister for Community Services. The Children's Commission, on the other hand, has a wider brief, one that does not focus solely on the protection of children at risk of harm. That said, it is the case that some key functions of the former Child Protection Council are now undertaken by the Children's Commission, including the task of reviewing and updating the Interagency Guidelines for Child Protection Intervention.

Children's Commission and the Community Services Commission: Under the Wood Royal Commission's 'one stop' proposal for child protection, the new Children's Commission was also supposed to absorb the work undertaken by the Community Services Commission. Largely in the interest of keeping advocacy and complaints handling functions in separate organisations, this recommendation was rejected. Under this legislative division of labour, the Community Services Commission remained the key child protection watchdog, with the power to receive and investigate complaints. As noted, this situation is now under review.

Children's Commission and the Ombudsman: Discussed in a later section of this paper is the role played by the NSW Ombudsman in the employment screening arrangements which are now in place. Both the Children's Commission and the Ombudsman have a supervisory function over that system,⁸³ but in other ways their roles are different. The

⁸¹ *Children and Young Persons (Care and Protection) Act 1998*, section 178. Relevantly, sections 181-184 are unproclaimed.

⁸² Committee on Children and Young People, *The First Steps...Review of the First Annual Report of the Commission for Children and Young People, for the 1999-2000 Financial Year*, May 2001, p 48.

⁸³ *Commission for Children and Young People Act 1998*, section 36 (1)(f) refers to the Commission's role in 'monitoring and auditing compliance with the procedures and standards for employment screening'; *Ombudsman Act 1974*, section 25B refers to the Ombudsman's role in keeping the relevant employment screening systems 'under scrutiny'.

Ombudsman's main function is the monitoring of investigations by government and non-government agencies concerning child abuse.

Children's Commission and the question of overlap in functions and powers: Bearing in mind the number of agencies involved in the child protection system in NSW, the question of an overlap of functions and powers between the Children's Commission and related agencies was raised by the Joint Parliamentary Committee on Children and Young People. In a written response, the Children's Commissioner replied that, in relation

to policy, research and training activities, the Commission for Children and Young People has shared interests with other agencies, which enable us to work collaboratively with them on projects. There are no unnecessary overlaps which require redressing.⁸⁴

That 'there may appear to be overlaps' with the work of the Child Death Review team was acknowledged, but it was added that 'The Child Death Review Team's legislative base in the Child and Young Persons (Care and Protection) Act 1998 is due for review in 2001/2, and this offers an opportunity to clarify and describe the role better'.⁸⁵

Of the relationship between the Children's Commission and the NSW Ombudsman it was said that

both have roles to play in protecting children by way of administering varying aspects of employment arrangements. It is not considered that these roles overlap, but rather serve to complement one another in ensuring the safety of children while entrusted in the care of organisations. It is not considered that any action needs to be taken in respect of the roles of the two organisations.⁸⁶

4.10 The NSW Children's Commission and inter-State comparisons

The Queensland Commission for Children and Young People: The Children's Commission of Queensland was established in 1996 as the first body of its kind in Australia. Following a review of its powers and functions in 1998, in which several

⁸⁴ Committee on Children and Young People, n 82, p 31.

⁸⁵ Committee on Children and Young People, n 82, p 31. As noted, the relevant sections of the *Children and Young Persons (Care and Protection) Act 1998* have not been proclaimed to commence (sections 191-198). Section 198 does require Ministerial review of the Child Death Review Team provisions but only 5 years after their commencement. At present, the Child Death Review Team is constituted under Part 7A of the *Children (Care and Protection) Act 1987* and it would seem that this is due for Ministerial review in 2001/2 (section 108).

⁸⁶ Committee on Children and Young People, n 82, p 31.

limitations were identified, notably in respect to the Commission's investigative powers, new legislation was passed in 2000 – the *Commission for Children and Young People Act 2000* (Qld). Certain points of similarity and difference with its NSW counterpart can be noted. Administratively, both are statutory bodies attached to the portfolios of their respective Premiers. Other similarities include the role both organisations play in the field of employment screening, as well as their more general promotional and monitoring roles on behalf of children. In fact, the Queensland legislation makes the advocacy role of the Children's Commission explicit, stating that its functions including 'to advocate for children, and in advocating for children, to seek help from advocacy entities, service providers and other entities'.⁸⁷

What is different is that, unlike its NSW equivalent, the Queensland model incorporates the receipt and investigation of complaints,⁸⁸ its jurisdiction being broadly equivalent to the child protection inquiry powers of the NSW Community Services Commission.⁸⁹ To enforce its complaints investigation jurisdiction, the Queensland Children's Commission has the Ombudsman-like powers of entry, search and seizure. In the performance of this investigative function, as in its work generally, the Queensland Children's Commission is expressly stated to operate independently. The legislation is explicit on the point that, in the exercise of his powers and functions, the Commissioner 'is not under the control and direction of the Minister'.⁹⁰ In effect, the Queensland body, which also oversees a community visitors scheme, is akin to an amalgamation of the NSW Children's Commission and Community Services Commission.

Note, however, that the Queensland Act does not make explicit provision for a 'special inquiry' power. What appears to be contemplated under the legislation is that the Commission's inquiry functions will focus on specific complaints, an observation supported by its 2000/01 Annual Report. That is not to say that broader, systemic inquiries may not be undertaken by the Children's Commission, but these would appear to be at the Premier's discretion and would probably operate under the Queensland *Commissions of Inquiry Act 1950*. In this connection, therefore, the statutory position of the NSW Children's Commission is at least on a par with its Queensland equivalent. Indeed, the fact that an express 'special inquiry' power exists in the NSW legislation, together with the requirement for Parliament to be informed if the Premier refuses a request for such an inquiry, would seem to advantage the NSW Children's Commission.

The Tasmanian Commissioner for Children: The above observation certainly applies in respect to the Tasmanian Children's Commissioner who can only 'inquire generally into and

⁸⁷ *Commission for Children and Young People Act 2000* (Qld), section 15 (c).

⁸⁸ Not all complaints must be investigated. The Commissioner may for example seek to resolve a complaint in an appropriate way - *Commission for Children and Young People Act 2000* (Qld), section 39 (1).

⁸⁹ *Commission for Children and Young People Act 2000* (Qld), section 32.

⁹⁰ *Commission for Children and Young People Act 2000* (Qld), section 17.

report on' child-related matters 'on the request of the Minister'.⁹¹ Other functions of the Commission include advising, on its own initiative, the relevant Minister on: matters relating to the administration of the *Children, Young Persons and Their Families Act 1997* (Tas); the policies and practices of government departments; or on matters affecting children in custody or under the guardianship of the State. While the Tasmanian Children's Commission is not set up to receive and investigate complaints, the Commission does have the power to require a person to answer questions and to produce documents.⁹² Also, in the exercise of all functions, the legislation is explicit in requiring the Children's Commissioner to 'act independently, impartially and in the public interest'.⁹³

On the other hand, the Tasmanian model has been criticised on the ground that the Commissioner may be a part-time appointment and may even hold another Office in the State public sector.⁹⁴ Furthermore, the Governor, on the recommendation of the Minister, 'may remove the Commissioner from office for any reason that he or she thinks sufficient'.⁹⁵

4.11 Comments

NSW, Queensland and Tasmania has each developed its own model of a Children's Commission. In terms of constitution, powers and functions, the Tasmanian model has the least in common with that envisaged by the Wood Royal Commission, whereas its Queensland counterpart, as amended in 2000, is closest to the recommendations of the Royal Commission. On the same criteria, the NSW Children's Commission lies somewhere between the two.

A major concern of the Royal Commission was that the multiplicity of supervisory agencies in the field of child protection can lead to confusion and overlap. Wood was aware of the contribution that could be made by interagency guidelines in this regard, but doubted whether these were an adequate substitute for a more focused organisational approach, stating 'Notwithstanding the existence of these guidelines, the need became apparent for a greater co-ordination of the system response to child neglect and abuse'.⁹⁶ Clearly, that multiplicity of agencies continues to exist, which underlines the point that the NSW Children's Commission is not the organisation envisaged by the Royal Commission, neither in terms of the scope of its powers, nor in respect to its independence from Ministerial

⁹¹ *Children, Young Persons and Their Families Act 1997* (Tas), section 79 (1) (c).

⁹² *Children, Young Persons and Their Families Act 1997* (Tas), section 80 (2).

⁹³ *Children, Young Persons and Their Families Act 1997* (Tas), section 79 (3).

⁹⁴ *Children, Young Persons and Their Families Act 1997* (Tas), Schedule 1, clause 3; Youth Affairs Council of Victoria, *Are You Listening? The case for a Victorian Children and Young People's Commission*, June 2001, p 11.

⁹⁵ *Children, Young Persons and Their Families Act 1997* (Tas), Schedule 1, clause 6.

⁹⁶ Royal Commission into the NSW Police Service, *Final Report Volume IV: The Paedophilia Inquiry*, August 1997, p 599.

control. Where it most closely approximates the Wood model is in its employment screening functions, as well as in its general advisory, advocacy and educational role. As a co-ordinating and watchdog body over the child protection system generally, or as an investigatory and research agency, the Children's Commission is quite different to the Royal Commission model. One consequence of this is that the Children's Commission is unaffected by the current jurisdictional dispute concerning the proposed merger of the Community Services Commission with the Ombudsman's Office.

5. THE CHILD DEATH REVIEW TEAM

The Child Death Review Team was established by the *Children (Care and Protection) Amendment Act 1995*. The impetus for reform came from a 1995 NSW Child Protection Council report, *Preventing Child Homicide* which recommended that the Team have the specific aim of 'learning from the facts surrounding the deaths of children, using the findings to educate workers and informing policy and procedure across all areas of work to prevent future child deaths'.⁹⁷ For the first three and a half years the Team was administratively supported by the NSW Child Protection Council, and reported to the Minister for Community Services. With the establishment of the Children's Commission in June 1999, the Children's Commissioner became the Team Convenor and the Commission now provides research and other support to the Child Death Review Team. As noted, notwithstanding the intimacy of the relationship between the two bodies, the Minister for Community Services has asked the Children's Commission to conduct a legislative review of the Child Death Review Team.⁹⁸ In the interim, it seems that the Cabinet Office, as part of its proposal to merge the Community Services Commission with the Ombudsman's Office, has suggested extensive reform of the review system for child deaths.

Currently, the Child Death Review Team is constituted under Part 7A and Schedule 2A of the *Children (Care and Protection) Act 1987*. As amended in 1998, this Part is in fact almost identical to the equivalent but as yet uncommenced provisions under the *Children and Young Persons (Care and Protection) Act 1998* (Chapter 11 and Schedule 1). The relevant provisions of both Acts are made subject to review 5 years after commencement, the upshot of which is that Part 7A is due for review in 2001/02. It may be that commencement of the 1998 legislation awaits the outcome of that review,⁹⁹ along with the conclusion of the ongoing Cabinet review of the 'watchdog' child protection agencies. In any event, at this stage the model for the Child Death Review Team is essentially the same under the 1987 and 1998 legislative schemes.

⁹⁷ NSW Child Death Review Team, *2000-2001 Report*, p 2.

⁹⁸ NSW Child Death Review Team, *Annual Report 2000-2001*, p 4.

⁹⁹ As noted, the Minister for Community Services has asked the Children's Commission to conduct the review – NSW Child Death Review Team, *2000-2001 Report*, p 4.

