Parliamentary Joint Committee on Human Rights inquiry into Australia's human rights framework

SNAICC response to questions on notice received following 25 August 2023 hearing

15 Sep. 23

1. **Since its establishment in 2013, the role of National Children's Commissioner (NCC) has been unable to properly fulfil its statutory functions, due to a lack of appropriate resourcing. Do you have data on the amount of funding and resources the NCC and proposed National Commissioner for Aboriginal and Torres Strait Islander Children would be required for them achieve their purpose across jurisdictions?**

SNAICC in partnership with King, Wood, Mallesons developed an extensive Model Options Paper (attached) in 2020 that looked at international and Australian commissioner models. Inadequate resourcing was identified as a key challenge for existing models both in Australia and internationally. Adequate funding and resourcing for such roles is a key element of compliance with the Paris Principles and should be mandated through legislation.

To comply with best practice, funding for any proposed commissioner model should satisfy the following requirements:

(a) **Adequacy of funding:** State funding should be sufficient to allow the National Commissioner to fund its mandated activities, maintain an accessible office, and operate and manage staff.

(b) **Source of funding:** the National Commissioner should receive public funds through a mechanism that is not under direct government control (e.g., through Parliament). Funding from external sources, such as private donors, should not compose the core funding of the National Commissioner and the National Commissioner should be free to raise funds from external sources without being disqualified from receiving public funds.

(c) **Allocation of funding:** The National Commissioner should have complete autonomy to allocate its budget in accordance with its mandate.

(d) **Financial accountability:** The National Commissioner is nevertheless obliged to comply with the financial accountability requirements applicable to other independent agencies of the State.

It is difficult to determine adequate resourcing for a commissioner to fulfil its statutory responsibilities, however one way of measuring this is through a per capita analysis or "budget per child". SNAICC through the Model Options Paper, recommends this approach as a

conceptual framework, in conjunction with consultation with communities, sector stakeholders and government to determine appropriate resourcing for a National Commissioner.

The Office of the Children's Commissioner for England was assessed in the Model Options Paper as being fully compliant with the Paris Principles in relation to adequate funding and resourcing. The annual budget for the Office in 2019-20 was £2.764m and it was noted that the Commission and commentators had not identified operational challenges related to budget. When considering 2018-19 budgets for Australian children and young people's commissions ranged from as low as $4.50 per child in WA to $29.36 per child in the NT. By far the highest budget of any Commission with available data was held by the Queensland Family and Child Commission with a total budget of $11.9 million, or $9.50 per child in population. While the NT per child budget may appear high, the total Commission budget was only $2 million. This highlights that a per child budget may not be effective in small jurisdictions and the need for loading to account for core operational costs and cost impacts related to geography and demography across jurisdictions. Financial data for the National Children's Commissioner could not be analysed as its budget is subsumed within the total budget for the Australian Human Rights Commission.

The full analysis of resourcing for existing commissioner models can be found in the Model Options Paper along with a budget per child analysis of jurisdictions with available budgetary information based on the number of children living in that jurisdiction.

Resourcing for a National Commissioner for Aboriginal and Torres Strait Islander children should be proportionate to the greater vulnerability of Aboriginal and Torres Strait Islander children's rights and their increased needs because of disadvantage caused by systemic racism and discrimination.

2. **The Committee was at the Brisbane hearings last week and heard from Natalie Lewis the Children's Commissioner there about her voluntary use of child impact statements – are these used in Victoria to promote children's human rights? Should they be used more broadly? How effective are these impact statements been in achieving desired outcomes?**

As voluntary child impact statements are designed to be utilised predominantly by governments during policy design and decision-making, SNAICC does not have visibility of the scope or use of specific child impact statements in Victoria. SNAICC recommends the Committee seek further advice from the Victorian Commission for Children and Young People.

Voluntary child rights impact statements aim to demonstrate the impact of legislative decisions on children and young people and draw attention to critical impacts that may have been overlooked or not considered. Child rights impact statements raise awareness of the impact of legislation on children and young people and contribute to the broader rights discourse by highlighting the impact of legislative decisions, across every government portfolio, on children and young people. Child rights impact statements also contribute to creating a culture in the public service that values and prioritises children's rights by explicitly naming and making visible the impact that decision makers have on the lives of children and young people. They also improve participation in law making when developed in consultation children and young people.

Upholding the rights of children is not solely the responsibility of the Commonwealth Government, and at a state and territory level, child rights impact statements are effective when these governments recognise their obligations as duty bearers under the United Nations Convention on the Rights of Child. The effectiveness of child rights impact statements would be enhanced by creating a federal Human Rights Act that delivers on the recommendation made by the Committee on the Rights of the Child in its concluding observations on the combined fifth and sixth periodic reports of Australia to "enact comprehensive national child rights legislation fully incorporating the Convention and providing clear guidelines for its consistent and direct application throughout the states and territories of the State party."

SNAICC supports the use of child rights impact statements by all Commonwealth, State and Territory governments in policy development, design and decision-making, and enacting a federal Human Rights Act in line with the Committee on the Rights of the Child's recommendation.

As outlined in the Australian Human Rights Commission Position Paper: A Human Rights Act for Australia, Victorian legislation requires the use of 'Regulatory Impact Statements' and 'Legislative Impact statements' under the *Subordinate Legislation Act 1994 (Vic)*. These statements are required when proposals are 'likely to impose a significant economic or social burden on a sector of the public'. Development of such statements requires that public consultation and submissions made through consultation must be addressed in the final impact statement and the rationale for the final direction taken. These statements are designed to support government decision making so that it that upholds and protects human rights and minimises negative impacts on the community.

