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and Young People Bill 1998 and
other child protection initiatives**

by

Rachel Simpson

Briefing Paper No 14/98

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Ms Marie Swain, Research Officer, Law/Social Issues (02) 9230 2003

Mr John Wilkinson, Research Officer, Economics (02) 9230 2006

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CONTENTS

EXECUTIVE SUMMARY

1.0	INTRODUCTION	1
2.0	ROYAL COMMISSION RECOMMENDATIONS	2
3.0	CHILDREN'S COMMISSION GREEN PAPER - DECEMBER 1997	5
4.0	COMMISSION FOR CHILDREN AND YOUNG PEOPLE BILL 1998 - AN OVERVIEW	9
5.0	QUESTIONS AND ANSWERS	11
5.1	Structure and focus of the Children's Commission	11
5.2	Core functions of the Children's Commission	14
5.3	Children's advocacy	18
5.4	Children's Guardian	21
5.5	Employment screening	23
5.6	Complaints handling	30
6.0	CHILD PROTECTION ARRANGEMENTS IN OTHER JURISDICTIONS	34
6.1	South Australia	34
6.2	Tasmania	35
6.3	Queensland	36
7.0	CHILD PROTECTION (PROHIBITED EMPLOYMENT) BILL 1998 (NO 2)	41
8.0	OMBUDSMAN AMENDMENT (CHILD PROTECTION AND COMMUNITY SERVICES) BILL 1998 (NO 2)	43

EXECUTIVE SUMMARY

One of the recommendations made by Commissioner Wood in the *Final Report of Royal Commission into the NSW Police Service: the Paedophile Inquiry* aimed at curbing paedophilia and protecting children from abuse was to create a “new body called the Children’s Commission, to be the focal point for co-ordinating the effort to protect children”. The Royal Commission put forward three suggestions for how this organisation could be structured. It’s preferred option was option three, which was for a separate Children’s Commission to be established, with responsibility for co-ordinating child protection activities, and with investigative functions being vested in other agencies. The Royal Commission’s recommendations are discussed at pages 2-5.

As a response to the Royal Commission recommendations, the Government released a Green Paper in December 1997, the purpose of which was to “obtain the views of interested organisations, agencies, and individuals on the creation of the Children’s Commission and the role and functions it should fulfil.” The Green Paper also identified a number of options for configuring a Children’s Commission and favoured an option whereby existing child protection arrangements are maintained and their inter-relationship streamlined. The Green Paper’s proposals are discussed at pages 5-8. A number of overseas and Australian jurisdictions currently have a children’s commission or children’s ombudsman in place. The position in other Australian jurisdictions with similar organisations (South Australia, Tasmania and Queensland) and overseas is discussed at pages 34-41.

A series of draft bills were introduced into the Legislative Assembly in June 1998 - the Child Protection (Prohibited Employment) Bill 1998 (No 2), the Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 2) and the Commission for Children and Young People Bill 1998. The first two bills are the subject of *Briefing Paper No 8/98* and are discussed here only insofar as they differ from the discussion in that paper (see pages 41-44). The objects of the Commission for Children and Young People Bill 1998 are: to establish a Commission for Children and Young People and to provide for its functions, and to provide for employment screening for child-related employment (pages 9-11).

The Green Paper posed a number of questions related to a possible Children’s Commission which can be broken into the following broad areas: structure and focus of the Children’s Commission; core functions; advocacy; employment screening; a children’s guardian and complaints handling. The recommendations of the Royal Commission are examined, along with the provisions of the draft bill and the opinions of interested community groups, including the Council of Social Service of NSW, the Child Protection Council, and the Community Services Commission.

Generally, the focus of the Children’s Commission contained within the draft bill is much broader than that recommended by the Royal Commission, whose focus was, understandably, on child protection. Community organisations also supported a broadening of focus for the Children’s Commission (pages 11-18). However, individual advocacy and a children’s guardian are not included in the draft bill, functions which the Royal Commission and the community groups considered essential in a Children’s Commission (pages 18-23). Community organisations also recommended the Children’s Commission play a role in ensuring NSW’s compliance with the United Nations Convention on the

Rights of the Child, which is not referred to in the draft bill.

Employment screening was unanimously supported by the Royal Commission, the Green Paper, the draft bill and community organisations. The debate focuses around where that function is to be located. The Royal Commission report and the draft bill place the employment screening function within the Children's Commission. The community organisations, however, believe that this function should not be located within the Children's Commission, as it is inconsistent with and a distraction from the other core functions proposed for the Children's Commission. Employment screening is discussed at pages 23-30.

The main questions with regard to complaints handling is whether or not the Children's Commission should handle complaints as well as being an advocate for children, and whether or not complaints are best handled on the basis of population groups or service groups. The Royal Commission saw no reason why the Children's Commission could not handle both complaints and advocacy, and recommended a complaints handling system based on population, in the form of the Investigation and Review Unit. The draft bill and the Green Paper take the view that complaints would be best handled on the basis of service systems and therefore do not allocate this function to the Children's Commission but leave it with specialist bodies with the Ombudsman being given an oversight function. Generally, community organisations supported this option. However, NCOSS in particular rejected the idea that the Community Services Commission be made accountable to the Ombudsman for all complaints (pages 30-33).

1.0 INTRODUCTION

In June 1998, the Minister for Community Services introduced a package of three draft exposure bills into the Legislative Assembly, as a part of the Government's continued response to the 140 recommendations made by the report of the Royal Commission into the New South Wales Police Service (the Royal Commission) focussing on paedophilia. Two of the bills, the Child Protection (Prohibited Employment) Bill 1998 (No 2) and the Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 2) had been introduced previously in November 1997. The initial bills were withdrawn by the Government following consultation with "major stakeholders, including public sector unions, the Privacy Committee, volunteer organisations and sporting groups", and the two revised bills were introduced in their place.¹ Those bills were the subject of the Parliamentary Library Research Service Briefing Paper No 8/98: *Initial Responses to the Wood Royal Commission Report on Paedophilia*. Except to outline any differences between the 1997 and 1998 bills, this Briefing Paper will not duplicate what was contained within Briefing Paper No 8/98. The new or different features of the 1998 bills are discussed in Parts 7.0 and 8.0.

The third bill, upon which this Briefing Paper focuses, is the Commission for Children and Young People Bill 1998. This bill implements the Royal Commission's recommendation that a children's commission be established to "oversee and co-ordinate the provision of service for the protection of children from abuse...".² In a Ministerial Statement, the Minister for Community Services, the Hon F Lo Po', MP, stated that the Commission will be an independent statutory corporation and will report to the newly established Joint Parliamentary Committee on Children and Young People. The Commission will have the scope to consider any issue affecting children and, under the proposed legislation, will have the authority to conduct special inquiries and recommend changes to legislation, policies, practices and services that seek to improve outcomes for children.³

This paper will outline the Royal Commission's recommendations regarding the establishment of a children's commission. It should be noted that Briefing Paper No 8/98 examined the Royal Commission's proposals in the general context of reform in the area of child protection. See the paper, specifically pages 9 to 11 in regard to the proposed children's commission. This paper will then look at the Government's Green Paper, and will examine the proposed legislation in light of questions raised in that Green Paper. Over 160 written submissions on the Green Paper were received. As a part of this paper, opinions from four of those submissions will be examined - from the Council of Social Services NSW (NCOSS), the Community Services Commission (CSC), the Child Protection Council (CPC) and the NSW Police Association (NSWPA). Interstate initiatives will also

¹ Hon F Lo Po', MP, Minister for Community Services, Ministerial Statement, NSWPD, 25 June, 1998, p. 6662.

² Royal Commission into the New South Wales Police Service, *Final Report, Volume V: the Paedophile Inquiry*, p. 1293, para 20.4.

³ Hon F Lo Po', MP, n 1, p. 6662.

be discussed, notably the recently passed legislation in Tasmania establishing a Commissioner for Children, and the newly formed Queensland Children's Commissioner.

2.0 ROYAL COMMISSION RECOMMENDATIONS

One of the cornerstones of the Royal Commission's recommendations aimed at curbing paedophilia and protecting children from child abuse was to create "a new body called the Children's Commission, to be the focal point for co-ordinating the effort to protect children".⁴ It was proposed that the Children's Commission would become the pivotal point of contact upon issues relating to the protection of children. The proposed Children's Commission would take over the functions previously carried out by the Community Services Commission as they relate to children,⁵ and all of the functions of the Child Protection Council,⁶ and be given the necessary powers to properly carry out those functions, including the power to obtain information across all agencies with respect to the background of families of children in care and the background of persons applying for employment involving the care or supervision of children, the power to investigate and conciliate serious complaints about services provided to children, and the power of review of such services on its own motion.

The Royal Commission considered three organisational models for the Children's Commission:⁷

⁴ Royal Commission, n 2, p. 562.

⁵ The Community Services Commission (the CSC) was created by the *Community Services (Complaints, Appeals and Monitoring) Act 1993*, and began operation in April 1994. The focus of the CSC is on consumers who receive or are eligible to receive services from the Department of Community Services, the Ageing and Disability Department, non-government services funded by the Minister for Community Services and Disability Services, and the Home Care Service of NSW. Priority is given to consumers who are least able to complain or protect their own interests, and hence much of their work involves children and young people and people with disabilities. Some functions of the CSC in relation to children include: dealing with complaints from children who are receiving or eligible to receive community services; carrying out reviews of individual children in residential or foster care; co-ordinating Community Visitors who advocate on behalf of children in residential care; undertaking inquiries on significant issues of concern or into matters which highlight systemic problems; educating children and young people about their right to complain and service providers about best practice in handling complaints from consumers, and supporting advocacy programs for children and young people. See for more detail, Community Services Commission, *Response to a NSW Children's Commissioner - Green Paper*, 31 March 1998, pp. 5-9.

⁶ The Child Protection Council (the CPC) was established in 1985 and is the body responsible for co-ordinating and monitoring child protection programs in NSW and for providing independent advice on child protection to the Minister for Community Services. The CPC's primary responsibilities are to prevent child abuse and neglect from occurring and to help and protect children who have been abused or who are at risk of abuse: NSW Child Protection Council, *Annual Report 1994-1995*, p. 9.

⁷ Royal Commission, n 2, p. 1294.

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1. The responsibilities for co-ordinating child protection and disciplinary investigative powers be vested in the Office of the Ombudsman;
 2. A separate Children's Commission be established, with responsibility for co-ordinating child protection as well as that for disciplinary investigations into allegations of child sexual abuse against employees or volunteers working for government departments or government funded agencies, or
 3. A separate Children's Commission be established, with responsibility for co-ordinating child protection activities, but with investigative functions mentioned above being vested in other agencies.

The Royal Commission rejected Option One primarily because of the belief that an independent agency investigating allegations of child sexual abuse was vital. In the Commission's view, it is inappropriate to have the same body conducting disciplinary investigations requiring a judgement as to whether specific acts have been proved to the standard required to sustain a "charge" of misconduct or disgraceful or improper conduct, while at the same time reviewing information and material for the quite different purpose of making an administrative decision that a person is an unacceptable risk to children. When that same agency must monitor and provide direction in the provision of child protection services, the potential for conflict is even greater. Similarly, the Royal Commission rejected Option Two. The imperative of creating a children's commission which will focus on the protection of the child does not allow for a single agency, whether it be the Ombudsman or a purpose created agency.