5.1 Structure and constitution of the Child Death Review Team

The Child Death Review Team is a corporate body, consisting of the Children's Commissioner in the position of Convener and up to 19 other experts appointed by the Minister for Community Services, including representatives from such key government departments as Community Services, Health, Police and School Education. A representative of the Office of the Coroner is also to be appointed. Where the team is to inquire into deaths of Aboriginal children, two Aboriginal members are to be appointed as additional members of the Team.¹⁰⁰

The Team's Convener enjoys the terms of appointment relevant to the Children's Commissioner. Other Team members (excluding temporary additional Aboriginal members) are appointed for up to 2 years¹⁰¹ and can be removed from office by the Minister for incapacity, incompetence or misbehaviour.¹⁰²

The Team is to report its finding and recommendations annually to Parliament. Whilst the Minister must see the draft report and may comment upon it, the only duty upon the Team is to consider those comments. Its reporting obligations are not subject therefore to Ministerial control. Summing up these arrangements, the Child Death Review Team was defined in answer to a parliamentary question as

an independent statutory body. It is a team of independent experts, headed by the Commissioner for Children and Young People. Neither the Department of Community Services nor the Government has any say over what goes into [the Team's] reports.¹⁰³

5.2 Functions and powers of the Child Death Review Team

The Child Death Review Team is, in essence, a research and surveillance, body. Its specific functions include:

- the formulation of recommendations for policies and practices to be implemented by government and non-government agencies for the prevention or reduction of child deaths. For this purpose, the Team must: (a) maintain a Child Death Register, under which deaths are to be classified according to cause of death, demographic criteria and other factors with a view to understanding and preventing child deaths; (b) undertake detailed case reviews of child deaths which are due to abuse or neglect, or that occur

¹⁰⁰ *Children (Care and Protection) Act 1987*, section 102.

¹⁰¹ *Children (Care and Protection) Act 1987*, Schedule 2A, clause 3.

¹⁰² *Children (Care and Protection) Act 1987*, Schedule 2A, clause 6.

¹⁰³ *NSWPD*, 17 November 2000, p 10234.

- in suspicious circumstances; and (c) identify patterns and trends relating to child deaths.
- identification of areas requiring further research. In its 2000-2001 report the Child Death Review Team said it had identified such areas for which research is currently under way or in the planning phase: child deaths due to fatal assault in NSW from 1996-1999; in conjunction with the Children's Commission and the Centre for Mental Health, a study of suicide and risk-taking deaths of children; and an infant sleep deaths project.¹⁰⁴
 - undertaking such research projects as the Minister may require concerning child deaths.¹⁰⁵

There is a duty upon government agencies, including the Director General of the Department of Community Services, the State Coroner and the Commissioner of Police, to assist the Child Death Review Team. As well as these named office holders, any departmental head, or any senior member of a statutory body or local authority, must provide the team with full and unrestricted access to records 'which the Team reasonably requires for the purpose of exercising its functions'.¹⁰⁶ Accompanying the Team's privileged access to information is a duty of confidentiality.¹⁰⁷

5.3 Case reviews of abuse and neglect deaths

The most controversial aspect of the Child Death Review Team's 2000-2001 Report was Chapter 7 dealing with deaths from child abuse and neglect. In total, the team conducted 21 case reviews during the reporting period which included deaths due to fatal beating, burning, suffocation, battering, drowning, smoke inhalation, choking, strangulation, sleep incidents and refusal to obtain medical treatment. All 21 children were under 7 years of age; 9 were infants aged less than 12 months. Six of the children were Aboriginal. According to the report, the children came from households characterised by a parental history of drug and/or alcohol abuse, domestic violence, criminal activity and mental health problems. It continued:

All the families reviewed had contact with NSW human service agencies prior to the child's death with the Department of Health, Department of Community Services and the Police Service being most common. Opportunities to recognise and assess the child's vulnerability and to provide support at crucial times in some cases were missed.

Two-thirds of the children who had died had previously been reported as at risk of harm to the Department of Community

¹⁰⁴ NSW Child Death Review Team, *2000-2001 Report*, p 3.

¹⁰⁵ *Children (Care and Protection) Act 1987*, section 103.

¹⁰⁶ *Children (Care and Protection) Act 1987*, section 104.

¹⁰⁷ *Children (Care and Protection) Act 1987*, section 106.

Services and 8 cases were registered and 'open' at the time the child died. While 4 children had been in out-of-home care, only one child was in out-of-home care when she died.¹⁰⁸

Commenting on these findings, the Convenor of the Child Death Review Team, Gillian Calvert, said that, 'As in previous reports, we found there was inadequate risk assessment by¹⁰⁹ DOCS once a child was reported to them'.¹¹⁰ For the Opposition spokesman on community affairs, Brad Hazzard MP, the report indicated that 'There is something dramatically wrong in child protection in NSW'.¹¹¹ Responding to these criticisms, Rhonda Stein, a DOCS Director, said the Department welcomed the report but added, 'However, it needs to be recognised that we now have significant new child protection legislation and new risk assessment processes to better protect children before abuse or neglect occurs'.¹¹²

Noted in the 2000-2001 Report were 4 monitoring recommendations which, a number of which it was said had already been implemented by government departments and agencies. One recommendation involved developing strategies for maintaining adequate staffing levels over the critical Christmas and New Year period. Another was for DOCS to consider establishing a system for centralising and integrating information from internal reviews of deaths of children with a previous current history of contact with the Department: 'The aim', according to the report, 'is to improve case work within the Department through identifying practice and management issues and sharing lessons throughout the agency'.

5.4 The Child Death Review Team and the question of overlap in functions and powers

In answer to a question on 'unnecessary overlaps' put by the Committee on Children and Young People, the Children's Commissioner acknowledged that 'The Child Death Review Team is one of a number of bodies, which reviews child deaths, and there may appear to be overlaps'. However, she went on to explain both the potential for overlap and the unique aspect of the Team's work as follows:

The Child Death Review Team reviews the deaths of children and young people from abuse and neglect or in suspicious or undetermined circumstances. Such deaths are also investigated by the Police and reviewed by the Coroner. Where the child had a disability, the case would also be reviewed by the Disability Death

¹⁰⁸ NSW Child Death Review Team, *2000-2001 Report*, p xiii.

¹⁰⁹ NSW Child Death Review Team, *2000-2001 Report*, p xiv.

¹¹⁰ G Jacobsen, 'DOCS failing to protect children declared "at risk", says watchdog', *The Sydney Morning Herald*, 1 November 2001.

¹¹¹ A Mitchell, 'DOCS blamed for tragic child deaths', *The Sun-Herald*, 4 November 2001.

¹¹² G Jacobsen, 'DOCS failing to protect children declared "at risk", says watchdog', *The Sydney Morning Herald*, 1 November 2001.

Review Team. If the child was a client of the Department of Community Services or another agency, the death would also be subject to internal departmental investigations.

The Child Death Review Team's role is to prevent or reduce child deaths. It works at a systematic level and is not involved in forensic work on individual cases, as the Police and Coroner are. Its reviews are informed by information from all government agencies, and are therefore much broader than internal reviews by a single agency.¹¹³

That many research groups, in NSW and nationally, undertake research and surveillance into specific types of child deaths was recognised by the Child Death Review Team itself in its 2000-2001 report. Each group, it said, has a particular focus determined by the cause of death (for example, drowning or suicide), or the context of the death (for example, farm or occupational deaths). It was acknowledged, too, that the role of the Child Death Review Team is not to investigate child deaths, this being the responsibility of the Police Service and the State Coroner; nor, yet, to deal with complaints relating to child deaths, this being the mandate of the Community Services Commission, the Health Care Complaints Commission and the NSW Ombudsman. Instead, the Team defined its 'unique role' in these terms:

Although there are specialised groups that are undertaking research on specific types of deaths of children in NSW, the role of the NSW Child Death Review Team remains unique. It is the role of the team to comment on trends and patterns in all child deaths in NSW with a view to making recommendations for prevention. Individual case file reviews are conducted that consider the circumstances surrounding abuse and neglect deaths. These reviews aim to identify systemic weaknesses in the protection of children in NSW and to identify areas requiring further research. The Team focuses on prevention rather than the culpability of alleged offenders or the individual performance of workers. Unlike investigating agencies, the Team does not formally report on each death reviewed.¹¹⁴

As discussed in the section of this paper on the Community Services Commission, Cabinet Office has proposed the establishment of a Community Services Division of the Ombudsman's Office which would have responsibility for the investigation of systemic issues relating to the deaths of children with disabilities. What role is envisaged for the Child Death Review Team under this proposal? The Association of Children's Welfare Agencies (ACWA) states in its submission that the Team is to be 'downgraded' under the proposal to 'an advisory committee', presumably appointed by the Ombudsman. ACWA

¹¹³ Committee on Children and Young People, n 74, p 31.

¹¹⁴ NSW Child Death Review Team, 2000-2001 Report, p 10.

says it is 'strongly opposed' to this, arguing 'This is an area of review of children who have been in the most vulnerable and tragic circumstances and warrants the retention of a highly expert and statutorily appointed team'.¹¹⁵ If nothing else, this debate underlines the need for an effective review of the delineation of powers and responsibilities in this field.

5.5 Comments

Administratively, the Child Death Review Team is supported by the Children's Commission and the Commissioner is the Convenor of the Team. The question is, why then isn't the Team constituted as a statutory body under the *CCYP Act*? Presumably, it is because the Team's work is most closely associated with DOCS and it is the Minister for Community Services who receives the Team's draft report for comment. Viewed in this light, the work of the Team belongs thematically to the *Children and Young Persons (Care and Protection) Act 1998*. On the other hand, the systemic research work of the Team is not restricted to child deaths relating to abuse and neglect. There is also the question of overlap with the work undertaken by the Community Services Commission, especially in relation to the deaths of children with disabilities. The broader question is whether the present legislative arrangements facilitate the intelligibility, coherence and effectiveness of the child protection system in NSW? This is the issue to be addressed in the upcoming legislative review of the Child Death Review Team, which is to be conducted by the Children's Commission. That Cabinet Office is also currently reviewing the oversight bodies in the field of child protection only adds to the fluidity and complexity of this area of law and practice.

6. THE COMMUNITY SERVICES COMMISSION

This is a time of uncertainty for the Community Services Commission when jurisdictional difficulties have foreshadowed its demise. It is constituted under the *Community Services (Complaints, Reviews and Monitoring) Act 1993 [CRAMA Act]*, and commenced operation in October 1994. Between then and the time the jurisdictional problems came to light, in November 2000, the Community Services Commission was taken to be the primary watchdog body over the services provided by DOCS. In the 2000 edition of the Interagency Guidelines for Child Protection Intervention its statutory responsibilities were defined as follows:

- Informing and educating consumers of community services, including children and young people, of their right to complain about access to services or about unreasonable conduct in the provision of services.
- Investigating complaints about access to and provision of community services, including child protection intervention and substitute care services; review the circumstances of children and young people in care; and undertake inquiries into matters affecting children and young people as consumers of community services.¹¹⁶

¹¹⁵

ACWA, *Submission to Cabinet Office regarding proposed merger of Community Services Commission with the Ombudsman's Office*, p 4.

¹¹⁶

The inquiry powers of the Community Services Commission were discussed in an earlier section of this paper at page 23.

- Co-ordinating the Community Visitors Scheme, which promotes and advocates for the interests of children, young people and people with a disability in full-time care.
- Providing education and training for Community Visitors about indicators of abuse and neglect and their obligation to report suspected risk of harm from abuse and neglect and procedures for reporting.
- Promoting the provision of timely, high-quality care and protection intervention and support by service providers.

6.1 Jurisdictional problems

Much of this has now been thrown into disarray. This followed initial advice from the Crown Solicitor's office which was reported by the NSW Law Reform Commission in its 1999 review of the *CRAMA Act*. Legislative amendment was recommended by the Law Reform Commission,¹¹⁷ which commented:

The Crown Solicitor has provided the NSW Ombudsman with advice that the child protection functions carried out by DOCS do not fall within the definition of 'community service' for the purpose of the community welfare legislation. The Community Services Commission notes that child protection issues constitute a significant part of its work, and suggests that the CAMA [the *Community Services (Complaints, Reviews and Monitoring) Act 1993*] definitions of 'community service' and 'service provider' be amended to clarify that this is part of their jurisdiction for the purposes of all its functions.¹¹⁸

It seems the Government then received its own advice in November 2000 from the Crown Solicitor's Office indicating that the Community Services Commission had no power to deal with statutory breaches of child protection services by DOCS and other service providers. In the Autumn 2001 issue of the *Community Services Commission Newsletter* Fitzgerald described the 'jurisdictional impasse' his organisation found itself in these terms:

The Commission's jurisdiction in relation to complaints concerning statutory functions in the areas of child protection and substitute care has been in legal limbo since November 2000. At that time, our Minister provided an advice from the Crown Solicitor's Office indicating that the term 'services' in our Act did not include 'statutory functions' (such as the response to child protection notifications by the Department of Community Services). Consequently, our ability to deal with complaints about

¹¹⁷

NSW Law Reform Commission, n 5, p 117. The Commission recommended: 'The definitions of "community service" and "service provider" should be amended to clarify that the jurisdiction of the Community Services Commission includes all child protection matters for the purposes of all its functions'.