SNAICC supports the use of participation mechanisms in legislative decision-making as proposed in the Australian Human Rights Commission paper under the positive duty requirements.

3. **How can state-based Commissioners for Young People/Commissioners for Aboriginal and Torres Strait Islander Children work in a more coordinated/impactful way?**

State and Territory Aboriginal and Torres Strait Islander Children's Commissioners, Advocates and Guardians currently undertake coordination efforts to share learnings and maximise impact for children in their jurisdiction through the First Nations Caucus of the Australian and New Zealand Children's Commissioners and Guardians. Members of the First Nations Caucus use their collective

voice and influence to strengthen transparency and accountability for all state and territory governments and elevate the collective voices of Aboriginal and Torres Strait Islander children to the extent possible within the confines of their existing legislated functions and powers.

The system as it is currently designed creates challenges for state-based Children's Commissioners to work collectively to effectively uphold the rights of Aboriginal and Torres Strait Islander children or maximise impact through coordinated efforts. The powers and functions vary between Commissioners across the country, and they have varied mandates in terms of whether they can take a dedicated focus on the rights of Aboriginal and Torres Strait Islander children. The absence of a National Commissioner for Aboriginal and Torres Strait Islander Children means that there is no role mandated to take up national issues or create accountabilities for Commonwealth government rights protections or national systems and strategies. Coordination for rights protection would be vastly improved through establishing an Aboriginal and Torres Strait Islander Children's Commissioner in every jurisdiction with consistent roles, functions and powers set by national minimum standards.

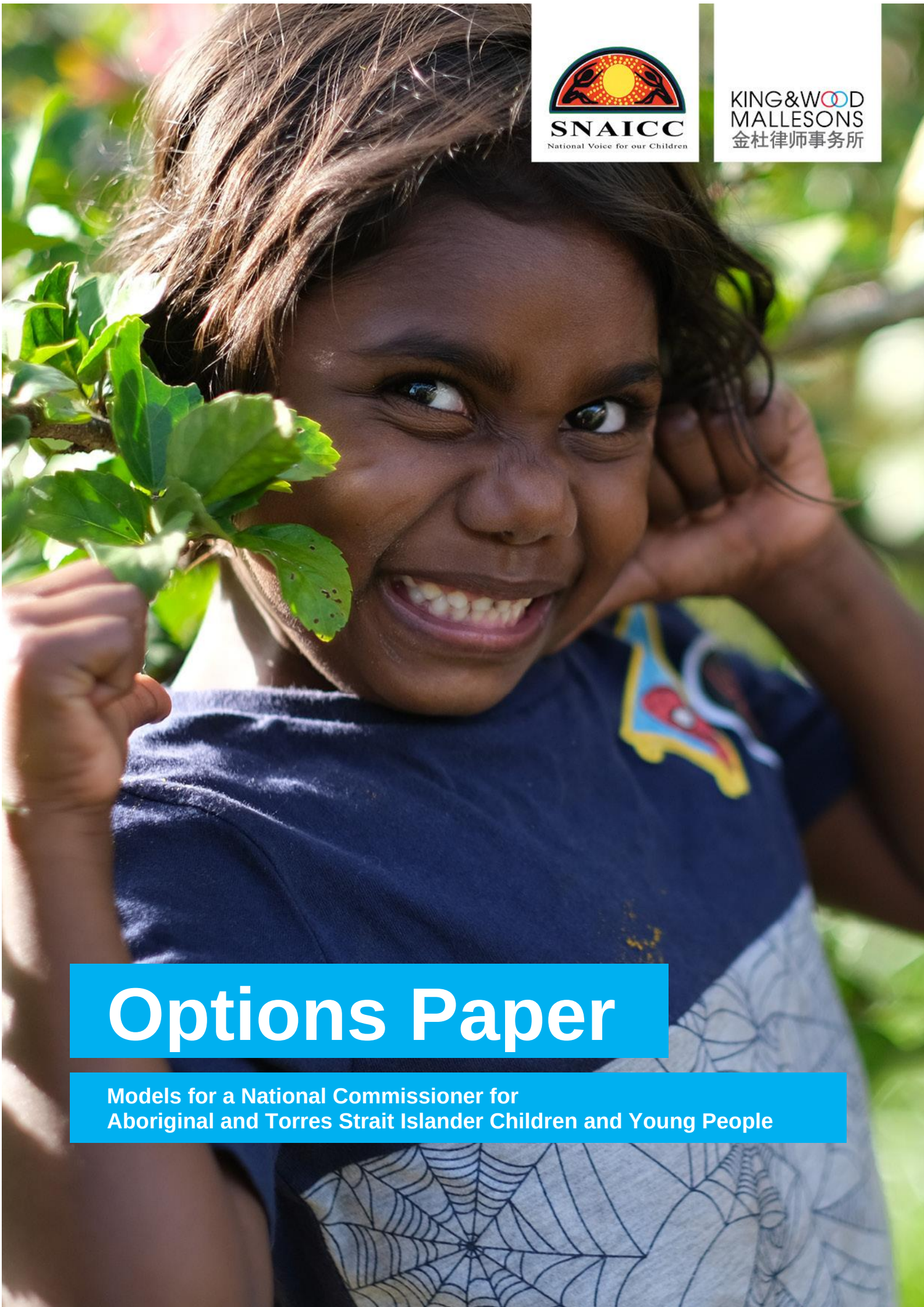
Action 7b under Safe and Supported is to establish Aboriginal and Torres Strait Islander Children and Young People Commissioner roles in each jurisdiction where they do not currently exist in line with national minimum standards to be agreed. A comprehensive network of state and territory commissioners would elevate the voices of children and young people in all jurisdictions and strengthen government accountability and transparency in relation to children's rights. These actions would support Children's Commissioners to advocate for children in cross-border communities such as the Aṉangu Pitjantjatjara Yankunytjatjara lands, where children are significantly impacted by jurisdictional borders and fall through the cracks in systems in the absence of consistent and comprehensive oversight.