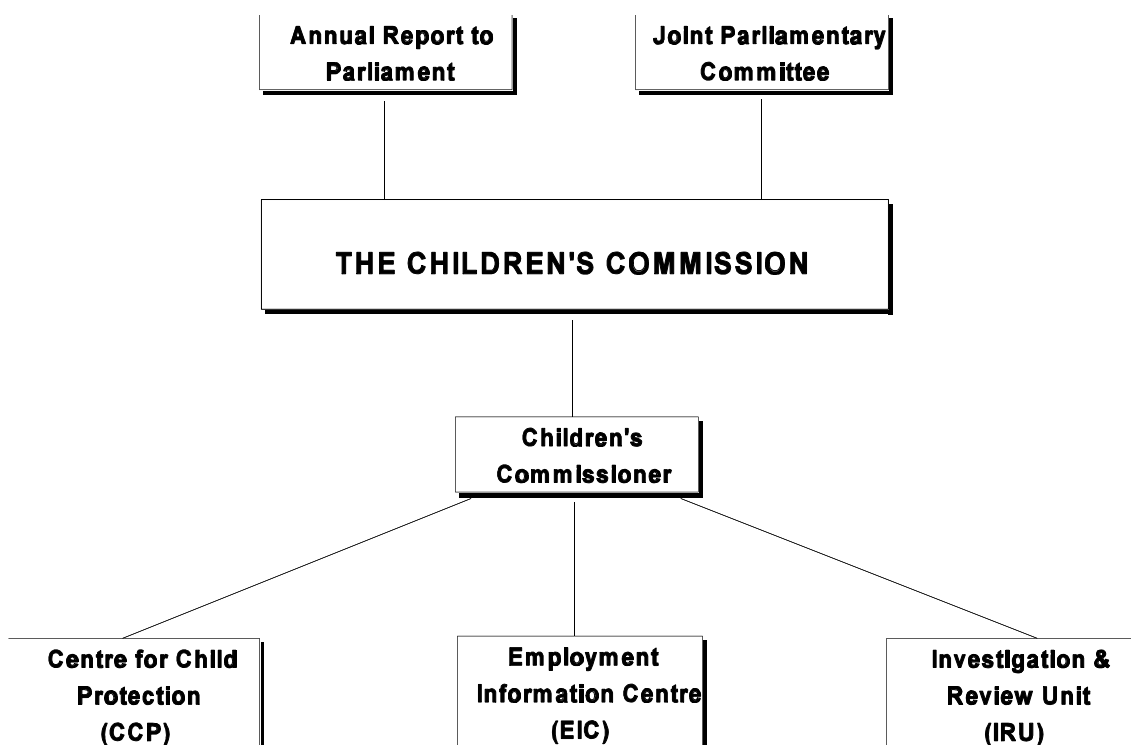
The option preferred by the Royal Commission is Option Three. The Royal Commission believes that this option would best enable the Children's Commission to fulfil its functions by

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 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.⁸

The Royal Commission's preferred structure of the Children's Commission can be represented diagrammatically as follows:⁹

⁸ Ibid, p. 1296, para 20.17.

⁹ Ibid, p. 1298, para 20.23.



The proposed **Centre for Child Protection (CCP)** would have 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)** would have the responsibility of administering the scheme for the issue of unacceptable risk certificates in relation 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)** would have 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 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 is created) be transferred to the Office of the Ombudsman. Implementation of this recommendation has been initiated in the Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 2).

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 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.¹⁰ The foundation of an Advisory Committee for the Children's Commission including experts drawn from relevant disciplines was also proposed.

3.0 CHILDREN'S COMMISSION GREEN PAPER - DECEMBER 1997

The Green Paper was released by the Office of Children and Young People in the Cabinet Office in December 1997. The purpose of the Green Paper was to "obtain the views of interested organisations, agencies, and individuals (both children and adults), on the creation of the Children's Commission and on the role and functions it should fulfil".¹¹ The Green Paper outlined the Royal Commission's recommendations, and posed a number of questions intended to facilitate discussion. These questions form the basis for discussion in Part 5.0 below. The Green Paper noted that there were some potential problems with a Children's Commission as proposed by the Royal Commission, namely

- There are potentially some conflicts of interest in the proposed functions of the Children's Commission (individual advocacy, substitute decision making, screening and complaints handling) being located in the one body. If decisions are made and complaints are handled by the same body there is no independent review. Similarly, if advocacy involves promoting the interests of individual children, the necessary impartiality required to adequately investigate complaints may be difficult to obtain.¹²
- Some of the proposed functions may be more effectively carried out if located in other existing organisations such as the Community Services Commission, the Office of the Ombudsman and the Office of the Public Guardian.¹³
- The Royal Commission did not specify whether the role of the Children's Commission should be limited to child protection or should extend to all matters affecting the wellbeing of children. The Green Paper argued that child protection can not be distinguished from children's overall wellbeing.¹⁴ The Green Paper stressed the importance of determining the scope of the Children's Commission's responsibilities before determining any structure that the Children's Commission might take. The structure proposed by the Royal Commission (see above) is only appropriate if the Children's Commission covers all the interests of children, not just child protection.¹⁵

¹⁰ Ibid, p. 1302, para 20.37.

¹¹ The Office of Children and Young People, *A Children's Commission for NSW - Green Paper*, December 1997, p. 4.

¹² Ibid, p. 7.

¹³ Ibid.

¹⁴ Ibid, p. 8.

¹⁵ Ibid, p. 10.

- Due to the wide range of functions proposed for the Children's Commission, a single advisory body proposed by the Royal Commission may not be able to represent adequately the relevant expertise in all fields. It may be preferable for the Children's Commissioner to have the power to seek advice as required.¹⁶
- The Royal Commission did not consider the questions of employment screening in any detail, for example who should be screened, how the screening system would work, what limits would be placed on screening, for example as a consequence of the spent convictions scheme, and how privacy issues should be addressed.¹⁷
- The Royal Commission recommended that 'Unacceptable Risk Certificates' be issued to prospective employees considered unsuitable for work with children. The Green Paper proposed an alternative system whereby all those working with, or seeking to work with children would be issued a certificate.¹⁸ It was also acknowledged in the Green Paper that the 'Unacceptable Risk Certificate' system could be counterproductive by instilling in employers a false sense of security about employees who are not officially deemed to pose an 'unacceptable risk', based as it is only on official evidence of threat to children's safety.¹⁹
- The Royal Commission recommended that the investigation and review unit be established. The Green Paper acknowledged the potential benefit of a 'one stop shop' for children. However, it also expressed concern that there could be some resultant confusion regarding which body was to handle a particular complaint, if the complaint could fall within the jurisdiction of the Children's Commission or a service-based complaints body such as the Ombudsman or the Community Services Commission. The opinion was also expressed that, due to the complexity of the various systems involved, for example the health or community services systems, knowledge of a particular system would be beneficial in understanding and resolving the complaint. In other words, an organisation based on service systems rather than population groups would be preferable.²⁰
- The Royal Commission's proposals may not give sufficient credence to the

¹⁶ Ibid, p. 9.

¹⁷ Ibid, p. 14. The Government established the Employment Screening Taskforce within the Premier's Department to examine the issues surrounding employment screening and provide a detailed proposal to Cabinet. More generally, see the discussion of the Child Protection (Prohibited Employment) Bill 1998 (Nos 1 and 2), in Part 7.0 below and in Briefing Paper No 9.98.

¹⁸ It was noted by the Green Paper that such a system has been successfully implemented in the United Kingdom where, for a small fee, individuals receive a certificate which they must provide as a part of their application for employment or voluntary work involving children.

¹⁹ Green Paper, n 11, pp. 16-17.

²⁰ Ibid, p. 18.

‘residual responsibilities’ of disability and aged services, responsibility for which it recommends be transferred to the Ombudsman. Such areas of responsibilities are equally as significant as children’s services, and any restructure must reflect this.

The Green Paper identified a number of options for configuring investigation and review functions of the proposed Children’s Commission:²¹

1. Dissolve the Community Services Commission, transfer its responsibilities for handling children’s complaints to the Children’s Commission, and establish a separate Disability Services Commission. Complaints about services to the aged, homeless and survivors of domestic violence could be transferred to the Ombudsman. To minimise duplication, the Ombudsman and the Health Care Complaints Commission would need to relinquish their role in investigating matters relating to children and people with a disability.

The Green Paper rejected this option on the basis that despite providing a ‘one stop shop’ for children, it would add to the number of existing complaints handling bodies. It would also increase the number of bodies relating to the health care system, a situation which is already particularly complex with a number of registration bodies and professional associations. This option would also continue the problems associated with complaints handling based on population groups rather than service systems.

2. Dissolve the Community Services Commission and integrate its entire jurisdiction under the Ombudsman. A separate community services division, headed by a Deputy Ombudsman, would be created.

The Green Paper rejected option two also. It was recognised that under this option the number of existing complaints handling bodies would be reduced. However the disadvantage of integrating the Community Services Commission into the Ombudsman is that the Community Services Commission currently handles complaints from both government and non-government service providers, whereas the Ombudsman has traditionally been concerned only with the operation of the whole spectrum of government agencies, so the focus and experience of the two organisations may not sit well together.

3. Retain existing arrangements and streamline their inter-relationship. The Community Services Commission would keep its existing jurisdiction, which covers government as well as non-government organisations, but be overseen by the Ombudsman, enabling the Ombudsman to handle complaints of a cross-jurisdictional nature. This would mean that the Ombudsman may have to extend its focus to certain non-government organisations if necessary for review.

The Green Paper identified a number of advantages with option three, which is the

²¹ Ibid, pp. 19-20.

Government's preferred option, and implemented in the Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 2) (see Part 8.0 below):

- the Ombudsman already has the largest jurisdiction of any existing complaints handling body, and apart from the Community Services Commission already has concurrent jurisdiction with other complaints bodies. In the year from 1 October 1996 to 30 September 1997 the Ombudsman received 250 complaints and logged 226 enquiries about services to young people.
- Currently no one complaints handling body has jurisdiction over all the agencies providing services to children. The result is that despite a large number of agencies commonly being involved in child abuse matters there can be a fragmented response to the most complex cases. The Joint Investigation Teams were given as an example, a complaint against which would currently be handled by both the Community Services Commission and the Ombudsman.
- Having the Ombudsman oversee all complaints by children would enable other streamlining arrangements such as a common phone number to be used by children when making a complaint.
- This option would allow the Ombudsman to monitor systemic problems affecting children and provide information to assist the Children's Commission in its work as a advocate, educator and researcher.
- This option would involve a more efficient use of resources by building on already existing bodies rather than creating new ones. It would also preserve the staff, budget and expertise of the Community Services Commission, ensuring other vulnerable groups were not compromised by a focus on children.

Additionally, the Green Paper identified as a disadvantage of option three the additional layer of reporting it places on the Community Services Commission. The Green Paper concluded, however, that the two organisations - the Ombudsman and the Community Services Commission would in fact develop so that their roles were supportive of each other.

4.0 COMMISSION FOR CHILDREN AND YOUNG PEOPLE BILL 1998 - AN OVERVIEW

The Commission for Children and Young People Bill 1998 is a draft bill, introduced in the Legislative Assembly on 3 July 1998 by the Minister for Community Services, the Hon Faye

Lo Po', MP, to enable community consultation and discussion in conjunction with the Child Protection (Prohibited Employment) Bill 1998 (No 2) and the Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 2). The objects of the bill are:

- (a) to establish a Commission for Children and Young People and to provide for its functions, and
- (b) to provide for employment screening for child-related employment.