¹¹⁸

NSW Law Reform Commission, n 5, p 117.

these statutory functions (as distinct from services) has been suspended.

The rest of our jurisdiction, including reviews of children in care, remains unaltered and we still have a substantial complaints jurisdiction for services provided to children and young people in the care system, as well as disability, Home Care and other services.¹¹⁹

On 27 February 2001 the Minister for Community Services told Parliament that the 'matters affected constitute only about 15 per cent of the Commission's caseload'. She continued:

It is acknowledged that the Commission plays a role that is central to the scrutiny of welfare agencies in this State, and we are working to resolve these issues as quickly as possible. The Government is committed to the effective monitoring of public sector agencies.¹²⁰

The Community Services Commissioner, Robert Fitzgerald, initially responded to these developments by calling on the Government to amend the legislation along the lines suggested by the Law Reform Commission.¹²¹ In a further development, the Opposition spokesman on community services, Brad Hazzard MP, introduced a Private Member's Bill to this effect on 8 March 2001 and again on 11 April 2001 – the Community Services (Complaints, Reviews and Monitoring) Amendment (Application) Bill 2001. For its part, the Government opposed the Bill on the ground that the jurisdictional matter generally is the subject of review by Cabinet Office.¹²²

In the interim, on 27 February 2001 the Parliament was informed that arrangements have been agreed with the Community Services Commissioner enabling the Ombudsman 'to handle the matters in question'.¹²³ By October 2001 this arrangement seemed to point the way to the Community Services Commission's future, or lack of it.

¹¹⁹ R Fitzgerald, 'Commissioner's message – jurisdictional impasse', *Community Services Commission Newsletter*, Issue 21, Autumn 2001.

¹²⁰ *NSWPD*, 27 February 2001, p 11913.

¹²¹ G Jacobsen, 'State accused of nobbling welfare watchdog', *The Sydney Morning Herald*, 15 February 2001; *NSWPD*, 28 February 2001, p 12001.

¹²² *NSWPD*, 11 April 2001, pp 13519-13520.

¹²³ *NSWPD*, 27 February 2001, p 11913; *NSWPD* 28 February 2001, p 12001. Note that, as amended in 1998, section 121 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* defines the jurisdiction of the Community Services Commission and the Ombudsman and provides for both organisations to 'enter arrangements regarding the co-operative exercise of their respective functions'.

6.2 Future directions

In its review, released in 1999, the Law Reform Commission said it found 'overwhelming community support' for the *CRAMA Act*, stating that its broad policy objectives

have been vigorously defended by consumers, families, carers, advocates and service providers alike. While this review, as required by the Act, is an opportunity to reflect on how well or otherwise the legislation has been operating, serious concerns have been expressed to the Commission that the significant advances made by CAMA [the *CRAMA Act*] should not be watered down. CAMA is considered watershed legislation which needs to be strengthened further, if any change is proposed at all.¹²⁴

This approach is quite different to that recommended by the Wood Royal Commission, although in that case the proposal to remove the Community Services Commission's jurisdiction over the investigation of child protection complaints was bound up with the recommendation to establish a 'one-stop' watchdog agency in the form of a Children's Commission. For the Royal Commission it would have been appropriate in these circumstances for 'the Community Services Commission to provide the infrastructure of the Employment Information Centre, and the Investigation and Review Unit of the Children's Commission'. It continued:

If it is judged that a transfer of child protection functions of the Community Services Commission to the Children's Commission would leave it with insufficient residual responsibility to justify its retention, then consideration could be given to moving those remaining functions (and budget) to the Office of the Ombudsman.¹²⁵

It has been explained that these recommendations were not adopted; but that, with the establishment of the Children's Commission as more of an advocacy than watchdog body, the jurisdiction of the Community Services Commission was left (supposedly) intact. But that was before the Crown Solicitor's advice of November 2000. Now the Community Services Commission finds itself in an uncertain position and is almost certain to be changed in one way or another. It has been suggested that one option under consideration is the transfer of the powers of the Community Services Commission to the Ombudsman.¹²⁶ This was confirmed in an announcement on 4 October 2001 from the Cabinet Office and the Community Services Commissioner which has been circulated for comment to stakeholders in the community services sector. According to Alan Kirkland of NCOSS, the key elements of this proposal are as follows:

¹²⁴ NSW Law Reform Commission, n 5, pp 13-14.

¹²⁵ Royal Commission into the NSW Police Service, n 25, p 1299.

¹²⁶ *NSWPD*, 11 April 2001, p 13523.

- The Community Services Commission would cease to be an independent agency and would be incorporated into the Ombudsman's Office.
- The existing functions and staff of the CSC would transfer to a new Community Services Division within the Ombudsman's Office. The Division would be headed up by the Community Services Commissioner and Deputy Ombudsman. (Under the proposal Robert Fitzgerald would automatically assume this role.)
- The jurisdictional problems concerning statutory functions in relation to child protection and out of home care would be fixed.
- The full budget of the CSC would be quarantined until 30 June 2004.
- The Ombudsman would be able to assign additional functions to the Community Services Division.
- The Community Visitors scheme would be transferred to the Community Services Division of the Ombudsman's Office along with other functions of the CSC. Community Visitors would still be appointed by the Minister for Community Services and would report both to the Minister and the Ombudsman.
- The Community Services Division would still have its own legislation – the *CRAMA Act*.
- The Community Services Commissioner and Deputy Ombudsman would be appointed by the Ombudsman. (Currently the Commissioner is appointed by the Minister.)
- The Community Services Division would report, like the rest of the Ombudsman's office, to Parliament. Reports forwarded to the Speaker would be required to be published. (Currently the CSC reports to the Minister.)
- Investigations of individual child deaths (where the child or young person was known to DOCS) and disability deaths would be conducted by the Coroner, through a new Deputy Coroner. The Community Services Division of the Ombudsman's Office would have responsibility for investigation of systemic issues relating to child and disability deaths.
- The Commission's functions in relation to advocacy would be redrafted.¹²⁷

Elements of this proposal were considered during the course of the Second Reading debate on the Community Services (Complaints, Reviews and Monitoring) Amendment (Application) Bill 2001. The Bill's sponsor, Brad Hazzard MP, questioned the Ombudsman's 'culture' in relation to the review of child deaths, on the grounds that, although the Office 'will look at systemic issues', it 'does not regard itself as having a personal advocacy role in the support of families'.¹²⁸ Of the broad idea of transferring the jurisdiction of the Community Services Commission to the Ombudsman it was said, by the Hon FJ Nile MLC, that the Ombudsman's Office

does not have the expertise to deal with this matter. It would mean setting up a community services department within the

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A Kirkland, 'Government announces proposal for Community Services Commission' (November 2001) 28(9) *NCOSS News* 1.

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NSWPD (Legislative Assembly proof), 15 November 2001, p 26.

Ombudsman's Office to address the issues – and that would be ridiculous and inefficient; a complete waste of taxpayers dollars.¹²⁹

Other reservations were also expressed about the short and long-term implications involved. For example, the fact that the Ombudsman requires matters to be put in writing, whereas the more user-friendly Community Services Commission permits verbal complaints was noted by the Hon PJ Breen MLC who went on to say:

I note that the New South Wales Council for Social Service, the Association of Children's Welfare Agencies, the Law Society's Criminal Law Committee and the Intellectual Disability Rights Service have all called for, in the Law Society's words, a 'clarification of the roles, responsibilities and powers of the relevant oversighting bodies'.¹³⁰

If nothing else, the current uncertainty over the jurisdiction of the Community Services Commission is a good opportunity for an exercise of that kind.

6.3 Selected stakeholder responses to the Cabinet Office proposal

Among the formal submissions in response to the Cabinet Office proposal are those by the Association of Children Welfare Agencies (ACWA), the Intellectual Disability Rights Service and People With Disabilities (NSW). Basically, the tenor of these responses is that they: (a) challenge the validity of the Crown Solicitor's advice; (b) oppose the merger proposal; and (c) state their preferred option is for reform of the existing legislation along the lines suggested by the NSW Law Reform Commission. However, at least two of the submissions reluctantly accept that some form of merger is inevitable, and seek amendments to preserve and enhance the Community Services Commission's functions as part of the Ombudsman's office. Another feature of two submissions is that they express 'grave concern about the process by which the Cabinet Office proposal has been produced'.

People with Disabilities (NSW): Trenchant in its criticism of the merger proposal was People With Disabilities (NSW) which advised that 'we are strongly opposed to it'. In support of the Community Services Commission, the submission argued that 'While it still remains the most effective watchdog operating in the disability services sector, the Community Services Commission has been greatly diminished over the past 12-18 months by a range of political, bureaucratic and other attacks on its jurisdiction, independence and intended role'. Among the concerns of People with Disabilities (NSW) were that

- "There are major cultural and administrative barriers to the Ombudsman becoming an effective watchdog in the disability services area, in particular its culture of "passive neutrality" ..."
- "The Ombudsman can only review administrative action, it cannot review Ministerial

¹²⁹ *NSWPD*, 11 April 2001, p 13527.

¹³⁰ *NSWPD*, 11 April 2001, p 13524.

action. This is a serious problem in the disability area where the Minister is reposed with a range of statutory duties, the exercise of which must be reviewable if people with disability are to have any real protection’.

- The Ombudsman is not ‘well adapted to dealing with issues in non-government agencies’.
- ‘The Ombudsman’s culture and approach would eventually, if not initially, consume that of the Commission’.¹³¹

Intellectual Disability Rights Services: The Intellectual Disability Rights Services presented detailed legal analysis challenging the accuracy of the Crown Solicitor’s advice. It was also highly critical of the process of reform, arguing: ‘It is difficult to avoid the conclusion that the abolition of the Commission is...a consequence of the embarrassment to the government caused by the Commission’s long history of effective monitoring, evaluation and review of community services to the State’s most disadvantaged and disenfranchised citizens’. Among its ‘macro concerns’ was the contention that, when the Community Services Commission was established the disability sector argued against the location of functions with the Ombudsman because:

- ‘Of the differences between the traditional role of the Ombudsman and the envisaged role of the Commission, vis the review of administrative injustice rather than the promotion of substantive rights and entitlements under the community welfare legislation’.
- ‘The Ombudsman’s powers apply only to statutory authorities (Part 3A has since extended the Ombudsman’s role to a limited type of non-government agencies) and do not extend to privacy issues’.
- ‘The need for a Commission identifiable by the disability sector as receptive to and focused on its needs’.
- ‘The inadequacy of the Ombudsman’s funding to meet its existing complaint volumes. Funding for a separate division would, therefore, be inadequate or disproportionate to other arms of the Ombudsman. Such disproportion would lead to disharmony’.¹³²

According to the Intellectual Disability Rights Service, ‘These objections remain relevant’. Among its other comments was that proposed amendment to section 83 (h) and (i) of the *CRAMA Act* ‘would change the Commission’s role in support of advocacy from a general one to one restricted to promoting participation in decision making about services received’.

Association of Children Welfare Agencies (ACWA): In its submission ACWA emphasised the effectiveness of the Community Services Commission and counselled caution in any

¹³¹ People with Disabilities (NSW) Inc, *Ombudsman Community Services Commission Merger Proposal*, 2 November 2001.

¹³² Intellectual Disability Rights Service Inc, *Submission to Cabinet Office Regarding the Proposal to Abolish the Community Services Commission and to make consequential amendments to the Community Services (Complaints, Reviews and Monitoring) Act 1993*, 25 October 2001.

reform process. It stated:

The establishment and operation of the Community Services Commission (CSC) has been an outstanding development for the child care and protection and disability services fields in NSW in the past decade. The impact of the Commission's role has been extremely positive and far reaching. Any proposal which seeks to make major structural changes to such an important and effective body is viewed with extreme caution.¹³³

ACWA's preferred position was for the jurisdiction of the Community Services Commission to be restored but, accepting that this is not a 'realistic option', it made several suggestions for amending the reform proposal. These included:

- *Maintaining the Commission's ability to report independently* – 'It is strongly recommended that the legislation be amended to ensure that the statutory Community Services Division retains the ability to prepare and deliver reports of the Commissioner's own initiative where the report raises a significant issue of public safety or public interest'.
- *Quarantine the Commission's budget* – ACWA recommended 'establishing the Commission's budget as a separate line item in the Treasury annual budget papers as well as being reported on each year in the Ombudsman's annual reports'.
- *Strengthen the consumer protection focus* – 'A key element in the Commission's operation has been its expert ability to respond to both disability and child welfare issues and to identify key policy and practice problems where both service systems are engaged or where consumers are "falling between" two sectors. This is an aspect of its work which must be maintained and strengthened'.