There must also be national consistency in the roles, functions, and powers of these positions across the country with national minimum standards that comply with the Paris Principles. Action 7a under the *first Aboriginal and Torres Strait Islander Action Plan* under *Safe and Supported: the National Framework for Protecting Australia's Children* (Safe and Supported) is to develop minimum requirements for independent and empowered Aboriginal and Torres Strait Islander Children's Commissioners or similar roles. Setting minimum standards for the powers and functions of these roles will result in nationally consistent accountability for governments and enable Commissioners to meaningfully compare progress and the impact of their offices.

The establishment of a National Commissioner for Aboriginal and Torres Strait Islander Children would also support coordination and impact by being a mechanism to hold the Commonwealth Government to account for their obligations to children. For instance, the Commonwealth Government are responsible for multiple systems that directly and indirectly impact children such as income support, disability services, early years education, childcare and health. A commissioner working at the national level to address Commonwealth issues and responsibilities for children's rights would address the current patchwork of accountability. The United Nations Convention on the Rights of the Child provides a common mandate, a central point of coordination and accountability to promote and protect the rights of Aboriginal and Torres Strait Islander children, regardless of where they live or who funds or administers the systems and institutions they interact with.

Attachments

Attachment A – Options Paper Models for a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People



SNAICC
National Voice for our Children

KING&WOOD MALLESONS
金杜律师事务所

Options Paper

Models for a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People

Acknowledgements and Disclaimer

This report is jointly prepared and published by SNAICC – National Voice for our Children and King & Wood Mallesons, a leading Australian law firm. It is not legal advice, and does not necessarily represent the views of the partners of King & Wood Mallesons.

Cover image: Photography by Sarah Francis

Options Paper: Models for a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People

17 December 2020

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1 Interpretation

1.1 Definitions

In this paper, the following terms have the following meaning.

"**AHRC**" means the Australian Human Rights Commission.

"**ANZCCG**" means the Australia and New Zealand Children's Commissioners and Guardians.

"**Convention**" means the *Convention on the Rights of the Child* adopted by the United Nations General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.[1]

"**Declaration**" means the *Declaration on the Rights of Indigenous Peoples* adopted by the United Nations General Assembly on Thursday, 13 September 2007.[2]

"**GANHRI**" means The Global Alliance of NHRIs.

"**General Observations**" means the *General Observations of the Sub-Committee on Accreditation* published by GANHRI and adopted by the GANHRI Bureau at its Meeting held in Geneva on 21 February 2018.[3]

"**National Commissioner**" means the proposed National Commissioner for Aboriginal and Torres Strait Islander Children and Young People in Australia, the subject of this paper.

"**NCC**" means the National Children's Commissioner.

"**NHRIs**" means National Human Rights Institutions.

"**OHCHR**" means the Office of the United Nations High Commissioner for Human Rights.

"**Paris Principles**" means the *Principles relating to the Status of National Institutions,* adopted by the United Nations General Assembly resolution 48/134 of 20 December 1993 and endorsed by the World Conference on Human Rights.[4]

"SNAICC" means SNAICC – National Voice for our Children.

"**UN Committee**" means the United Nations Committee on the Rights of the Child.

"**UNHRC**" means the United Nations Human Rights Council.

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1 Available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

2 Available at <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

3 Available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf>.

4 Available at <https://www.un.org/ruleoflaw/files/PRINCI~5.PDF>.

2 Executive summary

SNAICC – National Voice for our Children and the Family Matters campaign have worked together with key partners to build momentum for the establishment of a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People in Australia (**National Commissioner**).

In October 2019, SNAICC developed a Position Paper on the establishment of a national commissioner for Aboriginal and Torres Strait Islander children and young people that was supported by more than 80 organisations across Australia. The Position Paper proposed a model for a National Commissioner to sit within the Australian Human Rights Commission.

Since the release of the Position Paper, some stakeholders have suggested that consideration of additional models may be worthwhile. With the invaluable support of leading international law firm King & Wood Mallesons, SNAICC has developed this comprehensive Options Paper that explores other possible models based on assessing existing national and international commissioner roles against the Paris Principles and identifies best practice elements.

2.1 An urgent and compelling need

SNAICC's 2019 Position Paper outlines the clear and compelling case for the establishment of a National Commissioner that is dedicated to advancing the rights of Aboriginal and Torres Strait Islander child and young people across Australia. The key reasons that demonstrate the need and imperative for a National Commissioner include:

- the unacceptably high levels of multiple and intersecting forms disadvantage and discrimination experienced by Aboriginal and Torres Strait Islander children and young people across all Australian states and territories;
- to prevent Aboriginal and Torres Strait Islander children and young people from continuing to fall through the cracks of our federal system; and
- as demonstrated through successful Family Matters reports, the clear need to develop and implement unique responses and solutions to address the unique challenges faced by Aboriginal and Torres Strait Islander children and young people.