The introduction to the bill also states that it “gives effect to certain recommendations of the Royal Commission into the New South Wales Police Service in its final report relating to the paedophile inquiry.” In her Ministerial Statement, the Minister for Community Services explained the change in name from Children’s Commission recommended by the Royal Commission. She stated that the term ‘young people’ had been inserted at the request of the young people who participated in the development of the Commission for Children and Young People proposal, on the basis that such people do not consider themselves ‘children’ despite being under the age of 18 years, which is the definition of ‘child’ adopted by this bill.²²

The draft bill is divided into 8 parts. Parts 2-7 are specifically relevant to the Commission for Children and Young People (“the Commission”)

- Part 2 establishes the Commission and constitutes it as a statutory body. It provides for the appointment of the Children’s Commissioner (“the Commissioner) and staff of the Commission, and for the appointment of an Expert Advisory Committee and other advisory committees considered necessary by the Children’s Commissioner from time to time.
- Part 3 outlines the principle functions of the Commission:
 - to promote the participation of children in the making of decisions that affect their lives;
 - to monitor the overall well-being of children in the community;
 - to conduct special inquiries into issues affecting children;
 - to make recommendations to government and non-government agencies on legislation, services and policies affecting children;
 - to promote the provision of information and advice to assist children;

²² Hon F Lo Po', MP, n 1, p. 6662. This was recommended by the Community Services Commission in their response to the Green Paper as better reflecting the target group of the Commission: Community Services Commission, n 5, p. 4.

- to conduct, promote and monitor education, public awareness activities and research on issues affecting children;
- to participate and monitor screening for child-related employment, and
- to develop and administer a voluntary accreditation scheme for persons working with persons who have committed sexual offences against children.

In the exercise of its functions, the Commission is to give priority to the interests and needs of children in out-of-home care, children in custody and to Aboriginal and Torres Strait Islander children.

- Part 4 authorises the Minister for Community Services to require the Commission to conduct a special inquiry into a specified issue affecting children. The authority may be granted as a result of the Commission's request or the Minister's own initiative.
- Part 5 requires the Commission to prepare annual reports to Parliament of its operations.
- Part 6 constitutes a Joint Parliamentary Committee on Children and Young People, to monitor and review the exercise by the Commissioner of the Commission's functions.
- Part 7 sets out the functions of the Commission with respect to employment screening:
 - collecting and maintaining a database of relevant apprehended violence orders and relevant completed disciplinary proceedings, and providing access to relevant records by certain employers;
 - conducting employment screening on behalf of employers where there is an agreement in place to that effect;
 - making recommendations to the Minister on appropriate procedures and standards for employment screening;
 - promoting public awareness and providing training on appropriate procedures and standards for employment screening, and monitoring compliance with those procedures and standards.

Employment screening is to be mandatory for employers of preferred applicants for certain paid primary child-related employment. A more detailed analysis of the Government's proposals follows in Part 5.5 below. Employers must notify the Commission of the name and other identifying particulars of any employee against whom relevant disciplinary proceedings have been completed, irrespective of the

findings of those proceedings. The destruction of records of such proceedings is prohibited.

5.0 QUESTIONS AND ANSWERS

The Green Paper posed a number of questions as a part of its discussion of options for a children's commission. The purpose of this section is to examine those questions and ascertain to what extent and in what manner the draft bill answers them. The questions provide a framework for a discussion of the views of relevant organisations such as the Council of Social Service of NSW (NCOSS), the Community Services Commission (the CSC), the NSW Police Association (the NSWPA), the Child Protection Council (the CPC) and Associate Professor Patrick Parkinson from Sydney University Law School²³. The discussion is broken into broad areas of concern: structure and focus of the Commission; core functions; advocacy; employment screening; a children's guardian, and complaints handling. It is noted that it has been stated in a paper presented to the Public Forum on the Commission for Children and Young People (the Public Forum), held in the NSW Parliament House Theatre on Monday 10 August 1998, that "there are very few similarities between the proposed Commission for Children and Young People and the Children's Commission which Wood envisaged" (Patrick Parkinson, Associate Professor of Law, University of Sydney). It is not, however, the purpose of this Paper to attempt to evaluate this development.

5.1 Structure and focus of the Children's Commission

The Green Paper asked whether or not the Children's Commission should be a statutory body, independent of Government, and what the role of the Commission should be. It also asked whether or not the Commission should address all issues affecting children, or just child protection, and whether or not the Commission should focus on vulnerable children. The Green Paper addressed the issue of accountability and reporting arrangements of the Children's Commission, and from whom the Commission should receive advice.

The Royal Commission

Commissioner Wood recommended that the Commission be a co-ordinating agency, with the appropriate powers and capacity to oversee and co-ordinate the delivery of service for child protection (although it would have more than simply an advisory role). The Children's Commission would be established by statute, and would have a very broad jurisdiction. The Royal Commission focussed its discussion of a Children's Commission on its role in the co-ordination of child protection services, and as such did not address the question of whether the Children's Commission's role should be broader. Nor did it discuss whether or not the Children's Commission should focus on vulnerable children in the provision of its services. The Royal Commission stressed that, if the Children's Commission is to be

²³ Associate Professor Parkinson was heavily involved in the review of the *Children (Care and Protection) Act 1987*.

able to “report fearlessly and objectively on matters within its field”, it must have actual as well as perceived independence from Government and the relevant departments and agencies delivering child protection services.²⁴ The Children’s Commission would receive advice from an Advisory Committee with membership drawn from a range of persons of similar experience and background to those presently constituting the Child Protection Council. In relation to the accountability of the Children’s Commission, the Royal Commission proposed that it report to Parliament annually and be subject to oversight by a joint parliamentary committee.

Community organisations

Community groups were eager for a Children’s Commission which would represent all children, not just those specifically in need of protection as proposed by the Royal Commission.²⁵ In its submission to the Government in response to the Green Paper, (NCOSS) endorsed a broader vision for a Children’s Commission than envisaged by Wood, working for all children while recognising that disadvantaged and vulnerable children must be its first priority.²⁶ The (CSC) also advocates a Children’s Commission with a statutory base, independent of government and government agencies, and with a broad jurisdiction covering government, non-government and commercial agencies and organisations. The CSC, like NCOSS believes the Children’s Commission must address all issues affecting children, not just child protection, and have a strong focus on vulnerable and disadvantaged children, as interpreted by the Children’s Commission in a way relevant to its role. It was, however, “particularly concerned” that the needs and concerns of children with disabilities not be overlooked by allowing them to fall into a gap somewhere between the scope of the Children’s Commission and the services provided by the disability sector.²⁷ In its submission in response to the Green Paper, the CSC stated that while the Green Paper has recognised some of the inconsistencies in the Royal Commission proposal, “its response has been to present a minimalist model for a Children’s Commission which assumes the roles of existing bodies without really creating new structures or functions and which fails to incorporate the key supervisory role intended by the Royal Commission”.²⁸ The NSW CPC stated in its submission in response to the Green Paper that “children need a body with more than just advisory functions”. Independence is seen as crucial if the new Children’s Commission “is to gain the necessary credibility as an institution which stands outside the

²⁴ Royal Commission, n 2, pp. 1293-94; 1296-97.

²⁵ Patrick Parkinson, address to the *Public Forum on The Commission for Children and Young People*, 10 August 1998, from notes taken by the author.

²⁶ Council of Social Service of NSW, *Response to the Green Paper, A NSW Children’s Commission, December 1997*, pp. 2-3.

²⁷ Community Services Commission, n 5, p. 18.

²⁸ *Ibid*, p. 4; p. 11.

existing structures”.²⁹

The Commission for Children and Young People Bill 1998

The Commission for Children and Young People Bill 1998 establishes the Children’s Commission as a statutory corporation with the functions conferred or imposed by that or any other piece of legislation. The Commissioner is to be appointed by the Governor for a term of up to three years. He or she may be reappointed for up to two additional terms. The Commissioner’s independence is, to some extent, guaranteed insofar as the Governor may remove the Commissioner only for misbehaviour, incapacity or incompetence.³⁰ Unlike the Children’s Commission recommended by the Royal Commission, the Children’s Commission envisaged by the bill would have a broad role, monitoring the “overall well-being of children” rather than focussing on child protection issues. In exercising its functions, the Children’s Commission is to “give priority to the interests and needs of children in out-of-home care, children in custody and Aboriginal and Torres Strait Islander children, and to other vulnerable children.”³¹

The Children’s Commission is to be advised by an expert advisory committee consisting of up to 8 members approved by the Minister on the recommendation of the Commissioner, with child-related expertise in the areas of health, education, child protection, child development, disabilities, the law, employment, sport or the arts. While it could be argued that the need for the Minister’s approval of members of the Expert Advisory Committees may compromise the Children’s Commission’s independence, the Commissioner is also empowered to appoint such other advisory committees as it considers appropriate in the exercise of its functions. Such other advisory committees do not require Ministerial approval.³² Additionally, the Children’s Commission is to “develop means of consulting with children appropriate to their age and maturity” and is to “use those means of consultation in exercising its functions and, in particular, before making any significant recommendations”.³³

A number of differences between the model contained within the Commission for Children and Young People Bill 1998 and that envisaged by both the Royal Commission and interested community groups were highlighted in the Public Forum:

- while the Commission for Children and Young People would have a broader role than that advocated by the Royal Commission, there is no focus on child protection at all. Considering that the Children’s Commission grew out of an inquiry into paedophilia in NSW, this could be considered a surprising omission. The Children’s

²⁹ NSW Child Protection Council, *Submission to: A NSW Children’s Commission - Green Paper - December 1997*, para 2.1.3.

³⁰ Commission for Children and Young People Bill 1998, clauses 5 & 6.

³¹ *Ibid*, clause 12.

³² *Ibid*, clause 9.

³³ *Ibid*, clause 13.

Commission must also be careful not to focus on children in special needs groups at the expense of children as a whole group.

- while the Commission for Children and Young People would appear to be substantially independent of government, there are a number of ways in which that independence could be compromised: there a strict limits on the Children's Commissioner's powers which need to be approved by the Premier, and the Commissioner is appointed for a relatively short term - three years, which does not compare favourably with the length of term of up to seven years for Law Reform Commissioners and up to five years for the Community Services Commissioner.
- some concern was raised that the Commission for Children and Young People Bill 1998 does not guarantee the input of young people, despite the provision in clause 13 for consultation. It was also noted that there was no stipulation as to the level of involvement of non-government organisations, or as to the role of the Area Child Protection Committees.³⁴ The NSW Police Association, in its submission in response to the Green Paper advocated greater police involvement in advisory committees, particularly the involvement of front-line practitioners in policy development.³⁵

5.2 Core functions of the Children's Commission

The Green Paper asked whether the functions of the Children's Commission should include the following:

- research;
- coordinating, developing and conducting professional training and education;
- coordinating, developing and conducting public education and awareness;
- convening an annual child protection conference;
- coordinating children's advocacy groups and, if so, how should it carry out this role;
- coordinating a voluntary accreditation scheme for people who work with child sex offenders, and
- monitoring children's overall wellbeing in New South Wales.

³⁴ Judy Cashmore, NSW Child Protection Council, presentation to the Public Forum on The Commission for Children and Young People, NSW Parliament House Theatrette, August 10, 1998.

³⁵ NSW Police Association, *Submission to The Office of Children and Young People regarding a NSW Children's Commission Green Paper*, March 1998, final draft, p. 3.

The Green Paper also asked whether or not the Child Death Review Team should be transferred to the Children's Commission.