6.4 The Community Services Review Council

Also constituted under the *CRAMA Act* is the Community Services Review Council, a body intended to provide strategic advice to the Minister for Community Services, as well as to co-ordinate the functions of the bodies established under the legislation. However, the Council has not been funded since 1996/97 and is effectively defunct.¹³⁴ In its July 1999 report, *Review of the Community Services (Complaints, Reviews and Monitoring) Act 1993 (NSW)*, the NSW Law Reform Commission recommended that the Community Services Review Council be abolished and a Parliamentary Joint Committee be established in its place. Suggested legislative reforms may render this recommendation redundant. If a

¹³³ ACWA, *Initial Submission to Cabinet Office regarding proposed merger of Community Services Commission with the Ombudsman's Office*.

¹³⁴ It seems that since 1996 only a minimum number of short-term appointments have been made to the Review Council, prompted solely by the legislative requirement for the Minister to consult with the Council before making appointments under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*: NSW Law Reform Commission, n 5, p 291.

Community Services division is to be established as part the Ombudsman's Office, presumably it too will be oversighted by the parliamentary joint committee to which the Ombudsman reports.

6.5 Comments

The position many in the community services sector now find themselves in is that, having successfully argued against the absorption of the Community Services Commission into the Children's Commission in 1998, they must now formulate a view on its potential merger with the Ombudsman's Office. Some of the sector's concerns in this respect have been canvassed. In terms of powers, a key issue is whether, as a division of the Ombudsman's Office, the reformed Community Services Commission would have the full inquiry powers granted under the Ombudsman Act? This is one way in which the proposal could be construed in a positive light. Whether this is an aspect of the merger proposal is not known at this stage.

7. THE CHILDREN'S GUARDIAN

The inclusion of the new office of the Children's Guardian among the child protection watchdog bodies is far from straightforward. Indeed, in the Second Reading speech for the Children and Young Persons (Care and Protection) Bill 1998 the Minister for Community Services stated:

It is important that I emphasise at this point that the Children's Guardian is not a watchdog and does not have investigatory, complaints handling or general advocacy functions. Rather, it is the ultimate safeguard to ensure that children and young people are not lost in the system, that regular review occurs and that they are cared for in accordance with agreed guidelines and standards.¹³⁵

In this paper the Children's Guardian is classified, not as a watchdog as such, but as an 'oversight or supervisory body'. In broad terms, the role of the Children's Guardian in child protection is 'to exercise parental responsibility for a child or young person. Additionally the Guardian promotes the interests of children and young people in out-of-home care and safeguards and promotes their rights'.¹³⁶ In its first annual report, the Office of the Children's Guardian described itself as 'one of the most significant reforms in out-of-home care in NSW. The Office is unique in Australia and it may well be the first of its kind in the world'.¹³⁷

¹³⁵ NSWPD, 11 November 1998, p 9766.

¹³⁶ *NSW Interagency Guidelines for Child Protection Intervention*, 2000 edition, p 27.

¹³⁷ NSW Office of the Children's Guardian, *Annual Report 2000/2001*, p 3.

7.1 Background to the Children's Guardian

Some of the background to the establishment of the Children's Guardian is discussed in the Office's first annual report. It is said there to have its origins in the *A Report to the Minister for Health and Community Services, the Hon JP Hannaford MLC*, published in January 1992 by the committee set up to review Substitute Care Services in NSW, commonly known as the Usher Report. That report recommended that instead of the Minister having responsibility for the guardianship of state wards, the government should establish an office of Children's Guardian, a position which would carry out a similar function to that of the Public Guardian for adults. The Usher Report identified what it called 'an inherent conflict' for the legal guardian (the Minister and, through him/her, the Department) who also makes decisions about the priority and availability of services: 'The obligations of the legal guardian to ensure that the best interests of the child are met will inevitably conflict with the obligations of the Minister and the Departmental officers to ensure the efficient use of resources'.¹³⁸ Underlying its proposal for a Children's Guardian, therefore, was a desire to create a separation between the service provider and the legal authority responsible for ensuring the adequacy of that service provision.

A Children's Guardian was also proposed in the two major reports released in 1997, namely, the *Report of the Review of the Children (Care and Protection) Act 1987* (the Parkinson Report) and the Wood Royal Commission report into Paedophilia. The Parkinson Report envisaged the Children's Guardian as

an Office where the existing legal responsibilities of the Minister as guardian of wards can be located as a specialist and accountable unit. The Office of the Children's Guardian is not intended as a 'watchdog' agency like the Community Services Commission. Nonetheless, it would need to be independent of the line management of the Department of Community Services because the Department is a service provider in substitute care and the guardianship function needs to be operationally separated from the role of service provision in substitute care.¹³⁹

A feature of the Parkinson Report's recommendation was that it said to be 'entirely consistent' with the Wood Royal Commission proposal that the Children's Commissioner should perform the role of a Special Guardian in relation to children in care - 'to ensure that their needs are properly addressed and to have standing to appear in the Children's Court in relation to any applications made concerning them, as well as the right to seek a review of any orders made'. According to Parkinson:

¹³⁸

Quoted in Department of Community Services, *Community Welfare Legislation Review, Review of the Children (Care and Protection) Act 1987: Recommendations for Law Reform*, 1997, p 103.

¹³⁹

Department of Community Services, *Community Welfare Legislation Review*, n 138, p 104.

If it was decided to place the functions of the Children's Guardian with the Children's Commissioner, this could best be achieved by providing that the Children's Commissioner hold the position of Children's Guardian. One of the Divisions of the Commission could then be an Office of the Children's Guardian.¹⁴⁰

This issue was also considered by the Community Services Commission in its response to the Green Paper of December 1997 on a NSW Children's Commission. It could see advantages and disadvantages in the Children's Guardian being part of the Children's Commission, stating: 'As the Children's Guardian would be a provider of a service it would be difficult for it to be part of a Children's Commission which has a monitoring role. On the other hand, there are very strong arguments for combining the role of the Children's Guardian and advocacy services as these can effectively complement each other'. For the Community Services Commission, the best option was for the Children's Guardian to be attached to the Children's Commission 'but not a part of it'. Indeed, it was of the view that the Children's Guardian must be a 'separate position' filled by a different person to the Children's Commissioner:

This would leave the Children's Guardian free to be single minded in his or her pursuit of the best interests of children in the care of the state. The Children's Commission would be able to maintain its monitoring role.¹⁴¹

The suggestion that the Children's Guardian should be a separate position was adopted, while the suggestion that the office could be co-located with the Children's Commission was not. Under existing arrangements, the Children's Guardian is established as a statutory office holder under Chapter 10 of the *Children and Young Persons (Care and Protection) Act 1998*.¹⁴² The Office of the Children's Guardian was established in December 2000 and, shortly thereafter, the first Children's Guardian, Linda Mallett, was appointed in January 2001. The Office is located in Parramatta. However, although a Children's Guardian has been appointed, the Office's functions have yet to be proclaimed to commence. Note, too, that large parts of Chapter 8 'Out-of-home care' and Chapter 9 'Medical examination and treatment' of the 1998 Act, under which the Children's Guardian has several specific responsibilities, are yet to commence

7.2 Structure and constitution of the Office of Children's Guardian

The Children's Guardian is appointed for a term of up to 5 years and, like the Children's Commission, can only be appointed for two successive terms of office. The Guardian may

¹⁴⁰ Department of Community Services, Community Welfare Legislation Review, n 138, p 102.

¹⁴¹ NSW Community Services Commission, *Response to a NSW Children's Commission - Green Paper*, 31 March 1998, p 16.

¹⁴² *Children and Young Persons (Care and Protection) Act 1998*, section 178. Relevantly, sections 181-184 are unproclaimed.

be removed from office by the Governor 'only for misbehaviour, incapacity or incompetence'.

The Children's Guardian is an independent organisation¹⁴³ which reports directly to the Minister for Community Services. As with the Child Death Review Team, in the case of annual or special reports which are to be tabled before Parliament, the Children's Guardian must provide a draft of the report to the Minister for Community Services. The Children's Guardian must consider any comments made by the Minister, but is not bound to amend its report in the light of those comments.¹⁴⁴

7.3 Functions and powers of the Children's Guardian

The functions relating to parental responsibility of the Children's Guardian are set out in section 181 of the *Children and Young Persons (Care and Protection) Act 1998*. In summary, they are as follows:

- to exercise, subject to any direction by the Minister, the parental responsibilities of the Minister for a child or young person for the benefit of the child or young person;
- to promote the best interests of all children and young persons in out-of-home care;
- to ensure that the rights of all children and young persons in out-of-home care are safeguarded and promoted;
- to examine a copy of the case plan for each child or young person in out-of-home care and a copy of each report made following the regular review of the case plan; and
- to accredit designated agencies and to monitor their responsibilities under the Act and the regulations.

The Children's Guardian is also empowered to: remove responsibility for daily care and control of a child or young person from an authorised carer,¹⁴⁵ and, using best endeavours, to informally resolve disputes between children and young person, parents, relatives or another person connected to the child or young person, designated agencies or an authorised carer.¹⁴⁶ Further, the Children's Guardian may also apply for reviews of Children's Court orders.¹⁴⁷

7.4 The Children's Guardian and the Community Services Commission

There are at least two relevant issues here, one concerning the scope of the oversight jurisdiction of the Community Services Commission, the other concerning the question of

¹⁴³ A Schedule 1 Department under the *Public Sector Management Act 1988*.

¹⁴⁴ *Children and Young Persons (Care and Protection) Act 1998*, section 189.

¹⁴⁵ *Children and Young Persons (Care and Protection) Act 1998*, section 182.

¹⁴⁶ *Children and Young Persons (Care and Protection) Act 1998*, section 183.

¹⁴⁷ *Children and Young Persons (Care and Protection) Act 1998*, section 184.

overlapping jurisdiction between itself and the Children's Guardian.

The first issue was discussed in the NSW Law Reform Commission's review of the *CRAMA Act*. It asked whether the jurisdiction of the Community Services Commission should be extended to cover the actions of the Children's Guardian in exercising the parental responsibilities of the Minister in relation to children and young people. At that stage the Community Services Commission itself submitted that its jurisdiction should be so extended. The argument was accepted by the Law Reform Commission which commented:

The Children's Guardian will take over the parental responsibilities exercised by the Minister for Community Services in relation to children and young persons in care. Therefore unless the Children's Guardian is specifically included under the jurisdiction of the CSC [the Community Services Commission], this whole group of cases will be excluded from the existing jurisdiction of the CSC.¹⁴⁸

This recommendation is reflected in the Private Member's Bill, the Community Services (Complaints, Reviews and Monitoring) Amendment (Application) Bill 2001, which proposes to extend the definition of 'service provider' to include the Children's Guardian. Its effect would be to permit the Community Services Commission to handle complaints of unreasonable conduct by the Children's Guardian, along with those relating to other 'service providers', including DOCS. According to the Bill's sponsor:

The powers exercised by the Children's Guardian prior to the creation of the office of Children's Guardian only a short time ago, were vested in the Director-General of the Department of Community Services [DOCS]. In that capacity, the Director-General of DOCS has always been, and certainly should be, subject to the scrutiny of the Community Services Commission. The fact that the Children's Guardian has now taken over those powers is only logical. It is a simple step to say that the powers bestowed on the Children's Guardian should also be reviewable by the Commission, if there is an assumption that she has not complied with her obligations.¹⁴⁹

Whether this amendment is in fact required as a strict matter of law may be a matter of debate. There is also a policy question at stake here. In the context of the proposed merger of the Community Services Commission with the Ombudsman's Office, the Association of Children's Welfare Agencies (ACWA) has submitted that 'the functions and operations of the Children's Guardian *per se* should not be subject to oversight by the Ombudsman. The Children's Guardian is subject to oversight by the Minister and the Parliament and this

¹⁴⁸ NSW Law Reform Commission, n 5, p 116.