The call for a National Commissioner builds on the increasing recognition by state and territory governments of the importance and value of a commissioner dedicated specifically to Aboriginal and Torres Strait Islander children and young people, as demonstrated by the establishment to date of similar bodies in Victoria, South Australia and Queensland.

A dedicated focus at the national level on advancing the rights of the current generation of Aboriginal and Torres Strait Islander children and young people is essential to end the intergenerational cycle of disadvantage and to promote better outcomes for future generations.

2.2 Key findings

The preparation of this Options Paper involved a comprehensive desktop review of existing Australian and international commissioner models. Models have been assessed against the United Nations Principles Relating to the Status of National Human Rights Institutions (known as the "Paris Principles") and this paper outlines key findings and recommendations for compliance with the best practice requirements for each element of the Paris Principles.

Based on a detailed review and analysis of eighteen commissioner models, this paper concludes that:

- the New Zealand and United Kingdom Children's Commissioner models appear to be the most compliant overall existing commissioner models when assessed against the Paris Principles.
- the South Australian Commissioner for Children and Young People appears to be the most compliant Australian model when assessed against the Paris Principles, although with the caveat that not all its functions are legislatively enshrined.

This Options Paper also identifies a number of challenges to implementation and efficacy that arise across the various commissioner models:

- a lack of clear mandate in establishing legislation;
- a lack of political impartiality or autonomy from government;
- a lack of transparency in appointment / selection of commissioners;
- inadequate quasi-judicial competency and complaints handling powers; and
- inadequate and insecure funding.

The identification of these major impediments provides further practical guidance on the key elements that must be incorporated into the establishment of a National Commissioner that meets best practice standards and will be effective to supporting improved outcomes for future Aboriginal and Torres Strait Islander people across Australia.

2.3 Proposed Model

This paper outlines a Proposed Model for the establishment of a National Commissioner that is based on examples of strongest compliance and provides concrete guidance for Federal Government decision-makers on the key elements required to establish an effective National Commissioner.

The elements of the Proposed Model are summarised as follows:

Paris Principle	Key requirements
Entrenchment in law	The National Commissioner should be established via standalone federal legislation with sufficient detail to ensure a clear mandate and independence. This should include the National Commissioner's role, functions, powers, funding, lines of accountability, appointment mechanisms and term of office. If the National Commissioner is to be mandated to receive, consider or resolve complaints, the enacting legislation should set out the necessary functions and powers required for the National Commissioner to adequately fulfil this mandate.
Human rights mandate	The National Commissioner should be legislatively empowered to protect and promote the rights of Aboriginal and Torres Strait Islander children and young people in Australia. In particular, the National Commissioner should be mandated to consider the implementation of rights enshrined in the UN Convention on the Rights of the Child and the UN Declaration on the Rights of Indigenous Peoples and other relevant bodies of the international human rights system.
Cooperation with other human rights bodies	The National Commissioner should develop, formalise and maintain working relationships with other domestic institutions established for the promotion and protection of the rights of Aboriginal and Torres Strait Islander children and young people, such as SNAICC.
Ensuring pluralism	Consistent with best practice in self-determination the National Commissioner should be an Aboriginal or Torres Strait Islander person. The office of the National Commissioner should comprise staff representative of the diverse segments of Australian society, with consideration of gender, ethnicity and minority status.

Selection & appointment of decision-making body	The establishing legislation should set out a clear, transparent and participatory selection and appointment process for the National Commissioner based on identified and objective criteria that is publicly available. Consistent with best practice in self-determination, the legislation should also mandate that Aboriginal and Torres Strait Islander young people be involved in the selection process for the National Commissioner.
Independence from government	The establishing legislation should provide that the National Commissioner be independent from Government, be free from political interference and stipulate clear details relating to tenure.
Adequacy of funding	The National Commissioner should have both financial independence and adequate resources to perform the mandated duties.
Public reporting	The National Commissioner should be mandated to publish annual and special reports, highlighting any key developments of the office and setting out the National Commissioner's opinions, recommendations and proposals with respect to matters affecting Aboriginal and Torres Strait Islander children and young people. These reports should be publicly available and tabled with parliament, with requirements that the issues identified in these reports be discussed and considered by the legislature and responded to in a timely manner. Preferably, the National Commissioner should be entitled to table these reports in Parliament directly, as opposed to going through the Executive. The National Commissioner should also be empowered to follow up on any action taken in response to the recommendations contained in its reports.

3 About this paper

This options paper has been prepared to assist with the development of a model for a proposed National Commissioner for Aboriginal and Torres Strait Islander Children and Young People (**National Commissioner**). The paper has been jointly prepared by SNAICC – National Voice for our Children (**SNAICC**) and King & Wood Mallesons, a leading international law firm.

SNAICC is the national non-government peak body for Aboriginal and Torres Strait Islander children and their families. SNAICC's purpose is to work for the fulfilment of the rights of Aboriginal and Torres Strait Islander children, in particular to ensure their safety, development and well-being. Established in 1981, SNAICC has a long history of achieving key milestones both in policy developments at state, territory and federal levels and in developing innovative and useful resources and supports for the sector.

King & Wood Mallesons is recognised as one of the world's most innovative law firms. In addition to its corporate practice, the firm has significant experience advising pro bono, commercial and government clients on human rights issues. The King & Wood Mallesons Human Rights Law Group operates across the firm, bringing a uniquely national and international perspective to our clients' matters and offering the latest global insights relevant to human rights issues.