The Royal Commission

The Royal Commission's proposed Children's Commission would take over all the functions of the current Community Services Commission and Child Protection Council. The functions proposed by the Royal Commission, not surprisingly, focus on child protection, and as such it is the Centre for Child Protection which would undertake many of the functions proposed. Under the Royal Commission's model, the Centre for Child Protection would have the power to:

- conduct research into trends in child protection both in Australia and overseas;
- act as the co-ordinating body for the Children's Advocacy Network recommended in the Report of the Inquiry into Children's Advocacy;
- receive information and feedback from the community to assist in the development of proper practices;
- co-ordinate the activities of the Area Protection Committees throughout NSW;
- liaise with and assist in monitoring the practices and effectiveness of the investigative work of the police and DOCS in relation to child sexual abuse;
- liaise with and assist the New Children's Hospital at Westmead in establishing an Expert Children's Centre and consider and report on its possible extension to other locations within the State;
- develop an inter-agency/multi-disciplinary training capacity to assist government and non-government agencies with staff development and continuing education;
- promote public awareness campaigns and public education;
- convene an annual conference in child protection work, and
- monitor developments arising out of the Royal Commission recommendations.³⁶

Community organisations

A major concern examined by community and welfare groups resources. For example, while the CPC supported a broadening of the focus of the Children's Commission, as

³⁶ Royal Commission, n 2, pp. 1300-1301.

proposed in the Green Paper, it was concerned that the current resources allocated to the CPC, if transferred to a Children's Commission with a wider focus, could cause the Children's Commission to be ineffective.³⁷ Another concern of the community sector is the absence of advocacy from the functions of the proposed Children's Commission in the Green Paper's proposed functions. Advocacy is discussed in more detail below in Part 5.3. The lack of direct reference to child protection, discussed above, was also noted at the Public Forum in reference to the proposed functions of the Children's Commission. Finally, a point made very strongly at the Public Forum was the need for the Children's Commission to have some role in ensuring NSW's compliance with the United Nations Convention on the Rights of the Child (UNCROC). It was believed that a commitment to the principles of the UNCROC should be included in any Children's Commission legislation. This would ensure that there was a focus on children's rights, which the representatives from the youth organisations in NSW, in particular, stated was fundamental to ensuring the position of children and young people improved in NSW.

NCOSS, in its submission in response to the Green Paper stated that

in setting out the roles and functions of a Children's Commission, a balance will need to be struck between the protection of children and the empowerment of children, between advocacy and monitoring, between co-ordination and active intervention. The various roles will need to complement, not conflict, with each other.³⁸

NCOSS continued by listing those functions which it believes should be located in a Children's Commission:

- advocacy for all children, including the establishment of a network of children's advocates across the State;
- the provision of policy advice to government on children's issues, and on legislation as it affects children and young people (this should include monitoring compliance with the UN Convention on the Rights of the Child);
- promoting best practice, and in particular, child-friendly practice, within agencies;
- assisting the participation of children in decision making;
- research, education and training;
- undertaking guardianship functions and overseeing review of children in care;
- providing access to the service and complaints system through an information and referral system;

³⁷ Child Protection Council, n 29, para 3.6.3.

³⁸ NCOSS, n 26, p. 3.

-
- monitoring complaints bodies;
 - overseeing the work of the Child Death Review Team;
 - initiating inquiries into systemic issues and stimulating public debate.³⁹

Neither the Royal Commission nor the community groups canvassed for this paper supported the idea of the Children's Commission maintaining a voluntary accreditation scheme for people who work with sex offenders. The CPC, for example, stated that service standards should be developed by agencies and funding bodies, and that the Children's Commission could have a role in monitoring the implementation of those standards, rather than directly accrediting service providers.⁴⁰ At the Public Forum, it was stated that it seemed incongruous to locate this function within a Children's Commission whose primary focus had to be children and their welfare, since those who work with sex offenders presumably do not themselves pose a threat to children, and whether or not there is a voluntary register of those who work with sex offenders (who are mostly adults) would in reality have little impact on children and their welfare.⁴¹

Commission for Children and Young People Bill 1998

The principle functions of the proposed Children's Commission are contained in clause 11 of the bill. The functions as set out in the bill are slightly different from those specified in the Green Paper, and are:

- (a) to promote the participation of children in the making of decisions that affect their lives and to encourage government and non-government agencies to seek the participation of children appropriate to their age and maturity;
- (b) to monitor the overall well-being of children in the community and the trends in complaints made by or on behalf of children,
- (c) to conduct special inquiries under Part 4 into issues affecting children,
- (d) to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children,
- (e) to promote the provision of information and advice to assist children,
- (f) to conduct, promote and monitor training on issues affecting children,

³⁹ Ibid.

⁴⁰ Child Protection Council, n 29, para 3.7.3.

⁴¹ J Cashmore, n 34.

- (g) to conduct, promote and monitor public awareness activities on issues affecting children,
- (h) to conduct, promote and monitor research into issues affecting children,
- (i) to participate in and monitor screening for child-related employment in accordance with Part 7 [Employment screening is discussed in Part 5.5, below],
- (j) to develop and administer a voluntary accreditation scheme for persons working with persons who have committed sexual offences against children.

The bill also proposes to amend the *Children (Care and Protection) Act 1987*, making the Children's Commissioner the convenor of the Child Death Review Team established under that Act. The amendment also stipulates that the Children's Commission is required to provide administrative support to that Review Team.⁴²

The community groups who took part in the Public Forum commended the bill for including as its first function the promotion of the participation of children and young people in making decisions which affect them. However, a few comments were made relating primarily to the absence of advocacy and the notion of a "one stop shop" which was also ruled out in the bill, and the fact that there was no specific function concerned with monitoring the child protection system. That function is presumably intended to go to the Ombudsman under the Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 2) amendments. It was also noted that the co-ordination function mooted in the Green Paper and recommended in submissions was not clearly set out in the bill, especially in relation to non-Government organisations, and there was no mention of monitoring compliance with the UNCROC.⁴³

5.3 Children's advocacy

The Green Paper asked whether the Children's Commission should focus on systemic advocacy for children, whether or not the Children's Commission should co-ordinate children's advocacy groups, and whether or not the Children's Commission should develop and promote the use of models to help children participate in decisions which affect their lives. It is worth taking note of the report of the Standing Committee on Social Issues inquiry into children's advocacy, which was tabled in September 1996. This inquiry terms of reference included inquiring into:

1. The degree to which the needs of children throughout New South Wales are being effectively advocated for and promoted in the areas

⁴² Commission for Children and Young People Bill 1998, Schedule 2.1.

⁴³ J Cashmore, n 14.

of health, education, law and justice and care and protection;

2. The adequacy of the organisation and co-ordination of existing agencies responsible for children's advocacy such as the NSW Ombudsman, the NSW Child Protection Council, the Official Visitors program, the Community Services Commission, the Health Care Complaints Commission, and the National Children's and Youth Law Centre; and
3. The adequacy of current mechanisms for redressing children's grievances.

In the introduction to the report, it was stated that

the inquiry is unique in the sense that all submissions and evidence received by the Committee were overwhelmingly in favour of the need for improved advocacy for children.Based on all the material gathered for this Inquiry, the Committee considers children's advocacy to be a highly significant and valuable component of our society.⁴⁴

The Inquiry made 37 recommendations. Of particular relevance to the current discussion is Recommendation 11 which states:

That the Attorney General extend funding to Community Legal Centres so that broad-based legal advocacy on a range of issues can be provided to children and young people throughout New South Wales.⁴⁵

and Recommendation 6:

That the Attorney General establish within the Legal Aid Commission a Children's Section, which is adequately resourced and staffed, to undertake matters in relation to juvenile criminal matters and care and protection matters throughout New South Wales. That Section shall be staffed with both solicitors and social workers.⁴⁶

The Royal Commission

The Royal Commission, as well as community and child welfare groups were all consistent in their strongly held beliefs that children's advocacy was a vital part of the Children's Commission's role. The Royal Commission stated in its *Final Report* that the Children's

⁴⁴ Standing Committee on Social Issues, *Inquiry into Children's Advocacy*, Report Number 10, September 1996, p. 1.

⁴⁵ *Ibid*, p. xvii.

⁴⁶ *Ibid*, p. xvi.

Commission should be empowered to “act as an effective and independent advocate for children’s interests.”⁴⁷ The CPC concurred, stating that “systemic advocacy is crucial if the status of children is to be improved”.⁴⁸ The NSW Police Association also supports the idea of systemic advocacy, writing in an article in the *NSW Police News* that a Children’s Commission should “play an important role in providing and promoting a systemic approach to children’s advocacy”.⁴⁹

Community organisations

Community groups, in particular, have also lobbied for some level of individual advocacy for children. The CPC, for example, proposed in its submission that the Children’s Commission should have “discretionary powers to deal with individual issues in circumstances where there is no other appropriate body or person to advocate on behalf of the child”. The CPC further pointed out that the Children’s Commission may wish to use an individual case “as a starting point for an analysis of systemic issues, as occurs in Sweden, and should have the power to do so”.⁵⁰ The CSC, while agreeing with the Green Paper’s comment that for most children the preferred advocate would be a parent or guardian, points out that not implementing a system of individual advocacy, is “ignoring the critical point that it is for the small group of children who do not have parents or carers who can effectively advocate for them, that an advocacy network is so vital.” The CSC continued by stating that many of the recommendations made in the report on the review of the *Children (Care and Protection) Act 1987* could only be effectively implemented if there were individual advocates available for children and young people.⁵¹ NCOSS took a stronger stance on advocacy, stating that

what is needed is individual advocacy for children at the local level to assist children to access systems, to support them through the process and to act as a face for the Children’s Commission on the ground. We know that children currently do not use complaints systems for a number of reasons ... an advocacy network that can respond to the issues raised by children in a personalised way and that can break down some of the barriers they face is essential ...the network of advocates in many ways forms the core of the Commission, linking to the information and referral role; acting as a public face for the Commission throughout the State; monitoring complaints and services, and informing the systemic advocacy and policy development

⁴⁷ Royal Commission, n 2, page 1294, para 20.8.

⁴⁸ Child Protection Council, n 29, para 3.1.3.

⁴⁹ V Sokias, ‘A Children’s Commission for NSW?’, *NSW Police News*, Vol 72, no 8, August 1998, p. 23.

⁵⁰ Child Protection Council, n 29, para 3.2.

⁵¹ Community Services Commission, n 5, p. 17.

work undertaken by the Commission.⁵²

The Commission for Children and Young People Bill 1998

The draft bill does not in fact discuss children's advocacy, despite the Green Paper's position that systemic advocacy should be a key role of the Children's Commission. The function contained in clause 11(d), to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children, could be interpreted as 'advocacy' in a broad sense. Contrary to the views of some community organisations, the bill specifically rules out individual advocacy in clause 16: "The Commission does not have the function of dealing directly with the complaints or concerns of particular children".

5.4 Children's Guardian

The Green Paper asked whether or not there should be a role of Special Guardian in relation to children in care, and if so, who should perform the role of Special Guardian? The Green Paper presented an option which would see the role of Special Guardian located in the Office of the Public Guardian rather than in the Children's Commission, based on the fact that this office was an already established, independent agency.

The Royal Commission

The Royal Commission was of the view that a "positive effort is needed to improve the lot of children in care, to see that their needs are properly addressed, and to ensure that they are protected from all forms of abuse, including child sexual abuse". The Royal Commission therefore recommended that the Children's Commissioner should perform the role of a Special Guardian, whose role would include:

- reviewing placements;
- requesting or receiving reports from carers and/or their spouses;
- visiting services and places where children in care reside, and
- bringing matters before the Children's Court.