¹⁴⁹ *NSWPD*, 31 May 2001, p 14131.

is sufficient'.¹⁵⁰

A second issue is that of overlap. Under the new regime both the Children's Guardian and the Community Services Commission have a statutory function relating to the review of the situation of children in care.¹⁵¹ It may be that these functions will be quite distinct in practice. For example, the Children's Guardian may focus more on evaluating the prospective operation of case plans for children in out-of-home care, whereas the Community Services Commission may undertake 'one-off' retrospective reviews of individual children in care. In any event, this division of labour is something which will need to be clarified, both for the benefit of the organisations involved and the community at large. Presumably a protocol to delineate their respective roles in this area will need to be developed before the commencement of the relevant sections of the *Children and Young Persons (Care and Protection) Act 1998*.

7.5 Comments

According to the first annual report of the Office of the NSW Children's Guardian, 'There are many reasons for having a Children's Guardian'. The report adds that 'the primary one is to ensure that children and young people in out-of-home care have someone who is seeking to promote their best interests and safeguard their rights'.¹⁵² The decision has been taken in NSW that this goal will be best achieved by a separate, specialist organisation, and not as part of the new Children's Commission. It would seem that the precise relationship between this new specialist organisation – the Children's Guardian – and the Community Services Commission still needs to be defined.

8. THE NSW OMBUDSMAN

Since the post Wood Royal Commission reforms, the NSW Ombudsman's Office is among the most dynamic players in the field of child protection, notably with responsibility for overseeing the child-related employment screening scheme which is now in place. Moreover, with the jurisdictional problems facing the Community Services Commission, the Ombudsman is tipped to become the most significant child protection watchdog. As noted, a proposal has been mooted under which the existing functions and staff of the Community Services Commission would transfer to a new Community Services Division within the Ombudsman's Office. The effect of this would be to make the Ombudsman the key complaints handling and investigatory organisation in respect to DOCS.

¹⁵⁰

ACWA, *Submission to Cabinet Office regarding proposed merger of Community Services Commission with the Ombudsman's Office*, p 5.

¹⁵¹

Children and Young Persons (Care and Protection) Act 1998, section 181 (1); *Community Services (Complaints, Reviews and Monitoring) Act 1993*, section 11. In the case of the Community Services Commission its review functions of children in care have not been affected by the jurisdictional problems experienced by the organisation since November 2000 – *Community Services Commission Newsletter*, Issue 22, Spring 2001, p 5.

¹⁵²

NSW Office of the Children's Guardian, *Annual Report 2000/2001*, p 8.

It could be argued that this would return the Ombudsman to the position it held in the child protection system before the *CRAMA Act*. Before then, under the *Ombudsman Act 1974*, the major areas that produced complaints by or involving children were the Juvenile Justice Centres, plus the work of the Department of School Education and DOCS. However, with the introduction of the *CRAMA Act* the Ombudsman's jurisdiction with respect to DOCS was taken over largely by the Community Services Commission.

It was explained by the Legislative Council's Standing Committee on Social Issues in its 1996 report, *Inquiry into Children's Advocacy*, that the Ombudsman retained jurisdiction 'where a complaint concerns systemic misconduct or maladministration'. As well, the Ombudsman continued to be able to exercise his/her 'own motion' power to investigate certain matters involving DOCS should the need arise. Some potential for overlap with the Community Services Commission was noted in this regard, but the Ombudsman submitted that 'such a problem has not as yet arisen'. The two other sources of complaints to the Ombudsman involving children were said to relate to 'complaints of police conduct' and a diminishing number of complaints from children in Juvenile Justice Centres.

Indeed, the main findings of the Standing Committee in respect to the Ombudsman were: (a) that the Ombudsman was not a children's advocate; and (b) that the Office received relatively few complaints either from young people themselves, or from children's advocacy organisations. In this latter respect, the statistics for the past 20 years were said to be 'almost infinitesimal'. In total the Ombudsman had dealt with 95,000 formal complaints and two or three times the number of informal complaints. Among the formal complaints were: 1 complaint respectively from the Child Protection Council, the NSW Federation of Parents' and Citizens' Association and the Juvenile Justice Advisory Council; 2 complaints from the National Children's and Youth Law Centre; and 7 from the Public Interest Advocacy Centre. In addition, the Ombudsman had received 2 complaints from the Kingsford Legal Centre, 6 from the Redfern Legal Centre, 8 from the Macquarie Legal Centre and 9 from the Marrickville Legal Centre. Among the Standing Committee's recommendations was one for the Government to provide on-going funding for education and publicity campaigns to raise community awareness of the Ombudsman's potential role in child protection.¹⁵⁵

The role played by the Ombudsman in child protection altered significantly in 1998 with the insertion of Part 3A into the *Ombudsman Act 1974*. Part 3A is headed 'Child protection' and it spells out the Office's powers and responsibilities in respect to the post-Wood Royal Commission child-related employment screening scheme. The Part was proclaimed to commence on 7 May 1999, along with the Ombudsman Regulation 1999. Its operation is considered in the next section of this paper.

9. THE CHILD-RELATED EMPLOYMENT SCREENING SCHEME

A major focus of the Wood Royal Commission recommendations was on the protection of child from paedophile activity in the context of child-related employment. Paedophiles working in the education system are one obvious example; the employment of paedophiles in religious organisations, or in sporting clubs frequented by children are others. The Royal Commission recommendations involved the introduction of 'an exceptional power' to issue unacceptable risk certificates, of which it said

in the light of the evidence received which demonstrates the tenacity and duplicity of paedophiles, the repetitive and obsessive nature of their offending, the low detection and conviction rates and the inability of the system in the past to remove paedophiles from positions in which they have direct access to children, special measures are required.¹⁵⁴

Central to the Royal Commission proposal was the Children's Commission which, under the Wood recommendations, was to have included an Employment Information Centre. Its role 'would be to collect and collate information relevant to the suitability of persons working, or desiring to work (whether as paid employees or volunteers) in the care or supervision of children'.¹⁵⁵ Based on this information the Children's Commissioner would consider whether or not a certificate should be issued that a person is an unacceptable risk. Detailed procedures were suggested by the Royal Commission for the operation of this system, including the provision of a right of appeal from the decisions of the Children's Commission to the Administrative Decisions Tribunal. In the event, although the Children's Commission as constituted under the *CCYP Act* has substantial responsibilities for the employment screening scheme, its role is somewhat different to that proposed by the Wood Royal Commission.

9.1 The relevant legislation

In total, the child-related employment screening scheme is established under 4 pieces of legislation:

- the *Child Protection (Prohibited Employment) Act 1998*, which commenced on 3 July 2000, sets out which persons are prohibited from working in positions of child-related employment, the duties and penalties applying to employees and employers, plus the mechanisms in place for exemption and appeal;
- the *Child Protection (Offenders Registration) Act 2000* applies to the extent that a 'registrable person' under this Act is also a 'prohibited person' under the *Child Protection (Prohibited Employment) Act 1998* and cannot therefore work in a child-related employment;
- Part 7, 'Employment screening', of the *CCYP Act*, which sets out the procedures for

¹⁵⁴ Royal Commission into the NSW Police Service, n 25, p 1304.

¹⁵⁵ Royal Commission into the NSW Police Service, n 25, p 1301.

checking current and future employees and for the issuing of guidelines by the Minister relating to privacy and other matters.

- Part 3A, 'Child protection', of the *Ombudsman Act* which sets out the scrutiny and investigation responsibilities of the Ombudsman over the employment screening scheme.

Note that the Children's Commission is responsible for the implementation of both the *CCYP Act* and the *Child Protection (Prohibited Employment) Act*. Basically, these two Acts constitute what is called the Working With Children Check, the guidelines developed by the Children's Commission which operate in this area setting out the duties of employers and employees, as well as the procedures and safeguards applying under the legislation. Explaining as it does the system in plain language, often by way of question and answer, the Working With Children Check is the best entry point into the employment screening scheme.

9.2 The Working With Children Check in summary

Summarising the employment screening scheme under the *CCYP Act*, Patrick Parkinson commented that the Act

provides the statutory basis by which preferred applicants for employment in relation to children may be screened. For some positions, employment screening will be mandatory; for others, it will be up to the employer to determine whether to use the screening system. Checks will be made not only on convictions for sex offences and child abuse offences, but also on unproved charges, apprehended violence orders to protect a child, and completed disciplinary proceedings relevant to child protection.

The screening authority, which might be the [Children's] Commissioner or an approved employer (such as the Departments of Education, Health or Community Services), will then conduct a risk assessment, on the basis of all the information available, concerning the appropriateness of this person working in child-related employment. It will be up to the employer to decide whether to employ the person on the basis of the risk assessment made by the screening authority (if the screening authority is not itself the prospective employer), but where the screening reveals that the preferred applicant has a conviction for sex offences, then it will be illegal to employ him or her. This is the consequence of provisions in a related Act, the *Child Protection (Prohibited Employment) Act 1998*. This Act also makes it an offence for convicted sex offenders to apply for, or to engage in, child-related employment.¹⁵⁶

The Working With Children Check Guidelines themselves summarise key aspects of the employment screening scheme as follows:

- Any person convicted of a serious sex offence will not be permitted to work or seek work in employment which primarily involves direct contact with children where that contact is unsupervised (in either a paid or unpaid role). These people are considered prohibited persons under the legislation.
- All employers must obtain a prohibited person declaration from any person seeking or currently working in paid or unpaid employment which primarily involves direct contact with children where that contact is unsupervised. Staff must then declare whether they are a prohibited person or not and if they are a prohibited person, cease child-related employment within one month.
- All people commencing paid employment, which primarily involves direct contact with children where that contact is unsupervised, foster carers and ministers of religion must be checked against any relevant criminal record, any relevant apprehended violence order or any relevant disciplinary proceeding.
- Employers may also choose to undertake relevant checks for other persons currently employed or seeking to work in child-related employment. It is not mandatory for such checks to be undertaken.

Basically, the system in place for prospective employees for positions where mandatory screening must take place is that: first, employers will seek consent from the prospective employee for him/her to make a 'prohibited employment declaration'; secondly, relevant information is then passed to the Children's Commission (or another Approved Screening Agency) for the screening process to be conducted. Some government agencies, such as DOCS, may undertake their own screening of prospective employees.

Not all current employees in child-related employment must be screened, but they must all complete a 'prohibited employment declaration'. A false declaration by either a prospective or current employee constitutes an offence. On 7 September 2001 a child sex offender was convicted for falsely signing a statement that said he had no convictions for serious sex offences in order to remain in child-related employment.¹⁵⁷

9.3 The Child Protection (Prohibited Employment) Act 1998

Objectives: The Act aims to prevent a 'prohibited person' from gaining or remaining in specific types of child-related employment, including child protection services, educational institutions,¹⁵⁸ religious organisations and employment involving fostering or other child

¹⁵⁷

NSW Commission for Children and Young People, *Media Release*, 7 September 2001.

¹⁵⁸

The provision does not apply to universities.

care.¹⁵⁹ The Act generally does not apply to child-related employment involving family members only.¹⁶⁰ For example, the legislation would apply to a babysitter arranged by a commercial agency, but not to a situation where a family member is contracted to look after his/her nieces or nephews.

Definitions: A 'prohibited person' is a person convicted of committing a serious sex offence 'whether before or after the commencement' of the Act. Its operation is retrospective, therefore. For the purposes of the legislation, a serious sex offence includes an offence involving sexual activity or acts of indecency which is or was punishable by penal servitude or imprisonment for 12 months or more in New South Wales.¹⁶¹ A 'registrable person' within the meaning of the *Child Protection (Offenders Registration) Act 2000* is also a 'prohibited person' for the purposes of the present legislation.¹⁶²

The definition of 'conviction' under the Act reads: '**conviction** includes a finding that the charge for an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to a conviction'.