3.1 Background

SNAICC has built momentum for the call for a National Commissioner in Australia. More than 80 organisations supported the *Position Paper: Establishment of a national commissioner for Aboriginal and Torres Strait Islander children and young people* (attached as Annexure A to this paper). The Position Paper outlines the need and imperative, principles, independency and autonomy, qualifications and experience, scope and purpose of the National Commissioner role.

The Position Paper proposed a model for a National Commissioner to sit within the Australian Human Rights Commission. However, since the release of the Position Paper, there have been challenges with traction on the proposal and stakeholders have identified particular barriers, suggesting that consideration of additional models may be worthwhile. This paper therefore reviews additional models for Commissioner roles and identifies suitable model proposals for consultation and development.

The purpose of this Options Paper is to review existing Commissioner models and propose a model for a National Commissioner that exists outside of the Australian Human Rights Commission. This paper examines the benefits and shortfalls of various independent Commissioner models, in Australia and internationally, and proposes an appropriate model for establishing the National Commissioner (**Proposed Model**).

3.2 Scope and qualifications

This paper is based on a desktop review of the best possible materials available at the time of writing, being predominately legislative materials, reports issued by Commissioners and other human rights organisations, media releases and internet materials. This paper is intended to provide an overview of the legislative structure of relevant Commissioner models, rather than an exhaustive review of how these Commissioners operate in practice.

As our inquiries were limited to a desktop review, there may be variances between the documentary material available and the actual practice of the Commissioner models. In addition, while feedback has been sought from a number of Australian Commissioners, detailed consultations with relevant Commissioners was not part of the scope of this paper.

Given the nature of a desktop review, it is acknowledged that the practical and effective operation of the Commissioner models explored in this paper may not be fully captured, notwithstanding that some Commissioner models may lack a number of structural features that are considered important by international best practice. For example, the Victorian Commissioner for Aboriginal Children and Young People continues to have a significant positive impact, despite the office lacking an express independent legislative framework and mandate.

The review of Commissioner models has been predominately directed towards determining best practice in the legal structure and form of the proposed National Commissioner, rather than a consideration of how the National Commissioner should exercise its powers once established. Where available, key achievements and criticisms have been included in the review of each Commissioner model in order to consider the broadest possible context.

3.3 Structure of paper

This paper is structured as follows:

(a) **Review criteria: Paris Principles:** This section summarises the Paris Principles, outlining their background and contents, and identifying why we have selected these criteria as forming the basis of our review.

(b) **Strongest models of compliance:** This section identifies the currently existing models that have the strongest compliance with the Paris Principles. We have identified three models, and have provided an overview of their key functions, responsibilities and constituent elements mapped against the Paris Principles.

(c) **Strongest compliance per Paris Principle:** This section identifies the Commissioner models that have the strongest compliance with each element of the Paris Principles. The aim of this section is to provide examples for each element that can be used to determine the strongest possible model for the establishment of the National Commissioner.

(d) **Challenges to implementation and effectiveness:** This section outlines some of the challenges to the implementation and effectiveness of the Commissioner models considered by our review.

(e) **Available commentary on existing models:** This section sets out the publicly available commentary in respect of various Commissioner models.

(f) **Recommendations:** This section provides a summary of the findings made in this paper to identify key requirements for a Proposed Model for a National Commissioner.

(g) **Appendix:** The appendix contains a detailed overview and assessment of each of the Australian and international commissioners that were analysed for the preparation of this Options Paper.

3.4 Research methodology

In preparing this paper we have conducted a desktop review of existing Australian and international commissioner models. These models have been assessed against the Paris Principles (see section 4), which we determined to be the most appropriate criteria for assessment on the basis that they provide an internationally accepted best practice articulation of the status, structure, mandate, composition, powers and methods of operation of domestic human rights entities.

We have prepared templated review sections for each Commissioner role identified as potentially relevant within Australia and for a limited representative sample of overseas jurisdictions. These templated reviews provide a high-level overview of the key elements comprising each Commissioner role. These review sections form the basis of our comparative analysis between the various models, critical review and the development of the model options.

4 Review criteria: Paris Principles

4.1 Background

The 'Principles relating to the status of national institutions' (**Paris Principles**) are the minimum international standards for the establishment of National Human Rights Institutions (**NHRIs**). The Paris Principles provide a broad normative framework for the status, structure, mandate, composition, power and methods of operation of the principal domestic human rights mechanisms.

The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris in October 1991. The Paris Principles were then adopted by the United Nations Human Rights Commission in 1992,[5] and by the UN General Assembly in 1993.[6]

This paper assesses the various existing Commissioner models against the Paris Principles. The Paris Principles were chosen as the appropriate assessment tool on the basis that they are directed towards:

(a) providing a clear, detailed and internationally-recognised framework for establishing NHRIs for the purpose of advancing and defending human rights at the national level;

(b) protecting NHRIs from government and parliamentary interference by setting out requirements for independence, tenure, appointment and removal mechanisms, and entrenchment in law;

(c) ensuring NHRIs have sufficient resources and powers to carry out their human rights mandate by setting out requirements to this effect; and

(d) promoting the effectiveness of NHRIs by requiring that they are able to engage directly with the legislature by, for example, tabling reports in parliament or otherwise being able to bring matters to parliament's attention.