Recommendation 136 reads:

The Children's Commissioner to have authority to 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

⁵² NCOSS, n 26, p. 4.

seek a review of any orders made (paras 20.37-20.38).⁵³

Community organisations

Community and child welfare organisations all strongly advocated a Children's Guardian, while acknowledging the difficulties inherent in determining who should perform that role, and where the office should be located. The CSC in its response to the Green Paper stated that it was "strongly in favour of there being a Children's Guardian separate from the Minister". As to where the Children's Guardian should be located, the CSC was of the opinion that this issue "cannot properly be considered in isolation from the outcome of the review of the care and protection legislation". However the CSC recognises both advantages and disadvantages of locating the Children's Guardian within the Children's Commission: on the one hand, the roles of Children's Commissioner and Children's Guardian can effectively complement each other, as evidenced in the Victorian Public Advocate which effectively incorporates both advocacy and guardianship functions. On the other hand, however, since the Children's Commission's fundamental role is to monitor and oversee the provision of child protection services, it could be incongruous to also be a service provider itself. The preferred option of the CSC is to attach the Children's Guardian to the Children's Commission. While the two bodies would be co-located, the Children's Guardian would not report directly to the Commissioner, and the position would be totally separate, filled by a different person than the Commissioner.⁵⁴

NCOSS also strongly recommended the establishment of a Children's Guardian, and believes, "in an ideal world, it would be appropriate for the Children's Commissioner to act as Special Guardian for children in care", thereby acknowledging the relationship between guardianship and advocacy. It would also sit well with the Children's Commission's stated focus on vulnerable children. However, NCOSS acknowledged that the location of a Children's Guardian within the Children's Commission could lead to the creation of a new conflict of interest and lack of accountability, especially in situations where there is a dispute between a child and the Children's Guardian. By locating the two within the same organisation, the child's access to the advocacy network which NCOSS wishes to see established within the Children's Commission could be compromised. In determining where the Children's Guardian should be located, NCOSS stated that "the main issue at stake is to remove guardianship from service delivery and the conflict of interest that so frequently occurs between the best interests of the child and the policies and resources of the Department of Community Services." Like the CSC, NCOSS believes that any decision regarding a Children's Guardian must be made in light of the outcome of the review of the *Children (Care and Protection) Act 1987*.⁵⁵

Commission for Children and Young People Bill 1998

⁵³ Royal Commission, n 2, p. 1302; 1334.

⁵⁴ Community Services Commission, n 5, p. 16.

⁵⁵ NCOSS, n 26, pp. 5-6.

The bill does not provide for a Children's Guardian in any form, a fact noted by the Opposition in the initial debate on the bill, where the Shadow Minister for Youth Affairs, Mrs J Skinner, MP stated that

the Commission for Children and Young People should become the guardian of children in the care of the State, removing this responsibility from the director-general and the Minister for Community Services.⁵⁶

5.5 Employment screening

Employment screening is potentially one of the most problematic questions in relation to a proposed Children's Commission. The issues of privacy, individual rights, procedural fairness and the right balance between employees' rights and children's rights are difficult. Many of the issues relating to employment screening were discussed in the context of the Child Protection (Prohibited Employment) Bill 1998 in Briefing Paper No 8/98. At this stage, there appear to be more questions than answers as to the most appropriate mechanisms to implement employment screening, despite there being a proposal contained within the Commission for Children and Young People Bill 1998. There are examples already of agencies which run successful employment screening. NSW Health was given as an example at the Public Forum as a decentralised system where there were no problems, particularly in relation to non-government organisations.⁵⁷

The Green Paper asked a number of questions in relation to the proposed employment screening function of the Children's Commission:

- Which employees should be screened - government, non-government and commercial organisations, and should volunteers should be subject to the same screening process as paid employees.
- Should employment screening be undertaken only in relation to those employees whose work involves regular, unsupervised contact with children, those employees who work in a facility which children use, or all employees of organisations which provide services to children.
- Should existing employees be screened as a matter of course on application or transfer to a new position. Or should existing employees only be screened where reasonable cause exists to suspect them of child abuse. If existing employees are to be screened, how often they should be subject to a new check.
- Is it reasonable to limit the screen to criminal convictions which relate to sexual and physical assault, or should the screen have a wider scope. Further, should screening

⁵⁶ Mrs J Skinner, MP, NSWPD, 25 June 1998, p. 6665.

⁵⁷ Roger West, Community Services Commissioner, address to the Public Forum on The Commission for Children and Young People, 10 August, 1998, Parliament House Theatre. Notes taken by the author.

include information relating to charges for child abuse which are pending or which were dropped, dismissed, or proved but resulted in no conviction being recorded, and should records of unproved allegations of child abuse be exchanged between public, non-government and commercial employers for the purposes of screening. If so, how could the confidentiality of this information be protected.

- Should the Government introduce time limits on the retention of unproved allegations of child abuse made against employees similar to the “spent conviction” provisions of the Criminal Records Act. If so, what time limits should apply to allegations which are determined to be unfounded and allegations which are not proved.
- Who should bear the costs of the screening program.
- Is the Royal Commission’s proposed right of review to the Administrative Decisions Tribunal was appropriate.

The Royal Commission

The Royal Commission recommended that the Children’s Commission have a separate unit, the Employment Information Centre, which would have responsibility for pre-employment screening and probity checking of people working with children. The purpose of the proposed Employment Information Centre 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.”⁵⁸ The Royal Commission recommends the concept of ‘unacceptable risk’ be adopted to determine whether a person is unfit to work with children. The concept of ‘unacceptable risk’ is a family law concept developed in relation to residence and contact issues in the High Court case of *M v M* [1988] 166 CLR 69:

the courts have endeavoured, in their efforts to protect the child’s paramount interests and to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.⁵⁹

It is proposed that, where in accordance with the unacceptability test, taking into consideration all relevant considerations, the Commissioner considers that the involvement of any person in any such work or services would expose a child or children to an unacceptable risk of sexual abuse, a certificate to that effect would be issued. The Royal

⁵⁸ Royal Commission, n 2, p. 1301, para 20.31.

⁵⁹ *M v M* [1988] 166 CLR 69 at 78, extracted, *ibid*, p. 1303, para 20.42.

Commission stressed that the issue of an unacceptable risk certificate would not involve a finding of guilt or innocence in respect of any specific allegation or complaint. Rather, the Royal Commission intended the Children's Commission to review the overall circumstances of the person in question in order to determine whether there is an unacceptable risk for that person to be employed in the care or supervision of children. It is, in other words, purely an administrative decision, confined to restricting employment in areas where the person has direct contact with children although "not a matter for whim or vague suspicion".⁶⁰

The Royal Commission recommended that it would be appropriate for the Children's Commission to issue an unacceptable risk certificate automatically where the person in question is convicted of a criminal charge involving child sexual abuse, or found guilty or a breach of discipline involving child sexual abuse. Where these circumstances do not apply, an unacceptable risk certificate will be issued only after due inquiry and where the Commissioner is convinced that the person does in fact pose an unacceptable risk to children.⁶¹ The Royal Commission proposed that, as the final step in the recruitment process, the employing authority should be required to submit details of the preferred applicant and the position in order to facilitate employment screening. In the case of already employed persons, once an allegation of inappropriate sexual conduct involving a child is made, or a reasonable suspicion to that effect arises in relation to a person, the Children's Commission is notified and the investigation process begins, resulting in the issue of an unacceptable risk certificate where warranted. In such cases the employee should have the right of appeal, preferably, in the Royal Commission's opinion, to the Administrative Decisions Tribunal or to the Industrial Relations Tribunal.

In order to carry out this function efficiently, the Royal Commission recommended that the Employment Information Centre have a statutory power to obtain information from relevant agencies in order to develop and maintain an information databank. In its Final Report, the Royal Commission likened this databank to the list of barred persons kept by the Department of Education and Employment in the United Kingdom ('list 99'). The Royal Commission recommended that the statute constituting the Children's Commission should contain a prohibition on the release of information contained in the databank, without a certificate authorising dissemination, in the public interest, from the Children's Commission or delegate.⁶²

Community organisations

The Community Services Commission's report *Who Cares?* examines the issues of

⁶⁰ Ibid, p. 1304, paras 20.46-20.47.

⁶¹ Ibid, 1305, para 20.51.

⁶² Ibid, pp. 1309-1311, paras 20.61-20.72.

recruitment and selection of staff for residential care facilities.⁶³ While community organisations agree that employment screening is an essential child protection measure, there was a general consensus that an employment screening agency **should not** be located within a Children's Commission. The primary reason for this is that employment screening is inconsistent with and a distraction from the other functions proposed for the Children's Commission.⁶⁴ It was also stated that by placing the employment screening function within the Children's Commission, the needs and interests of the disabled community are ignored.⁶⁵ The CPC stated that "the Children's Commission could have a very small specialised section with the role of developing employment, recruitment and other personnel practices as part of a preventative and educative approach to improving the calibre of those working with children", rather than actually involving itself in the employment screening process. The CPC continued by stating the individual agencies may be best placed to undertake their own probity checks where they have or can develop the required expertise. The only disadvantage to this proposal is that a large number of agencies would need to gain access to highly confidential information on the data base which could pose a threat to an employee's privacy. The costs of screening should be borne by individual agencies, with smaller organisations being given extra funds to help cover compliance costs.⁶⁶

The CSC postulated three possible options for the placement of an employment screening agency:

1. Each sector, such as education, community service, etc, could have its own employment screening agency;
2. There could be a single stand alone statewide employment screening agency independent of the various sectors it would serve, or
3. There could be a single unit attached to an existing body such as the Independent Commission Against Corruption (ICAC).

The CSC considered ICAC would be appropriate as this would fit with its focus on exposing and preventing corruption. Sexual abuse by a public official in the course of his or her duties fits within ICAC's definition of corruption. The probity unit would also be

⁶³ *Who Cares?* is a report on the recruitment, screening and appointment practices of the Department of Community Services, the Department of Juvenile Justice and Non-Government Services funded or approved by the Department of Community Services, the Department of Juvenile Justice and the Ageing and Disability Department. It was released in September 1996, and was heavily relied on by all community organisations whose submissions the author examined.

⁶⁴ Community Services Commission, n 5, p. 12.

⁶⁵ NCOSS, n 26, p. 8.

⁶⁶ Child Protection Council, n 29, para 3.5.3.

concerned with exposing and preventing this type of conduct.⁶⁷

Roger West, the Community Services Commissioner, stated at the Public Forum that any probity unit must be independent, and not a “player” in the child protection area. It must have very wide access to information to ensure that adequate screening is undertaken, and that information must not be disclosed. He suggested that a certificate of some sort be issued, to which the employee will be able to answer and appeal against.⁶⁸

Commission for Children and Young People Bill 1998

The bill establishes employment screening as a function of the Commission for Children and Young People. The system proposed in the bill has two tiers - those agencies with sufficient resources to undertake their own employment screening will do so, with access to the information database maintained by the Commission, while those agencies or employers with insufficient resources may request the Commission to undertake employment screening on their behalf. Employment screening is mandatory for the preferred applicants for primary child-related employment, as defined in the Child Protection (Prohibited Employment) Bill 1998 (No 2) (see Part 7.0 below). The functions of the Commission in respect to employment screening are set out in clause 36 of the Bill:

- to collect and maintain a database of relevant apprehended violence orders against any person and any relevant disciplinary proceedings that have been completed against any person;
- to give access to information on that database for the purposes of employment screening by employers who have entered into a memorandum of understanding with the Commission on such access and the use of the information obtained;
- to conduct employment screening on behalf of employers for whom the Commission has agreed to conduct any such screening;
- to make recommendations to the Minister on appropriate procedures and standards for employment screening;
- to promote public awareness and provide training on appropriate procedures and standards for employment screening, and
- to monitor and audit compliance with the procedures and standards for employment screening.