Operation: Under the *Child Protection (Prohibited Employment) Act* an employer cannot commence employing, or continue to employ, a prohibited person for work which primarily involves direct contact with children where that contact is unsupervised.¹⁶³ 'Primarily' in this context has been defined by the Industrial Relations Commission to mean 'At least one of the essential duties of the position involves direct, unsupervised contact with children'.¹⁶⁴

All employers must ask all existing paid and unpaid employees engaged in such positions if they are a prohibited person. Employees must make the declaration to their employer within one month of being requested to do so or, if they are a prohibited person, remove themselves from child-related employment.¹⁶⁵

Where an employer removes a prohibited person, the employer is permitted to transfer the employee to employment of a different kind.¹⁶⁶ As explained by the Working With

¹⁵⁹ *Child Protection (Prohibited Employment) Act 1998*, section 3.

¹⁶⁰ *Child Protection (Prohibited Employment) Act 1998*, section 4.

¹⁶¹ This does not apply where the offence occurred in a 'public place' and would not have constituted an offence in this State 'if the place were not a public place'.

¹⁶² *Child Protection (Prohibited Employment) Act 1998*, section 5.

¹⁶³ *Child Protection (Prohibited Employment) Act 1998*, section 8.

¹⁶⁴ Children's Commission, *Annual Report 2000-2001*, p 67. The Annual Report refers to Matter No IRC 4337 of 2000. The case is reported as *HREA v Commission for Children and Young People* [2001] NSWIR Comm 93.

¹⁶⁵ *Child Protection (Prohibited Employment) Act 1998*, section 7.

¹⁶⁶ *Child Protection (Prohibited Employment) Act 1998*, section 10.

Children Check Guidelines, 'Employers may consider transfers to other positions which are not child-related within the organisation. If no such alternative exists, the employee will be required to terminate their services with the employer'. The Guidelines add: 'Prior to employment, employers must ensure that all applicants for child-related employment declare whether they are a prohibited person or not. Employers should also ensure that once they have identified a position as being child-related, all information regarding the position clearly states that prohibited persons are not eligible to apply'.

Offences and defences: It is an offence for an employer to fail to ask whether a person is a prohibited person or to employ a prohibited person.¹⁶⁷ It is also an offence for a prohibited person to apply for, undertake or remain in child-related employment.¹⁶⁸ It is a defence if a prohibited person 'establishes that he or she did not know, at the time of the commission of the offence, that the employment concerned was child-related employment'.¹⁶⁹ Note that the onus of proof is on the defendant.

Exemptions by declaration: Under Part 3 of the *Child Protection (Prohibited Employment) Act* a person may apply to the Industrial Relations Commission or the Administrative Decisions Tribunal for an order declaring that the Act does not apply to a prohibited person in respect of a specified offence. The test to be applied by the relevant Tribunal is whether the person poses a 'risk to the safety of children'.¹⁷⁰ Various factors to be taken into account in deciding whether to make an order are set out, including the ages of the offender and victim(s) at the time the offence was committed. The Children's Commission is to be party to any proceedings under Part 3.

Interpretation: Significantly, the *Child Protection (Prohibited Employment) Act 1998* is to prevail 'to the extent of any inconsistency between it and any other law'.¹⁷¹

The exemption scheme in operation Since coming into operation on 3 July 2000 the 'exemption' provisions of the *Child Protection (Prohibited Employment) Act* have been tested on a number of occasions in the NSW Industrial Relations Commission. Various applications for exemptions orders have succeeded, the Commission arriving at the conclusion that the applicant does not 'pose a risk to the safety of children'.¹⁷² In its 2000/2001 Annual Report the Children's Commission said that it agreed with all 24 exemptions which been granted to date. At the time of reporting 27 applications were still

¹⁶⁷ *Child Protection (Prohibited Employment) Act 1998*, section 7 (1).

¹⁶⁸ *Child Protection (Prohibited Employment) Act 1998*, section 6 (1).

¹⁶⁹ *Child Protection (Prohibited Employment) Act 1998*, section 6 (2).

¹⁷⁰ *Child Protection (Prohibited Employment) Act 1998*, section 9 (4).

¹⁷¹ *Child Protection (Prohibited Employment) Act 1998*, section 12.

¹⁷² For example – *G v J & H* [2001] NSWIRC Comm 69; *HREA v Commission for Children and Young People* [2001] NSWIR Comm 93; '*M*' and the *Commission for Children and Young People* [2001] NSWIRC Comm 110; *L v Commission for Children and Young People* [2001] NSWIRC Comm 134.

pending.¹⁷³

Included among these pending applications was 'A' v *Commissioner for Children and Young People and Anor*,¹⁷⁴ a decision subsequently handed down by Hungerford J on 28 August 2001. The case involved the interaction between the *Child Protection (Prohibited Employment) Act* and section 579 of the *Crimes Act 1900* - a 'spent convictions' provision. Section 579 allows for a conviction that was dealt with by way of recognisance to be treated as spent and 'disregarded' if a period of 15 years has elapsed since the recognisance was entered into, provided the recognisance was observed and no further conviction was proven. This applied in the circumstances of this case. 'A' was convicted of the offence of 'carnally know a girl under the age of 16 years' on 12 March 1971 in the Sydney Quarter Sessions. At the time of the offence the victim was 14 years of age and 'A' 18 years of age. 'A' had been employed as a secondary school teacher with the New South Wales Department of Education and Training since 1978.

During the exemption hearing before the Industrial Relations Commission, Counsel for 'A' made submissions that the *Child Protection (Prohibited Employment) Act* should not apply to the applicant due to the operation of the provisions of section 579 of the *Crimes Act*. It was argued on behalf of the Commission for Children and Young People that pursuant to s.12(1) of the *Child Protection (Prohibited Employment) Act*, that Act should prevail where there is any inconsistency between it and any other Act or law.

Justice Hungerford ruled that with respect to section 579 of the *Crimes Act*, the intent of the legislature was to remove the continuing stigma of a criminal conviction and provide the person with the benefit of a clean criminal record. He was of the view that both Acts can operate and stand together. He was satisfied that in reviewing the provisions of the *Child Protection (Prohibited Employment) Act*, it disclosed nothing to suggest that the legislature intended to derogate from or otherwise affect, retrospectively, a right 'crystallised' under section 579. Justice Hungerford concluded that the applicant was not a 'prohibited person' within the meaning of section 5 of the *Child Protection (Prohibited Employment) Act*. Of the decision it has been said that it

poses a serious hurdle for the child protection work undertaken by the Commission for Children and Young People. That is, the child-protection objects of the *Child Protection (Prohibited Employment) Act 1998* will be frustrated if persons convicted of serious sex offences may have the offences disregarded due to the operation of s.579 of the *Crimes Act*. The decision effectively removes from the definition of 'prohibited person' any person who, though convicted of a serious sex offence, has had his or her conviction treated as spent by virtue of s.579 of the *Crimes Act*.¹⁷⁵

¹⁷³ The Commission for Children and Young People, *Annual Report 2000-2001*, p 41.

¹⁷⁴ [2001] NSWIR Comm 194.

¹⁷⁵ NSW Crown Solicitor's Office, *Cifent Newsletter*, October 2001, p 6.

An application for leave to appeal the decision has been filed in the Industrial Relations Commission on behalf of the Commission for Children and Young People.

9.4 Part 7 of the Commission for Children and Young People Act 1998

Functions of the Children's Commission: As discussed in an earlier section of this paper, Part 7 of the CCYP Act sets out the functions the Children's Commission may exercise in relation to employment screening.¹⁷⁶ One function is to provide the checking services used in the employment screening scheme.

Approved screening agencies: To assist the Commission in this role, Approved Screening Agencies have been appointed by the Premier. According to the Working With Children Check Guidelines, in the interest of confidentiality the number of such Agencies has been kept to a minimum. At present, the Approved Screening Agencies are: the Children's Commission; the NSW Departments of DOCS, Education and Training, Health and Sport and Recreation; and the Catholic Commission for Employment Relations.

As noted, in its 2000/01 Annual Report the Children's Commission said that, in July 2000, the Working With Children Check was introduced to implement this system, in the first year of which over 223,000 employment checks were undertaken by the Commission and its Approved Screening Agencies. Sixty seven people were rejected for employment on the basis of these checks.¹⁷⁷ The Annual Report also noted that 39 employers had failed to notify the Children's Commission when they 'had not employed someone on the basis of a risk assessment'. According to the Commission, it has started to monitor the notification by employers of any employees who have relevant completed disciplinary proceedings against them. The monitoring of public sector employers is also under way, and the monitoring of private sector employees will start in 2001-02.¹⁷⁸

Mandatory employment screening: Part 7 of the CCYP Act makes employment screening mandatory for people who have applied for what the Act defines as 'primary child-related employment' – paid work that primarily involves direct contact with children where that contact is unsupervised, foster carers and ministers of religion. Employment screening can include checks for: any relevant criminal record with respect to offences involving sexual activity, acts of indecency, child abuse or child pornography; any relevant AVOs made against the person for the protection of children; and any completed relevant disciplinary proceedings against the person. Based on these checks, an assessment of the risk to children involved in that child-related employment may be made.¹⁷⁹

Under the CCYP Act employers may also screen current paid employees engaged in child-related employment and unpaid workers, such as volunteers. However, screening is not

¹⁷⁶ Commission for Children and Young People Act 1998, section 36 (1).

¹⁷⁷ The Commission for Children and Young People, *Annual Report 2000-2001*, p 40.

¹⁷⁸ The Commission for Children and Young People, *Annual Report 2000-2001*, p 41.

¹⁷⁹ Commission for Children and Young People Act 1998, section 37.

mandatory in this case.

An employer may carry out employment screening itself, or it may engage one of the Approved Screening Agencies noted above. In other words, DOCS for example may conduct its own screening or request the Children's Commission to undertake this work on its behalf.

Duties of employers: Under the legislation employers must notify the Children's Commission of any: decision not to employ a person as a result of the findings of the employment screening process;¹⁸⁰ and completed disciplinary proceeding against an employee involving child abuse, sexual misconduct or acts of violence in employment where these acts involve children, are directed at children, or take place in the presence of children.¹⁸¹

Confidentiality safeguards: The *CCYP Act* establishes confidentiality arrangements in relation to all information obtained during the screening process. It is an offence to inappropriately use any information obtained during employment screening.¹⁸² Privacy issues are also dealt with under the Working With Children Check Guidelines. Among other things these Guidelines state that all relevant public sector agencies, including local government organisations,

will be required to handle personal information in accordance with the information protection principles in Part 2 of the Privacy and Personal Information Protection Act, subject to applicable exemptions. Non-government organisations should collect and hold personal information relating to the checking process in accordance with the Data protection Principles endorsed by the former NSW Privacy Committee and currently accepted by the NSW Privacy Commissioner.¹⁸³

Powers to compel the production of information: The Children's Commission is to be party to any proceedings under section 9 of the *Child Protection (Prohibited Employment) Act*. Further to this, in preparing submissions to the Industrial Relations Commission or the Administrative Decisions Tribunal, the Children's Commission may direct any government agency to provide it with relevant information.¹⁸⁴

¹⁸⁰ *Commission for Children and Young People Act 1998*, section 40.

¹⁸¹ *Commission for Children and Young People Act 1998*, section 39.

¹⁸² *Commission for Children and Young People Act 1998*, section 42.

¹⁸³ Working With Children Check Guidelines, *Disciplinary Proceedings*, p 8.

¹⁸⁴ *Commission for Children and Young People Act 1998*, section 14A.

9.5 Part 3A of the Ombudsman Act 1974

Overview of Ombudsman's functions: Under Part 3A the Ombudsman is required to keep under scrutiny the systems for handling child abuse allegations or convictions against employees of designated government and non-government agencies. The Ombudsman's child protection responsibilities include:

- overseeing and monitoring investigations of child abuse allegations against employees;
- conducting direct investigations into those allegations if appropriate;¹⁸⁵
- scrutinising child protection systems;¹⁸⁶
- handling complaints about the way agencies have dealt with child abuse allegations;
- assessing and analysing trends and patterns of child abuse in the workplace;
- developing policies, procedures and guidelines for effectively managing child protection investigations; and
- conducting education, training and liaison activities.