Compliance with the Paris Principles is also a prerequisite to receiving the Global Alliance of National Human Rights Institutions (**GANHRI**) accreditation. GANHRI accreditation confers on an NHRI:

(a) international recognition and protection;

(b) the right to participate in the work and decision-making of the GANHRI; and

(c) the right to access the UNHRC, being the international body responsible for investigating breaches of human rights in United Nations member states.[7]

At present, the AHRC is the only Australian institution that has received full GANHRI accreditation.[8] Importantly, the AHRC has used its access to the UNHRC on numerous occasions to promote human rights.[9]

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5 See UNHRC Resolution 1992/54.

6 See UN General Assembly Resolution 48/134.

7 See GANHRI, "GANHRI Sub-Committee on Accreditation (SCA)" (Webpage, 2020) <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/default.aspx>

8 See GANHRI, *Chart of the status of national institutions* (27 November 2019) <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/Status%20Accreditation%20-%20Chart%20(%2027%20November%202019).pdf>.

9 For example, in 2015 Professor Gillian Triggs, the President of the Australian Human Rights Commission, addressed the 28th session of the UNHRC on issues such as the challenges faced by Australia in the area of asylum seeker and refugee policy.

4.2 Summary of the Paris Principles

The essential requirements of the Paris Principles are summarised as follows:

(a) **Entrenchment in law:** An NHRI shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text.[10]

(b) **Human rights mandate**: An NHRI shall be mandated with specific functions to both promote and protect human rights. These specific functions shall include submitting to Government, Parliament, and any other competent body, opinions, recommendations, proposal and reports on any matters concerning the promotion and protection of human rights. In particular, the opinions, recommendations or reports may relate to:

(i) legislation;

(ii) any situation of violation of human rights;

(iii) the preparation of reports on the national situation with regard to human rights; and

(iv) making proposals for initiatives to end situations of violation of human rights.[11]

(c) **Encouraging ratification or accession to international human rights instruments**: An NHRI shall be responsible for:

(i) promoting and ensuring harmonisation of national legislation and practices with international human rights instruments; and

(ii) encouraging ratification of those international human rights instruments.[12]

(d) **Interaction with the international human rights system**: An NHRI shall contribute to reports which States are required to submit to the United Nations and cooperate with the United Nations and any other organisation in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights.[13]

(e) **Cooperation with other human rights bodies:** Within the framework of its operation, the NHRI shall:

(i) maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions); and

(ii) develop relations with the nongovernmental organisations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.[14]

(f) **Recommendations by NHRIs:** An NHRI shall have the power to make recommendations to the Government, Parliament and any other competent body on any matter concerning the promotion and protection of human rights.[15] Furthermore, an NHRI shall address public opinion directly or through any press organ in order to publicise its recommendations.[16]

(g) **Ensuring pluralism of the NHRI**: The appointment and composition of the NHRI shall be established in accordance with a procedure that guarantees pluralist representation of the social forces involved in the promotion and protection of human rights. In particular, the composition of the NHRI shall promote and enable effective cooperation to be established

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10 Paris Principles, *Competence and responsibilities*, principle 2.

11 Paris Principles, *Competence and responsibilities*, principle 3(a).

12 Paris Principles, *Competence and responsibilities*, principle 3(b), (c).

13 Paris Principles, *Competence and responsibilities*, principle 3(d), (e).

14 Paris Principles, *Methods of operation*, principle (f), (g).

15 Paris Principles, *Competence and responsibilities*, principle 3(a).

16 Paris Principles, *Methods of operation*, principle (c).

with non-governmental organisations, universities and qualified experts, Parliament, and Government departments. Such cooperation may be achieved by appointing representatives of the above bodies to the NHRI.[17]

(h) **Selection and appointment of the decision-making body of NHRIs:** The appointment procedure of the NHRI shall be by election or otherwise.

(i) **Political representatives on NHRIs**: An NHRI must be able to "freely consider any question falling within its competence".[18] An NHRI shall be independent of the government.[19] To the extent that representatives of government departments are able to be appointed to the NHRI, they shall participate "only in an advisory capacity".[20]

(j) **Adequate funding of NHRIs**: An NHRI shall have an infrastructure that is suited to the smooth conduct of its activities, in particular adequate funding. It should have its own staff and premises in order to independent from the government.[21]

(k) **Annual reports of NHRIs**: An NHRI shall be responsible for submitting to government, parliament and any other competent body, reports on any matter concerning the promotion and protection of human rights.[22]

4.3 General Observations – interpretive tools of the Paris Principles

The GANHRI promotes the establishment and strengthening of NHRIs in conformity with the Paris Principles. The GANHRI has published "General Observations" which are interpretive tools of the Paris Principles.

The General Observations provide the following guidance in relation to the essential requirements of the Paris Principles set out at section 4.2 above:

(a) **Entrenchment in law:** The General Observations state that:

(i) ***Entrenched in law*:**[23] The enabling legislation should specify the NHRIs role, functions, powers, funding, and lines of accountability, as well as the appointment mechanisms for members, including the terms of office.

(ii) ***Independence:***[24] The enabling legislation must ensure independence by, for example, containing an independent and objective dismissal process.

(iii) ***Complaints handling:***[25] It is not a requirement of the Paris Principles that an NHRI have a mandate to receive, consider or resolve complaints. However, where NHRIs have such a mandate, they should be provided with the necessary functions and powers to adequately fulfil this mandate. For example, the NHRI should be able to receive complaints against both public and private bodies, commence complaints on its own initiative, investigate complaints, compel the production of evidence and witnesses, protect complainants from retaliation, etc.