Employment screening may involve any or all of the following procedures:

- a check for any relevant criminal record of the person, for any relevant apprehended

⁶⁷ Community Services Commission, n 5, p. 13.

⁶⁸ R West, n 57.

violence orders made against the person or for any relevant disciplinary proceedings completed against the person,

- any other relevant probity check relating to the previous employment or other activities of the person,
- an assessment of the risk to children involved in that child-related employment arising from anything disclosed by such a check, having regard to all the circumstances of the case,
- the disclosure of the results of any such check or risk assessment to any person who determines whether the person is to be employed or continue to be employed in that child-related employment (or to a person who advises or makes recommendations on the matter).

The information which may be disclosed for the purposes of employment screening is varied: any information relating to a relevant criminal record; information relating to spent convictions (despite anything in the *Criminal Records Act 1991*), and information relating to criminal charges, whether or not heard, proved, dismissed, withdrawn or discharged.⁶⁹ Information relating to completed disciplinary proceedings must also be furnished to the Commission by an employer, irrespective of the findings in those proceedings. Records of information relating to this information must be maintained by the employer. Disciplinary proceedings completed within the period of five years immediately before the commencement of the section must be furnished to the Commission. Such information may also be related to another employer for the purposes of employment screening. Where an employer rejects an application on the basis of the assessed risk in employment screening, this decision must be notified to the Commission.⁷⁰

Clause 41 protects persons involved in employment screening from any action, liability, claim or demand, as long as the action was done for the purposes of employment screening. However, if a person discloses any information obtained in connection with employment screening he or she is guilty of an offence with a maximum penalty of \$550 or six months imprisonment, or both. This provision does not apply where the disclosure was made in good faith for the purposes of employment screening, or where the disclosure was made with the consent of the person from whom the information was obtained.⁷¹ A person against whom any relevant disciplinary proceedings have been taken is entitled to obtain access to any documents from any agency concerning those proceedings, under the *Freedom of Information Act 1989*. Nothing in the provisions relating to employment screening affect any statutory rights an employee may have in relation to employment or termination of employment. However any court or tribunal exercising their jurisdiction in relation to any such right must take into account the results of any employment screening carried out in

⁶⁹ Commission for Children and Young People Bill 1998, clause 38.

⁷⁰ *Ibid*, clauses 39-40.

⁷¹ *Ibid*, clause 42.

relation to the employee concerned, and must give paramount consideration to the welfare of children in any decision made.⁷²

The Community Services Commissioner, Roger West, raised a number of issues with respect to the bills' proposed employment screening mechanisms:

- There is insufficient protection for children at risk of abuse - employment screening is only mandatory in the cases of paid employment, and only employment which primarily involves direct contact with children. Foster carers and churches are not covered, and there is no means of assessing those potential employees who give a false name (there is no provision for an identity check). Finally, there is no employment screening for workers in the disability sector.
- The system only applies to pre-employment screening. There is no provision for on-going employment screening.
- Resignations 'under a cloud' are not included as a factor which must be taken into consideration.
- Employment screening is not really mandatory - employers only have to carry out screening "to the extent that it is reasonably practicable for the employer to do so" (clause 37(2)). There is also little incentive for an employer to adequately check a potential employee's records as there is no civil action against an employer who, for example, does not adequately screen an employee who subsequently sexually abuses a child, nor is there any penalty for failing to comply with the provisions of the proposed legislation.
- There is insufficient protection for innocent workers, since they do not have to be told if they were unsuccessful for a position on the basis of employment screening: Freedom of Information will be the only way the person can access any relevant records. It is unclear what risk assessment will involve and what test is to be utilised in the case of unproved disciplinary actions. It is most likely that those people with such a record will be treated as though the allegation had been proven. This problem is compounded by the extent of the potentially prejudicial information to which employers will have access.
- Employees have no right of appeal, a factor which was very important in the Royal Commission's proposals.⁷³

5.6 Complaints handling

There are two main questions in relation to complaints handling: are complaints more

⁷² Ibid, clauses 43-44.

⁷³ R West, n 57.

effectively handled on the basis of service systems, where a particular body has responsibility for a discreet type of service, as is the current situation with the CSC, the Ombudsman and the Health Care Complaints Commission, or population groups, which cut across service systems. This is what the Royal Commission proposed for the Investigation and Review Unit. The Green Paper stated that “given the complexity of services, such as the health or community services systems, it is arguable that knowledge of a particular system provides a stronger basis for understanding and resolving complaints”.⁷⁴ However, it was also acknowledged that “a complaints handling system based on population groups may be more immediately accessible” than one based on service systems.⁷⁵ It may also, to some extent, overcome some of the problems which can arise in situations where the complainant is, for example, a child with a disability. When complaints are handled on the basis of service systems, such a person may find that his or her complaint is not heard at all since each system believes it to be the responsibility of the other. Secondly, the Green Paper asked should the Children’s Commission handle complaints in addition to its advocacy and screening functions.

The Green Paper put forward three possibilities for configuring investigation and review functions. These are discussed in part 3.0 (at page 7) above. The Green Paper’s preferred option, option 3, would see the existing arrangements kept and their inter-relationship streamlined. Under this option, the Community Services Commission would retain its jurisdiction and would be overseen by the Ombudsman, enabling the Ombudsman to handle complaints of a cross-jurisdictional nature.⁷⁶

The Royal Commission

The Royal Commission advocated that the Children’s Commission be an easily accessible “one-stop shop” for children, so that children in NSW would know that they could seek advice and information from the Children’s Commission and make complaints to the same body. The Investigation and Review Unit proposed by the Royal Commission would carry out the functions of the Community Services Commission as they relate to children under the *Community Services (Complaints, Appeals and Monitoring) Act 1993*. The functions of the proposed Investigation and Review Unit would include the following:

- monitoring systemic issues affecting government and non-government organisations involved in the care or supervision of children;
- investigating complaints received directly from the public in respect of systemic issues affecting those organisations;
- receiving complaints from the public in relation to individual cases and either:

⁷⁴ Green Paper, n 11, p. 18.

⁷⁵ Ibid.

⁷⁶ Ibid, p. 20.

-
- referring those complaints to the appropriate agency for investigation;
 - facilitating local resolution;
 - providing advice, or
 - investigating or conciliating those complaints;
- reviewing children in foster and substitute care either on complaint or of its own motion;
 - assist with any investigations requested by the Employment Information Centre;
 - liaise closely with the Child Protection Enforcement Agency and DOCS to ensure that Children’s Commission investigations do not compromise any police investigation, and
 - have authority to inspect files and to request information and documents from government departments and agencies including disciplinary bodies set up to receive complaints, and to request information from employees of those departments and agencies.⁷⁷

Community organisations

The CPC in its submission stated that it “does not support the transfer of the Community Services Commission to the Children’s Commission as proposed by the Royal Commission and fully supports retaining the Community Services Commission”. However, the CPC did not support the notion of the CSC being overseen by the Ombudsman as that organisation did not possess the requisite expertise to necessarily act in the best interests of children (the CPC did not, however, suggest an alternative). The CPC suggested the following model: the CSC be retained in its current form; the most appropriate body be identified to handle complaints in the education system and other systems currently not covered by a complaints handling body, and the Children’s Commission be given a discretionary complaints handling power to handle complaints where children are falling through gaps in service or where a “test case” is identified. The CPC also stated that there need not be a conflict of interest between advocacy and complaints handling, and cited the example of the CSC as a body which successfully combines both functions.⁷⁸ Similarly, while the CSC does not disagree with complaints handling and advocacy in the same organisation, it is “not in favour of the Children’s Commission having complaints handling functions,” on the basis that other bodies are better placed to undertake the complaints handling role, having

⁷⁷ Royal Commission, n 2, p. 1302, paras 20-34-20.35.

⁷⁸ Child Protection Council, n 29, para 3.3.3.

specialist expertise and experience in complaints handling.⁷⁹ Furthermore, the complaints handling function would detract from the Children's Commission's ability to effectively carry out its supervisory, oversight and other roles. It was also noted that having the Children's Commission handle complaints does not even reduce the number of bodies a consumer has to deal with - it simply transfers the functions to a different body.⁸⁰ This notion was supported by the NSWPA in its submission, which supported the Green Paper's 'option three' and stated that another independent complaints body does not need to be established as it would simply complicate what the Association feels "is an area adequately covered".⁸¹

NCOSS went further, specifically rejecting proposal three, and in particular the notion that the CSC be made accountable to the Ombudsman for all complaints. It is the view of NCOSS that "rather than decrease or subsume the functions of the CSC, the Government should build on its strengths by giving it two additional functions". These additional functions are an accreditation system for the children's services sector, and review of deaths of adults with a disability. The role of the Children's Commission, in NCOSS's submission, should not be to undertake individual complaints handling systems, as this would conflict with what NCOSS sees as its overriding role as an advocate. Rather, the Children's Commission's role should be to facilitate access to existing complaints bodies through its one-stop-shop and advocacy network, thereby opening the system up and making it more responsive to children's needs.⁸² The difficulty with its proposal, which NCOSS acknowledged, is the non-existence of any form of independent complaints mechanism for the education system. To overcome this shortfall, NCOSS proposed an independent Education Complaints Commission be established. Alternatively, a specialist unit could be established in the Ombudsman's Office, although there could be some doubt as to such a unit's applicability to the private sector.⁸³

Commission for Children and Young People Bill 1998

The Commission for Children and Young People Bill 1998 does not locate complaints handling within the Commission for Children and Young People, as option three from the Green Paper is the one which the Government decided to implement. In her Ministerial Statement, the Minister for Community Services stated:

⁷⁹ Community Services Commission, n 5, p. 13.

⁸⁰ Ibid, p. 14. The CSC made the additional point here that the Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 2) does not resolve the problem, either as "it merely adds another layer of reporting which would impede rather than aid efficiency and effectiveness."

⁸¹ NSW Police Association, n 35, p. 5.

⁸² NCOSS, n 26, p. 7.

⁸³ Ibid, p. 8.

Submissions on the green paper strongly supported the retention of New South Wales specialist complaints bodies, including the Ombudsman and the Community Services Commission. In recent times, those organisations have been working to make their services more accessible to children and young people by employing child and youth liaison officers. Accordingly, responsibility for investigating complaints will stay with existing complaints bodies. The bill gives the commission scope to consider any issue affecting children. This approach was supported by a significant majority of responses to the green paper, and was the unanimous view of young people who were consulted on the commission.⁸⁴

See the discussion in Part 7.0 below in relation to the Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 2) and the proposed relationship between that Ombudsman's Office and the Community Services Commission. It does not appear that the question of an independent complaints handling body for the education system was addressed in the Commission for Children and Young People Bill 1998. The NSW Government produced a Ministerial Discussion Paper, *The Establishment of a Teacher Registration Authority in New South Wales* in August 1997, proposing that a Teacher Registration Authority be formed with some or all of the following functions:

- setting minimum qualifications for entry into the profession;
- ensuring the quality of the education of persons entering the profession;
- establishing, maintaining and improving standards of professional practice;
- having and implementing a code of ethics, and
- having effective disciplinary and appeal processes.⁸⁵

Perhaps this organisation could also take on some of the complaints handling functions mentioned in the preceding paragraphs.