Notification of child abuse: As explained in the Ombudsman's Annual Report for 2000/01, all allegations or convictions relating to child abuse by employees or agencies specifically designated in the Ombudsman Act (even if the alleged child abuse did not take place in the workplace) must be reported to the Ombudsman by way of a notification. Generally, the government and non-government agencies the Ombudsman oversees are those that provide services to children, such as DOCS, government and non-government schools, child care centres and out-of-home care service providers. In addition, all other government agencies must notify the Ombudsman of any allegations of child abuse by employees if the abuse arises in the course of employment.

The main requirements that agencies within the Ombudsman's jurisdiction must comply with are as follows:

- Child abuse allegations or convictions against employees must be notified to the Ombudsman within 30 days of the agency becoming aware of the allegation or conviction.
- The agency must inform the Ombudsman whether or not it intends to take any disciplinary or other action in response to the allegation or conviction, and their reasons for not taking such action.
- The agency must also inform the Ombudsman of any submissions made by the employee involved regarding the action that the agency intends to take.¹⁸⁷

The Ombudsman has reported that 'One of the major issues we are still dealing with is under-reporting and late reporting'. Further to the issue of under-reporting, the Ombudsman

¹⁸⁵ Ombudsman Act 1974, section 25G.

¹⁸⁶ Ombudsman Act 1974, section 25B.

¹⁸⁷ Ombudsman Act 1974, section 25C.

commented that 'People in some agencies deny the problem exists, fail to recognise certain behaviour as abusive or do not want to damage the agency's or the alleged abuser's reputation'. That said, in 2000-2001 the Ombudsman did receive a total of 1,379 written notifications and complaints compared to 1,221 in 1999-2000. No less than 47.5% of notifications were from government schools; 13.5% from the Catholic school system; and 12.7% from the Police Service.¹⁸⁸

A special report: In April 2000 the Ombudsman released his first special report relevant to the new child protection jurisdiction, *Handling of Child Abuse Allegations Against Employees: An Investigation into the System Used by the NSW Department of Education and Training*. The report was based on the referral by the Director-General of the DET of two separate cases of alleged improper conduct of a sexual nature by teachers (T1 and T2). These cases had led to adverse media reports in 1999 when, at first, criminal charges against the teachers had been dismissed and departmental disciplinary charges were not proven, yet subsequently the Victims Compensation Tribunal awarded compensation to the children who had made the allegations. As the Ombudsman explained, this meant that in circumstances where the DET had cleared T1 and T2, the Tribunal was satisfied on the balance of probabilities that the children concerned had been subjected to an act of violence and had suffered injuries as a result.

The Ombudsman's findings were generally critical of the DET's handling of child abuse allegations. In particular, it was recommended that the DET needed to 'shift from the disciplinary scheme to a risk management approach', as adopted by the NSW Police Service. The Ombudsman commented:

The DET is not the only government department with a responsibility to protect children. Other departments must also deal with allegations of sexual abuse of children by their staff. These departments are also presently required to use a restricted disciplinary regime when responding to such allegations. For this reason, consideration should be given to the benefits of a 'whole of government' approach in addressing the issues highlighted in this report.¹⁸⁹

No update on action taken in response to these recommendations is provided in the Ombudsman's annual report, or elsewhere it seems.

9.6 Comments

The child-related employment screening scheme is a major development following the Wood Royal Commission. What is in place is something like a dual track system. Under the *Child Protection (Prohibited Employment) Act* child-related employers must seek

¹⁸⁸ NSW Ombudsman, *Annual Report 2000-2001*, p 41.

¹⁸⁹ NSW Ombudsman, *Handling of Child Abuse Allegations Against Employees*, April 2000, p 13.

declarations from all prospective and current employees stating if they have been convicted of a class of sexual offences. If so, the employer must ensure that the person's child-related employment is terminated. The second strand to this scheme is the employment screening mechanism under which all prospective employees for primary child-related employment must be checked for any relevant criminal record, AVOs or disciplinary proceedings and an assessment made of the risk to children involved. Current employees may also be screened, but this is not mandatory. The Ombudsman's main role is then to oversee the investigation of child abuse against employees and, where appropriate, to conduct its own investigations into the systems which are in place. Important recommendations have already been made for the improvement of those systems.

10. THE CHILD PROTECTION REGISTER

The *Child Protection (Offenders Registration) Act 2000*,¹⁹⁰ commenced on 15 October 2001. The Child Protection (Offenders Registration) Regulation 2001 also commenced on that date. This new statutory regime puts into effect recommendation 111 of the Wood Royal Commission which called for consideration to be given 'to the introduction of the compulsory registration with the Police Service of all convicted child sexual offenders'. This was to be accompanied by requirements for: the notification of changes of name and address; and for the introduction of systems to verify the ongoing accuracy of the information held by police.

Having considered other registration schemes in overseas jurisdictions, notably in the UK and the US, the Royal Commission supported a regime along the lines of the UK's *Sex Offenders Act 1997*. The provisions of that Act and the background to the more general debate is discussed in earlier NSW Parliamentary Library Briefing Papers.¹⁹¹ It is enough to note here that, unlike the 'Megan's Law' approach adopted in the US, the UK model does not make the registration information available to members of the public. It can be said, too, that the Royal Commission cautioned that registration legislation would be of limited value unless it formed part of a uniform national system.¹⁹² Whether the *Child Protection (Offenders Registration) Act 2000* is a first stage in a national process remains to be seen.

That Act is of course part of a larger legislative package introduced since 1998 for the better management of sex offenders in the community. Included in that package are the *CCYP Act* and the *Child Protection (Prohibited Employment) Act* both of which prevent child sex offenders from entering or remaining in child-related employment. In addition, the *Crimes Legislation Amendment (Child Sexual Offences) Act 1998* makes it an offence for convicted child sex offenders to loiter near places frequented by children.

¹⁹⁰ As amended by the *Child Protection (Offenders Registration) Amendment Act 2001*.

¹⁹¹ In Briefing Paper No 12/1997, *Registration of Paedophiles* by Marie Swain and in Briefing Paper No 22/1999, 'Megan's law' and other forms of sex-offender registration by Rachel Simpson.

¹⁹² Royal Commission into the NSW Police Service, n 25 , p 1227.

10.1 The Child Protection (Offenders Registration) Act 2000¹⁹³

In summary this Act requires persons sentenced for child sex offences (and other specified serious offences against children) to keep local police informed of changes to their name, address, employment and motor vehicle details for a specified period after their release into the community. A register of these offenders is to be established and maintained by the Commissioner of Police.¹⁹⁴ This register is to be referred to as the NSW Police Service Child Protection Register.¹⁹⁵

Definitions and scope of operation: Under the legislation, obligations are imposed on 'registrable persons', these being persons sentenced for certain registrable offences against persons under the age of 18. 'Registrable offences' are divided into Class 1 and 2 offences. Class 1 offences are treated more seriously and involve murder, sexual intercourse or the persistent sexual abuse of a child. Class 2 offences include acts of indecency punishable by imprisonment of 12 months or more and offences under sections 91D-G of the *Crimes Act* (child prostitution offences, other than those committed by child prostitutes).¹⁹⁶ The Act is retrospective in operation as regards 'registrable persons', although this only applies to those found guilty of a registrable offence prior to the Act's commencement and who are classified as an 'existing controlled person'. In other words, it only applies retrospectively to those persons who are already in the criminal justice system, either as prisoners, forensic patients or subject to a good behaviour bond or community service order in respect to a registrable offence.¹⁹⁷ It does not apply to those offenders who have been released and finished their parole period.

Obligations of registrable persons: Registrable persons must attend a police station in the area in which they live within 28 days of sentencing or release from custody, or entering NSW, whichever is later. Existing controlled persons who are not in custody must report to police within 90 days of the Act's commencement.¹⁹⁸ When attending the police station,

¹⁹³ This summary is based on D Hunt, 'Child protection through offender registration' (2001) 13(9) *Judicial Officers' Bulletin* p 65.

¹⁹⁴ *Child Protection (Offenders Registration) Act 2000*, section 19.

¹⁹⁵ *Child Protection (Offenders Registration) Regulation 2001*, clause 18. The Register is to record whether a registrable person is a child or has a special need or disability.

¹⁹⁶ The definition of 'registrable person' also exempts from the Act certain persons who have been sentenced of a registrable offence, including: persons sentenced in respect of a single Class 2 offence, where the sentence did not include a term of imprisonment (home detention and periodic detention included), a community service order or supervised bond; and persons subject to orders under section 10 of the *Crimes (Sentencing Procedure) Act 1999* or section 33(1) of the *Children (Criminal Proceedings) Act 1987*.

¹⁹⁷ *Child Protection (Offenders Registration) Act 2000*, section 3.

¹⁹⁸ *Child Protection (Offenders Registration) Act 2000*, sections 10 and 12. Section 13 establishes alternative arrangements for protected witnesses and specified former protected witnesses.

registrable persons must provide police with such personal information as his/her name, date of birth, residential address, employment, motor vehicle usage, and criminal history.¹⁹⁹

Registrable persons are required to inform police of changes to relevant personal information within 14 days of that change occurring.²⁰⁰ Registrable persons intending to travel interstate for more than 28 days, or who intend to travel overseas, must advise police of their travel details before leaving.²⁰¹ If absent from NSW for 28 days or more, they must also report to police within 14 days of their return.²⁰²

As soon as practicable after sentencing, a registrable person must be given written notice of his/her obligations under the Act.²⁰³ The details of this notification scheme are set out in the Regulations, including the duties of a supervising authority or police as regards to children, persons with special needs or those incapable of understanding a statutory notice.²⁰⁴

Ongoing reporting obligations: The period for which a registrable person must report to police varies. As explained by David Hunt:

Reporting periods generally range from eight to 15 years, depending on the nature of the offences committed and the offender's criminal history. Persons who commit registrable offences as children are subject to half the reporting period of adults. Registrable persons who subsequently reoffend and are convicted must report to police for the rest of their life, subject to review by the Administration Decisions Tribunal after 15 years (s. 16).²⁰⁵

Registrable persons need not report while in custody, while outside NSW, or while subject to an Administration Decisions Tribunal order under section 16 of the Act. On the other hand, the reporting period is extended by the length of any time that is spent in custody.²⁰⁶

Offences and defences: Offences under the legislation include failing to comply with

¹⁹⁹ *Child Protection (Offenders Registration) Act 2000*, section 9.

²⁰⁰ *Child Protection (Offenders Registration) Act 2000*, section 10 (2)

²⁰¹ *Child Protection (Offenders Registration) Act 2000*, section 11.

²⁰² *Child Protection (Offenders Registration) Act 2000*, section 10 (3).

²⁰³ *Child Protection (Offenders Registration) Act 2000*, section 4.

²⁰⁴ *Child Protection (Offenders Registration) Regulation 2000*, clause 12.

²⁰⁵ D Hunt, n 193, p 67.

²⁰⁶ *Child Protection (Offenders Registration) Act 2000*, section 15.

reporting obligations without reasonable excuse.²⁰⁷ Clause 17 of the Regulation requires the court to consider in this context whether the information given to a registrable person was sufficient to inform them of their obligations, having regard to the person's circumstances. It is a defence to proceedings for an offence if a registrable person can establish that, at the time the offence is alleged to have occurred, they had not received notice or were unaware of their reporting obligations.²⁰⁸

It is also an offence for any person (not just registrable persons) to supply police with information they know to be false or misleading.²⁰⁹

Clause 14(5) of the Regulation provides that a police officer commits an offence if he or she uses fingerprints of a registrable person obtained under the Act for a purpose other than confirming the person's identity, or failing to destroy them (or copies) immediately after they have been used for that purpose. The offence is punishable by a maximum 20 penalty units.