(b) **Human rights mandate**: The General Observations state that:

(i) ***Nature of mandate*:**[26] "Promotion" of human rights means creating a society where human rights are more broadly understood and respected. "Promotion" can occur by education, training, advising, public outreach and/or advocacy. "Protection" of human

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17 Paris Principles, *Composition and guarantees of independence and pluralism*, principle 1.

18 Paris Principles, *Methods of operation*, principle (a).

19 Paris Principles, *Composition and guarantees of independence and pluralism*, principle 3.

20 Paris Principles, *Composition and guarantees of independence and pluralism*, principle 1(e).

21 Paris Principles, *Composition and guarantees of independence and pluralism*, principle 2.

22 Paris Principles, *Competence and responsibilities*, principle 3(a).

23 GANHRI General Observations, G.O. 1.1.

24 GANHRI General Observations, G.O. 2.1.

25 GANHRI General Observations, G.O. 2.9.

26 GANHRI General Observations, G.O. 1.2.

rights means addressing and seeking to prevent actual human rights violations. "Protection" can include monitoring, inquiring, investigating, and/or reporting on human rights violations. "Protection" may also include individual complaint handling.

(ii) ***Breadth of mandate*:**[27] The NHRIs mandate should be interpreted broadly, liberally and in a purposive manner to promote a progressive definition of human rights.

(iii) ***Protection from liability*:**[28] Members and staff of the NHRI should be protected from both criminal and civil liability for acts undertaken in good faith in their official capacity, including when exercising investigative powers.

(iv) ***Powers of inquiry and investigation*:**[29] A NHRI should be authorised and empowered to conduct inquiries and investigations into alleged human rights violations falling within its area of responsibility. A NHRI should hold powers to access premises, inspect documents and examine individuals.

(c) **Encouraging ratification or accession to international human rights instruments**: The General Observations recommend that the NHRI's role in encouraging ratification should form an integral part of the NHRI's enabling legislation.[30]

(d) **Interaction with the international human rights system**: The General Observations state that:[31]

(i) ***Engagement with human rights system:*** Effective engagement with the international human rights system may include:

1. submitting parallel or shadow reports to the Universal Periodic Review, Special Procedure mechanisms and Treaty Bodies Committees;
2. making statements during debates before review bodies and the Human Rights Council;
3. assisting, facilitating and participating in country visits by United Nations experts; and
4. monitoring and promoting the implementation of relevant recommendations originating from the human rights system.

(ii) ***Preparation of state reports:*** While it is appropriate for governments to consult with NHRIs in the preparation of a state's reports to human rights mechanisms, NHRIs should neither prepare the country report nor report on behalf of the government. NHRIs must maintain their independence.

(e) **Cooperation with other human rights bodies:** The General Observations expand on the Paris Principles in this respect by recommending that NHRIs should develop, formalise and maintain working relationships, as appropriate, with other domestic institutions established for the promotion and protection of human rights.[32]

(f) **Recommendations by NHRIs:** The General Observations state that:[33]

(i) ***Annual reports:*** The NHRI should use its annual, special and thematic reports to make recommendations in relation to and monitor respect for human rights. See paragraph (k) below for more details.

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27 GANHRI General Observations, G.O. 1.2.
28 GANHRI General Observations, G.O. 2.3.
29 GANHRI General Observations, G.O. 1.2.
30 GANHRI General Observations, G.O. 1.3.
31 GANHRI General Observations, G.O. 1.4.
32 GANHRI General Observations, G.O. 1.5.
33 GANHRI General Observations, G.O. 1.6.

(ii) ***Follow up action:*** The NHRI should undertake follow up action on recommendations contained in its reports and should publish detailed information on the measures taken or not taken by public authorities.

(g) **Ensuring pluralism of the NHRI**: The General Observations state that:

(i) ***Pluralism*:**[34] There should be diverse models for ensuring pluralism within the decision-making body of the NHRI. These could include avoiding narrow and restrictive criteria for membership, allowing diverse societal groups to suggest or recommend candidates, and/or making use of diverse advisory committees, networks, consultations or public forums. Where a NHRI has only a single member, like an Ombudsman, the NHRI should focus on promoting pluralism through its staff.

(h) **Selection and appointment of the decision-making body of NHRIs:** The General Observations interpret the statement that appointment must be "by election or otherwise", paired with the call for pluralism above, as requiring a clear, transparent, merit-based and participatory selection and appointment process. In particular, the General Observations state that the appointment process should require:[35]

(i) publication of vacancies broadly;

(ii) maximising potential candidates from a wide range of societal groups;

(iii) promoting broad consultation and/or participation in the application, screening, selection and appointment process;

(iv) assessing applicants on the basis of pre-determined, objective and publicly available criteria; and

(v) selecting members to serve in their own individual capacity rather than on behalf of the organisation they represent.

(i) **Political representatives on NHRIs**: The General Observations go further than the Paris Principles in this respect:[36]

(i) ***Starting position:*** The General Observations recommend, as a starting position, that government representatives and members of parliament should not be members of, nor participate in, the decision-making organs of an NHRI.

(ii) ***Fall-back position:*** However, where government representatives or members of parliament, or representatives of government agencies, are included in the decision-making body, the NHRI's legislation should clearly indicate that such persons participate only in an advisory capacity.