6.0 CHILD PROTECTION ARRANGEMENTS IN OTHER JURISDICTIONS

The Green Paper briefly mentioned that New South Wales will not be the only Australian State to have established a Children's Commission. There has also been mention of a Federal Children's Commission to be established by the ALP if successful at the next Federal election. The Children's Commission would be a part of the Human Rights

⁸⁴ Hon F Lo Po', MP, n 1, p. 6662.

⁸⁵ NSW Government Ministerial Discussion Paper, *The Establishment of a Teacher Registration Authority in New South Wales*, August 1997, p. 4.

Commission.⁸⁶ The Green Paper states that children's commissioners, or children's ombudsmen, have been established in 19 countries, including Finland, Israel, Canada, states of the United States, Sweden and New Zealand. The functions of these offices vary considerably, from investigating complaints to commenting on policies and programs which impact on children.

6.1 South Australia

The South Australian Office for Families and Children has a broad jurisdiction to promote the welfare and interests of children. The Office was established in 1995 by integrating the Office for Families, the Children's Incest Bureau, the Domestic Violence Unit and Parenting SA. The Office "has a mandate to work with all government agencies to improve outcomes for families and children". The role of the Office for Families and Children, is to:

- promote research to improve available knowledge about families and children;
- monitor the trends and needs of families and children;
- provide advice to the Minister on matters affecting families and children;
- provide community education about families and children;
- promote whole of government and whole of community approaches to support and strengthen families and children;
- encourage all South Australian Government agencies to consider the impact of their decisions on families and children;
- provide leadership in professional education in areas such as violence in families and children's rights;
- ensure the rights and interests of children are protected;
- co-ordinate the South Australian Government's strategy to reduce the incidence of domestic violence.⁸⁷

The dual focus on families as well as children could result in the rights and interests of children being subsumed by a focus on families, although the Office does have a separate Family Policy and Projects unit and Children's Interests Bureau. From the information received by the author, it does not appear that the Children's Interests Bureau focuses on

⁸⁶ S Dunlevy, 'Children's Commission heads Labor Family Policy', *Daily Telegraph*, 7 January 1998, p. 19.

⁸⁷ Pamphlet provided to the author by the Office for Families and Children, 19 August 1998.

advice and monitoring, and does not have a significant role to play in advocacy, complaints handling or employment screening as proposed for the NSW Children's Commission. Additionally, as pointed out in the Green Paper, the Office reports directly to the Minister for Family and Community Services and is a part of the Department for Family and Community Services, which may prevent it from providing independent comment on government policy.

6.2 Tasmania

Legislation was assented to in November 1997 in Tasmania, the object of which is to "provide for the care and protection of children in a manner that maximises a child's opportunity to grow up in a safe and stable environment and to reach his or her full potential".⁸⁸ At the time of writing this Paper, the Act had not been proclaimed, however, the provisions of the Act, being the most recently passed Act relevant to the current discussions, are of interest. The Act contained a number of child protection initiatives. One of these was the creation of a Commissioner for Children, contained in Part 9 of the Act. The functions of the Commissioner are:

- on the request of the Minister, to investigate a decision or recommendation made, or an Act made or omitted, under this Act in respect of a child;
- to encourage the development within the Department of Community and Health Services of policies and services designed to promote the health, welfare, care, protection and development of children;
- to inquire (on request of the Minister), into and report on any matter relating to the health, welfare, care, protection and development of children;
- to increase public awareness of matters relating to the health, welfare, care, protection and development of children;
- to advise the Minister on any matter relating to the administration of the *Children, Young Persons and their Families Act 1997* and the policies and practices of the Department, another department, or any other person which affect the health, welfare, care, protection and development of children, or on any matter relating to the health, welfare, care, protection and development of any child placed in the custody, or under the guardianship of the Secretary.⁸⁹

The Act also prescribes that a number of committees be established by the Commissioner: the Children and Young Persons Consultative Council; the Children and Young Persons Advisory Council, and other committees as he or she considers appropriate.⁹⁰ The

⁸⁸ *Children, Young Persons and Their Families Act 1997*.

⁸⁹ *Ibid*, section 79(1).

⁹⁰ *Ibid*, section 81.

Consultative Council is to comprise members who work in a range of Government, non-government and community organisations concerned with the health, care, protection, development or legal rights of children. All members of the Advisory Council are to be children, representing as far as possible, diverse cultural and ethical backgrounds.⁹¹

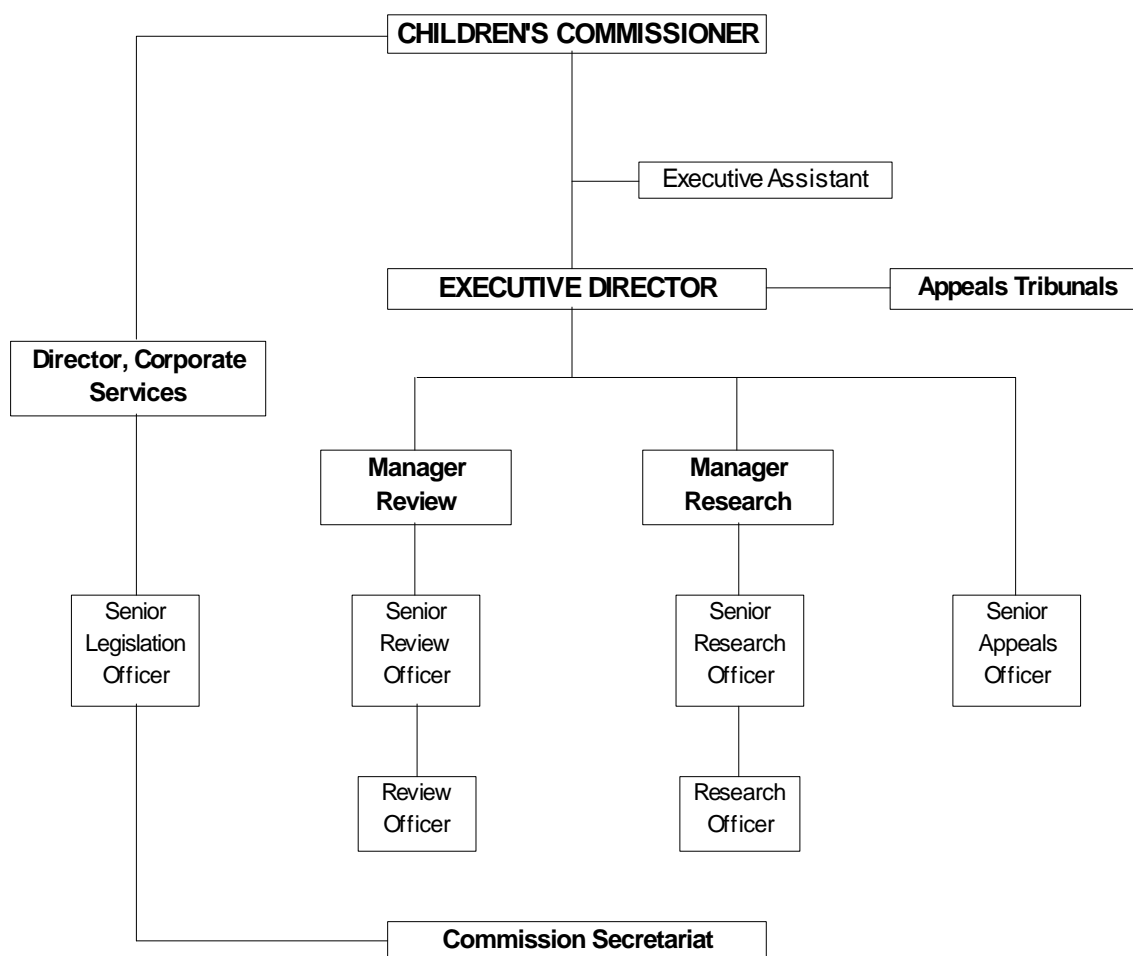
6.3 Queensland

Queensland is currently the only State in Australia which has a dedicated, independent and separate children's commission. For this reason, the Queensland Children's Commission is examined in some length. The Commission was constituted by the *Children's Commissioner and Children's Services Appeals Tribunal Act 1996*, which was assented to on 20 November 1996. The first Commissioner appointed under the Act, Norman Alford, was appointed on 19 December 1996. Section 7 of the Queensland Act ensures that the Commissioner is not subject to the control or direction of any minister or department in carrying out his or her functions. The only exceptions relate to some minor reporting obligations. The first formal appointment occurred in May 1997 with the appointment of a Director of Corporate Services. Corporate Services is one of four 'business units', the other three being Administration, Appeals Tribunal and Review and Research.⁹² The approved organisational structure provides for thirteen staff in addition to the Commissioner. In order to avoid duplication of administration services and costs, the commission currently relies upon the Department of Families, Youth and Community Care to provide a number of administrative support services.⁹³ The structure of the Children's Commission is represented in the diagram on the following page:

⁹¹ Ibid, Schedule 2(1) and (2).

⁹² Children's Commission of Queensland, *Annual Report 1996-97*, p. 4.

⁹³ Ibid, p. 3.



An Appeals Tribunals mechanism was also established under the Act. The Children's Commissioner is responsible for appeals tribunals to hear appeals of a reviewable decision.⁹⁴ A tribunal of three members is established by the Commissioner from a panel of members appointed by the Minister for Families, Youth and Community Care. The members are 'persons with knowledge of, and experience in, child protection, community services, child welfare, education, law, medicine, psychology or social work or other similar areas', and are appointed for a period of up to three years.⁹⁵ An initial panel of 21 members was appointed by the Minister under the Act, from over 80 applicants for the positions.⁹⁶ The Commissioner may also sit on any tribunal. The Appeals Tribunals supersede the tribunals previously operating in respect of the *Adoption of Children Act 1964* and the *Child Care Act 1991*. Additionally, the tribunals have jurisdiction to hear appeals made under the *Children's Services Act 1965*. A 'reviewable decision' is,

⁹⁴ National Children's and Youth Law Centre, 'A Children's Commissioner for Queensland: the cutting edge proves blunt', *Alternative Law Journal*, Vol. 20, No. 1, February 1997, p. 39.

⁹⁵ The Children's Commission of Queensland, 'Message from the Commissioner', http://www.childcomm.qld.gov.au/children_voice.html, p. 3 of 3.

⁹⁶ A full list of panel members can be found in the Children's Commission Annual Report, n 92, p. 6.

consequently, one specified in those Acts.⁹⁷ The tribunals may affirm, vary or set aside a reviewable decision. If the tribunal sets aside a decision it may substitute its own decision or may return the matter to the decision maker for further consideration. Appeals from the tribunal on a question of law may be made to the District Court. There were no appeals lodged with the Commissioner prior to 30 June 1997.⁹⁸ A total of 14 appeals were lodged in the year to 30 June 1998. The following list shows the number of appeals received under each section of the relevant Acts:

- ***Child Care Act 1991***
 - Section 91 - issuing a direction to the licensees of a child care facility - 2 appeals
- ***Children's Services Act 1965***
 - Section 58 - placement of children with care providers - 4 appeals
 - Section 103(1A)(b) - removal of child in care from a foster parent - 5 appeals
 - Section 104(4) - revocation of approval of foster parent 2 appeals
- ***Adoption of Children Act 1964***
 - Section 13B(6) - removal of name from foreign adoption register - 1 appeal

In relation to these 14 appeals, the following outcomes were recorded:

- 3 were withdrawn by the applicant;
- 2 were struck out (1 by court, 1 by tribunal) due to lack of jurisdiction;
- 1 there was no tribunal convened, because the Department informed the Commission that it was going to review the decision and the child was returned to the parents;
- 5 affirmed the Department's decision;
- 1 set aside the Department's decision, and

⁹⁷ Section 41(1) of the *Child Care Act 1991*, section 15D(1) of the *Adoption of Children Act 1964* or in the newly inserted Schedule 1, Dictionary, of the *Children's Services Act 1965*.