10.2 Comments

The Child Protection Register is the first of its kind in Australia and, predictably, its coming into operation has given rise to a range of comments. For the NSW Council for Civil Liberties, Cameron Murphy is reported to have said that the Register would encourage vigilantism and drive sex offenders underground: 'One of the problems with these sorts of systems is...the information gets into the public domain and then we have acts of vigilantism against the sex offenders'. Murphy added, 'That's unhelpful and if police can't control the information that's what will happen'. He predicted that, if the information does get into the public domain, sex offenders will be driven away from rehabilitation programs and the 'convicted sex offender is likely to shift interstate or move overseas, and when they do they'll change their identity and they'll be out of reach of treatment programs'.²¹⁰

Directly opposed to this view was the response of Gwenn Hann, the mother of a five year old girl murdered in 1974 by John Lewthwaite. Her view was that access to the information on the Register should not be restricted to police, but should be available to schools and community groups who should be told if a convicted sex offender is living in their area. 'It's not strong enough as far as I'm concerned', she is reported to have said, 'I think the victims should be told...(whether) the perpetrator is north, south, east or west'.²¹¹

Former Police Minister, the Hon Paul Whelan MP, reportedly said that police could pass information from the Register on to schools and other groups if they thought it appropriate:

²⁰⁷ *Child Protection (Offenders Registration) Act 2000*, section 17.

²⁰⁸ *Child Protection (Offenders Registration) Act 2000*, section 17 (3).

²⁰⁹ *Child Protection (Offenders Registration) Act 2000*, section 18.

²¹⁰ 'Paedophile register will encourage vigilantism – Murphy', *AAP Online*, 16 October 2001.

²¹¹ 'Paedophile crackdown not enough', *AAP Online*, 15 October 2001.

'Well it may be that the police...determine that those in the school community should be told. It doesn't rule it out, but it leaves that issue to operational police to determine'.²¹² He is also reported to have said that the Register 'enables police to closely monitor offenders who continue to pose a threat to children, it is going to lift the veil of anonymity that paedophiles exploit to blend into a community and prey on the young and vulnerable'.²¹³

After reviewing the legislation, David Hunt who is a Principal Policy Analyst with the Ministry for Police, concluded:

The obligations that the Act imposes on registrable persons are not particularly onerous. A registrable person may be required to report to police as infrequently as a single occasion. They may report to police at the police station nearest to them in a private manner (see s.12). A registrable person may avoid their reporting obligations by leaving New South Wales.²¹⁴

As noted, the Wood Royal Commission had cautioned that a register of this kind would be of limited value unless it formed part of a uniform national system.²¹⁵

11. CONCLUSION

It has been said that producing a 'snap-shot' of the child protection system is never easy, At issue is the safety and well-being of some of the most vulnerable members of our community, namely children at risk of harm and in need of care and protection. That the system is likely to fail some children is hardly surprising bearing in mind the complexities of the issues and circumstances at stake. There is no perfect system; no fail-safe set of practices and procedures. At times the people working on the ground in this area are dealing with intractable problems which no amount of goodwill or dedication can resolve entirely.

Whilst acknowledging the complexities and difficulties involved, it remains the case that the administrative system of child protection generally must be subject to review by effective oversight and supervisory agencies. Any doubts on that score are quickly dispelled by the findings of the Wood Royal Commission. Four years down the track from that landmark report much has been done to alter the legislative and administrative arrangements. A child-related employment screening scheme is in operation, as is the first Child Protection Register in Australia. A Children's Commission has been established, albeit on different lines to those envisaged by the Royal Commission. There is a Children's Guardian. Still more change is foreshadowed, in the form of the proposed merger of the Community Services Commission with the Ombudsman's Office.

²¹² 'Paedophile crackdown not enough', *AAP Online*, 15 October 2001.

²¹³ C Wockner, 'Tracking paedophiles', *The Daily Telegraph*, 15 October 2001.

²¹⁴ D Hunt, n 193, p 67.

²¹⁵ Royal Commission into the NSW Police Service, n 25, p 1227.

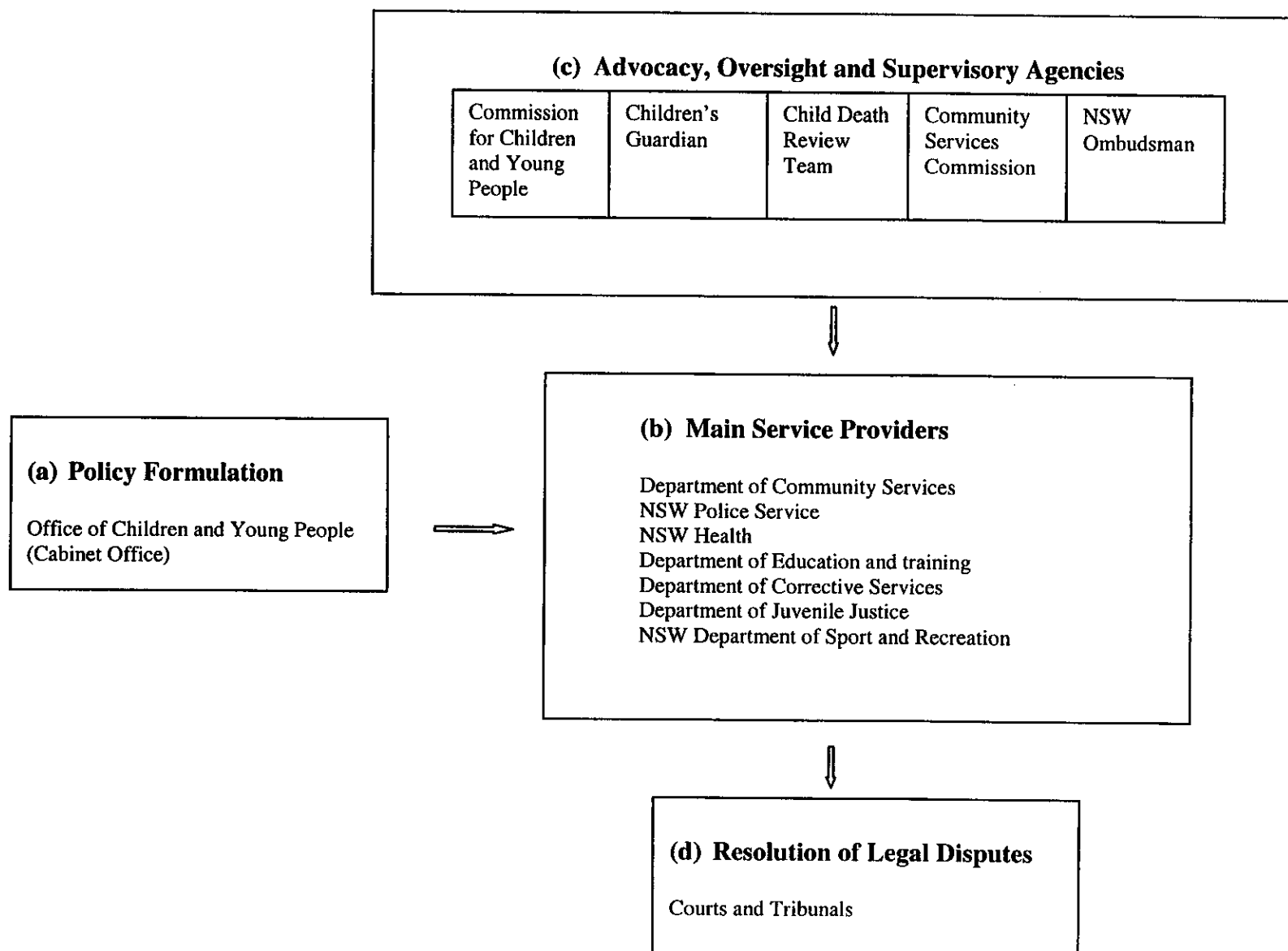
But if the system of child protection is always in flux, the questions to be asked in respect to it are constant. Are the oversight and supervisory agencies effective? Are they independent? Do they have the requisite powers? Do they use the powers they possess? Are they adequately funded? Do children know of their existence, especially those children at risk of harm who form the core constituency of these agencies? Is there effective coordination and cooperation between agencies?

Reasonable as it is to ask such questions, it must be acknowledged that they are always hard to answer in any definitive way. The answer the Wood Royal Commission arrived at in 1997 was a damning one, encapsulated in the finding: 'Serious deficiencies in existing structures and procedures for the protection of children by those agencies and institutions responsible for their care have been highlighted along with an appalling lack of coordination of effort or commitment.'²¹⁶ For all the recent reforms, what we seem to have at present in NSW is an oversight and supervisory system in a state of transition. Some developments are very positive. On the other hand, it is self-evident that all the long-standing jurisdictional problems have not been resolved. The Cabinet Office's proposal and selected responses to it have been discussed. By way of a general guide it can be said that, if they are to be effective, the various oversight and supervisory bodies which operate in this area must have clearly defined agendas and jurisdictions, as well as the necessary powers and independence to sometimes be the bearers of 'bad news' to the government of the day. That is the crux of the matter.

APPENDIX A

THE NSW CHILD PROTECTION SYSTEM IN OUTLINE

THE NSW CHILD PROTECTION SYSTEM IN OUTLINE



APPENDIX B

**TABLE 1 – TERMS AND CONDITIONS OF APPOINTMENT
OF SELECTED NSW STATUTORY OFFICE HOLDERS**

Table 1 – Terms and Conditions of Appointment of Selected NSW Statutory Office Holders

	Term of appointment	Re-appointment	Conditions for removal from office
Commissioner for Children and Young People	Up to 5 years	Maximum of 2 successive terms (10 years in total)	Removal by Governor for misbehaviour, incapacity or incompetence
Children’s Guardian	Up to 5 years	Maximum of 2 successive terms ¹	Removal by Governor for misbehaviour, incapacity or incompetence
Health Care Complaints Commissioner	Up to 5 years	Maximum of 10 years ²	Removal by Governor for misbehaviour, incapacity or incompetence ³
Community Services Commissioner	Up to 5 years	No restrictions on re-appointment ⁴	Removal by Governor for misbehaviour, incapacity or incompetence ⁵
Privacy Commissioner	Up to 5 years	No restrictions on re-appointment ⁶	Removal by Governor for misbehaviour, incapacity or incompetence ⁷
Chairperson of the Legal Aid Commission	Up to 5 years	No restrictions on re-appointment ⁸	Removal by Minister for inability, misbehaviour or failure to comply with conditions of employment ⁹
President of the Anti-Discrimination Board	Up to 7 years	No restrictions on re-appointment ¹⁰	Removal by Governor for misbehaviour, incapacity or incompetence ¹¹
ICAC Commissioner	Not more than 5 years (Subject to veto by the Parliamentary Joint Committee on the ICAC)	No restrictions on re-appointment ¹²	Removal by Governor for misbehaviour, incapacity or incompetence, or on the address of both Houses of Parliament ¹³
NSW Ombudsman	Not more than 7 years (Subject to veto by the Parliamentary Joint Committee on the Office of the Ombudsman)	No restrictions on re-appointment	Removal by Governor on the address of both Houses of Parliament ¹⁴
NSW Auditor General	7 years (Subject to veto by the Public Accounts Committee)	No re-appointment ¹⁵	Removal by Governor on the address of both Houses of Parliament ¹⁶

* See End Notes overpage.

END NOTES

- 1 *The Children and Young Persons (Care and Protection) Act 1998, section 178 (3) read with Public Sector Management Act 1988, section 42F.*
- 2 *Health Care Complaints Act 1993, section 77 (2).*
- 3 *Health Care Complaints Act 1993, section 77 read with Public Sector Management Act 1988, section 42F.*
- 4 *Community Services (Complaints, Reviews and Monitoring) Act 1993, section 78 (3) read with Public Sector Management Act 1988, section 42F.*
- 5 *Community Services (Complaints, Reviews and Monitoring) Act 1993, section 78 (4).*
- 6 *Privacy and Personal Information Protection Act 1998, Schedule 1.2(2).*
- 7 *Privacy and Personal Information Protection Act 1998, Schedule 1.4.2.*
- 8 *Legal Aid Commission Act 1979, Schedule 2. 3. (2).*
- 9 *Legal Aid Commission Act 1979, Schedule 2. 6.*
- 10 *Anti-Discrimination Act 1977, section 73.*
- 11 *Anti-Discrimination Act 1977, section 80 (4).*
- 12 *Independent Commission Against Corruption Act 1988, Schedule 1. 4.*
- 13 *Independent Commission Against Corruption Act 1988, Schedule 1. 6 (2) and (3).*
- 14 *Ombudsman Act 1974, section 6 (1), (2) and (5).*
- 15 *Public Finance and Audit Act 1983, section 28.*
- 16 *Public Finance and Audit Act 1983, Schedule 1.5.*

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