⁹⁸ Children's Commission Annual Report, n 92, p. 6.

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- 2 were currently before the tribunals.⁹⁹

The Commission receives an average of 10 complaints and inquiries per day. Whenever possible, the complaint is answered without going to a tribunal. Only when the complaint is of the nature of a reviewable decision, and all other options have been exhausted, leaving the complaint unresolved, does it go before a tribunal.

The major functions of the Children's Commission, contained within section 8 of the Act are to:¹⁰⁰

- Monitor and review the provision of children's services and suggest ways of improving their quality, adequacy and effectiveness, in collaboration with the service providers;
- Promote practices and procedures that uphold the principle that parents and legal guardians have the primary responsibility for raising and developing their children;
- Advise the Minister on best practice standards for child care and foster homes;
- Receive, assess and where appropriate, investigate complaints about the delivery of children's services and alleged offences involving children;
- Monitor the systems developed by service providers to deal with complaints regarding children's services and alleged offences involving children;
- Co-operate with the Queensland Police Service and the Australian Bureau of Criminal Intelligence in the investigation of allegations about offences involving children, particularly sexual abuse of children, child pornography and sex tourism;
- Co-operate with the Queensland Police Service, the Australian Bureau of Criminal Intelligence and other relevant entities to help eradicate sexual abuse of children, child pornography and sex tourism;
- Implement and maintain an Official Visitors Program to residential facilities;
- Confer and co-operate with other relevant entities such as the Criminal Justice Commission and the Ombudsman;
- Establish Tribunals to hear appeals of reviewable decisions;

⁹⁹ Information supplied to the author by Dolores Schneider, Senior Appeals Officer, Queensland Children's Commission, 4 August 1998.

¹⁰⁰ This summary is taken from The Children's Commission of Queensland, 'The Children's Commissioner & Children's Services Appeals Tribunal Act 1996', <http://www.childcomm.qld.gov.au/unconvention.html>, p. 2 of 2.

- Conduct research and inquire into any matters relating to the Commission's activities;
- Inquire into any matters referred to the Commission by the Minister, and
- Do anything else incidental to these functions or likely to enhance the Commission's performance.

The third main initiative of the Queensland Act, while not directly relevant to the NSW proposals, is also of interest: the Act creates the position of 'official visitor'. An official visitor is a public servant appointed by the Commissioner to inspect residential facilities in order to determine whether or not they provide appropriate standards of care for residents. They also have the duty to suggest ways of improving the effectiveness and quality of care provided in those facilities. An official visitor has the power to enter and inspect the facility and any documents relating to its operation, and to speak to a resident or staff member privately in order to ascertain the level of care provided.¹⁰¹

A number of criticisms have been levelled at the Queensland Children's Commission.¹⁰² These criticisms are included to identify areas which could be considered in respect to any NSW Children's Commission, and include the following:

- The qualifications of the Commissioner stipulated in the Act may be inappropriate for the requirements of the position. The Act states that the Children's Commissioner have 'knowledge of, and experience in, child protection, community services, child welfare, education, law, medicine, psychology or social work'. It has been suggested that perhaps qualifications in law, medicine or social sciences would be appropriate, as well as a demonstrated commitment to and ability to communicate with young people.
- The requirement that a complaint made to the Children's Commissioner about an offence involving a child be forwarded immediately to the Police Commissioner may reduce the potential effectiveness of the Children's Commission. Having passed the complaint on, once it is returned to the Children's Commissioner it must then be assessed as to whether or not it warrants investigation by the Children's Commission. It has been suggested that this simply creates another "inaccessible bureaucracy" wherein a complaint is simply passed around in circles.¹⁰³
- The ultimate sanction available to the Commissioner is the tabling of a report in Parliament. This will occur if the Commissioner investigates a complaint about a

¹⁰¹ National Children's and Youth Law Centre, n 94, pp. 38-39.

¹⁰² Much of the information for the following comments come from the article written by the National Children's and Youth Law Centre, which appeared in the February 1997 edition of the *Alternative Law Journal*. See note 94.

¹⁰³ *Ibid*, p. 39.

service provider and that service provider fails to take action. The report is tabled by the Minister for Families, Youth and Community Care. It has been suggested that there may be a reluctance on behalf of the Minister to table such a report, particularly if the subjects of the report are in fact Ministerial staff.

7.0 CHILD PROTECTION (PROHIBITED EMPLOYMENT) BILL 1998 (NO 2)

For a more detailed discussion of the provisions of the Child Protection (Prohibited Employment) Bill 1998 (No 2) see Briefing Paper No 8/98. The differences between the original bill and the revised Child Protection (Prohibited Employment) Bill 1998 (No 2) fall into two main categories: definitional differences, and administrative differences concerning exemptions by declaration. Part 2 of the bill concerning offences, is virtually identical in both versions, although the time in which a prohibited person must notify his or her employer that he or she is such a person has been extended from 7 days to one month from the commencement of the provisions (clause 6(3)(a)). The relevant differences are:

Definitional differences

- definition of ‘child related employment’
 - a new category, employment involving the provision of child protection services has been added;
 - the category of employment in schools has been extended to include other educational institutions (previously clause 3(a)(iii));
 - the category of employment in child refuges has been extended to include all refuges used by children (previously clause 3(a)(iv));
 - the category of employment in hospitals specifies both public and private hospitals, and the definition is extended to include all wards in which children are patients, rather than only specific children’s wards (previously clause 3(a)(v));
 - the category of employment as a babysitter or childminder is limited to only those situations where arranged by a commercial agency (previously clause 3(a)(viii));
 - the category of employment involving the escorting of children has been restricted to only those instances where it involves the provision of regular taxi services for the transport of children with a disability (previously clause 3(a)(x)).
- A definition of ‘employer’ has been added, and includes an employment agent as well as a person who engages a person under a contract.

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- Where a child is related to the employed person's spouse under the revised bill it is no longer a sufficiently close relationship to be excluded from the definition of 'child related employment'. Similarly, where the children are related to the employer's spouse the exception no longer applies (clause 4(1)).
 - The situation in which a person is considered to be related is spelt out in the revised bill in clause 4(3). A person is related to another person if the person is a relative of the other person, is the guardian of the other person, where the person has the custody of or parental responsibility for the other person or where the spouse of the person is related to the other person.
 - The definition of 'serious sex offence' is slightly different in the revised bill. An additional section of the *Crimes Act 1900* - section 578C is added for the purposes of the definition. Under section 578C, publishing child pornography or indecent articles is an offence. The original bill only included the possession of child pornography in its definition of 'serious sex offence'.

Administrative differences

The original bill provided for application to the Supreme or District Court, or the court that convicts the person of the serious sex offence, that a declaration be made to exempt that person from the application of the provisions of the bill. The revised bill replaces the courts with a regime whereby a person can apply to the Industrial Relations Commission (IRC) or the Administrative Decisions Tribunal (ADT) for the declaration. The jurisdiction of the IRC is evoked where the person is a current employee for the purposes of the *Industrial Relations Act 1996* and the person has been dismissed from employment under the provisions contained within the bill. All other applications will be heard by the ADT. As contained in the original bill, the tribunal cannot make an order unless it considers that the person does not pose a risk to the safety of children. The factors which must be taken into account when determining this risk remain the same. Other features of the revised bill are:

- the specification that the Commission for Children and Young People (the Commission) be a party to any proceedings for an order under these provisions. The Commission may make submissions in support of or opposition to the application;
- the requirement for the tribunal to notify the Commissioner of Police of the terms of any order made. This is in order to ensure that the police records for that person remain accurate and up to date, and
- in relation to proceedings before the ADT, the Tribunal may not order costs, and any appeal lies, on a question of law, to the Supreme Court.

Some comments were made at the Public Forum on The Commission for Children and Young People, held in the NSW Parliament House Theatre in relation to this bill. The first is that the provisions of the bill only apply where a person's employment **primarily** involves **direct, unsupervised** contact with children. The result of this specification is that

employees whose job involves frequent or occasional contact with children will not be covered by the proposed legislation. It does not follow that, just because a person only has frequent or even occasional contact with children that they pose any less of a potential risk to the safety of those children. Cleaners, gardeners or clerical staff employed in a child care centre were given as examples who might fit this category. The bill also omits churches and church groups from its ambit. Sunday school teachers, for example, will not come under the scrutiny of the bill. The second comment is that the provisions of the bill could potentially be extended to cover those who work with other vulnerable people, such as disabled people.¹⁰⁴

8.0 OMBUDSMAN AMENDMENT (CHILD PROTECTION AND COMMUNITY SERVICES) BILL 1998 (NO 2)

For a more detailed discussion of the Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 2) see Briefing Paper No 8/98. The differences between the two versions of the Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 2) are few. In fact, the two bills are almost identical with a few exceptions:

- an additional ‘object’ has been inserted:(c) to facilitate the co-operative exercise of the functions of the Ombudsman and the Community Services Commission with respect to child protection and community service matters.
- wording in clause 3, which amends Schedule 1 of the *Ombudsman Act 1974*, is slightly different;
- The primary function of Schedule 2, to remove the bar that exists according to section 121 of the *Community Services (Complaints, Appeals and Monitoring) Act 1993*, was contained in both versions of the bill. Effectively, there is a complete bar on the jurisdiction of the Ombudsman in respect of matters which fall under the jurisdiction of the Community Services Commission. The difference between the two bills is that under the first bill, the bar was lifted in a blanket fashion, whereas under the second bill the bar is lifted with respect to the child protection jurisdiction imposed by the bill, and in any other respect as agreed upon by the two organisations to effect a co-operative exercise of their functions. The revised bill adds a requirement that the details of any such arrangement be advertised in the Gazette.
- Schedule 3 in the original bill has been omitted in the revised version. The purpose of Schedule 3 was to amend the Ambulance Services (Staff) Regulation 1995, the Public Sector Management (General) Regulation 1996 and the Teaching Service (Education Teaching Service) Regulation 1994 to allow for the recording of charges and disciplinary action taken relating to child abuse allegations or convictions to be

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R West, n 57.

kept separately from the personal record of the person to whom the allegations relate. The Public Sector Management (General) Regulation states that if an officer is found not to have committed a breach of discipline for which he or she has been charged, no record must be maintained of the charge or alleged breach of discipline. This Regulation applies to all persons employed in the NSW Public Service.

The primary concern raised in relation to this bill at the Public Forum was that under the provisions of this bill, the Ombudsman is required and empowered to keep the child protection system under scrutiny, insofar as is relevant to employment. Given that the Children's Commission is supposed to be the monitoring body in this area, the question was asked why the Children's Commission hasn't been given this task. It was noted, in fact, that the proposed Children's Commission was not specifically required to monitor child protection, so the proposed arrangements could in fact result in only child protection systems as they related to employment specifically being placed under review. The other point raised at the Public Forum regards the definition of 'designated public authority' in the amended section 25A of the *Ombudsman Act 1974*. If the Community Services Commission and the Health Care Complaints Commission are specifically included in that definition, why not also include agencies such as ICAC, the Police Integrity Commission, the Children's Commission (for example) which are also involved in child protection?¹⁰⁵