Following consultation with SNAICC, we have adopted an expanded interpretation of this requirement being the degree to which a NHRI is independent from government. We have considered the overall independence of each Commissioner under this subheading, and have identified two specific considerations, tenure and recruitment, as specifically relevant. However, elements informing a NHRI's independence from government arise under most other General Observation sections – for example, a legislatively enshrined mandate will promote stability, whilst sufficient budgeting will promote autonomy, and our analysis of each Commissioner's independence from government must be considered in the context of this broader analysis.

(iii) ***Tenure*:**[37] The enabling legislation must contain an independent and objective dismissal process, similar to that accorded to members of other independent state agencies. The grounds for dismissal must be clearly defined and appropriately

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34 GANHRI General Observations, G.O. 1.7.

35 GANHRI General Observations, G.O. 1.8.

36 GANHRI General Observations, G.O. 1.9.

37 GANHRI General Observations, G.O. 2.1.

confined. Dismissal should not be allowed based solely on the discretion of appointing authorities.

(iv) ***Recruitment*:**[38] The NHRI should be legislatively empowered to determine the staffing structure and the skills required to fulfil the NHRI's mandate. However, staff should be recruited according to an open, transparent and merits-based selection process that ensures pluralism.

(j) **Adequate funding of NHRIs**: The General Observations recommend that:[39]

(i) ***Adequacy of funding***: The state funding should be sufficient:

1. to lease (or purchase) premises which are accessible to the wider community, including for people with disabilities;
2. to provide access to telephone and internet services;
3. to ensure salaries and benefits awarded to staff are comparable to those of civil servants performing similar tasks in other independent institutions of the State;
4. to remunerate members of the decision-making body (where appropriate); and
5. to fund the mandated activities of the NHRI.

(ii) ***Source of funding:*** Funding from external sources should not compose the core funding of the NHRI as this is the responsibility of the State. At the same time, government funding should be allocated to a separate budget line item applicable only to the NHRI. Such funding should be regularly released and in a manner that does not impact adversely on the NHRI's functions, day-to-day management and retention of staff.

(iii) ***Allocation of funding:*** The NHRI should have complete autonomy to allocate its budget in accordance with its mandate.

(iv) ***Financial accountability:*** The NHRI is nevertheless obliged to comply with the financial accountability requirements applicable to other independent agencies of the State.

In undertaking the research for this report, it has become apparent that insufficient funding has been, and continues to be, a major impediment to the effective operation of several Australian Commissioners. It is difficult to determine from a desktop review whether a Commissioner's funding is adequate for carrying out its statutory functions. This is due to the inconsistent availability of readily accessible budgetary information and the inherent difficulty in assessing whether a Commissioner is making effective use of their allocated budget. Rather, we have identified a framework for analysis adopted by the Department for Education in the United Kingdom which involves determining a "budget per child" figure. This more readily allows for comparisons to be drawn between jurisdictions and is explored further at section 6.10.

(k) **Annual reports of NHRIs**: The General Observations state that an NHRI should publish annual, special and thematic reports. Furthermore:[40]

(i) ***Annual reports:*** The annual reports should provide a regular audit of the government's performance and also of what the NHRI has done. The reports should also provide a forum for making recommendations to government.

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38 GANHRI General Observations, G.O. 2.4.

39 GANHRI General Observations, G.O. 1.10.

40 GANHRI General Observations, G.O. 1.11.

(ii) ***Publication and distribution:*** All reports should be publicised and widely distributed and be made publicly available.

(iii) ***Engagement with legislature:*** All reports should be tabled with the legislature, rather than with the executive. The legislature should then be required to discuss and consider the reports so as to ensure that any recommendations are properly considered by relevant public authorities.

5 Strongest models of compliance

This section identifies the currently existing models that have the strongest compliance with the Paris Principles. It highlights three models and provides an overview of their key functions, responsibilities and constituent elements mapped against the Paris Principles.

5.1 Strongest international models

On the basis of our desktop review, we consider that all four foreign Commissioner models reviewed perform highly against the criteria of the Paris Principles. However, we consider the New Zealand and United Kingdom Commissioner models to have the strongest compliance overall with the Paris Principles. We also note that these models are the most relevant to Australia given the similarities between jurisdictions, given their shared common law and Westminster parliamentary system backgrounds.

We have set out below a summary of each Commissioner model's performance against each of the Paris Principles. Further detail regarding both Commissioner models is set out in the review templates in the Appendix to this paper.

Office of the Children's Commissioner (NZ)

The position of Children's Commissioner was established under the *Children, Young Persons and Their Families Act 1989* as a separate body from the executive and administrative arms of government.[41] Its independence was reinforced when it was given its own statute, the *Children's Commissioner Act 2003*, and the status of an independent Crown entity.[42] The Office includes the Children's Commissioner, the Strategy Rights and Advice team, the Development, Monitoring and Investigations team, the Corporate team and a Communications team.[43]

The Commissioner's primary role is as an advocate for children, and to give better effect in New Zealand to the Convention and to have regard to the Convention when carrying out its functions and powers.

We consider the following features of this Commissioner model to be particularly notable:

(a) structure as an independent Crown entity;

(b) security of tenure (being a 5-year tenure);

(c) wide mandate of the Commissioner and its extensive reporting and investigative powers;

(d) the amount of funding available to the Commissioner;

(e) the potential introduction of the Assistant Māori Children's Commissioner; and

(f) the Commissioner's responsiveness to criticism and community concern.

Legislative establishment and independence

The *Children's Commissioner Act 2003* provides a clear mandate for the Commissioner, including its role, functions and powers.[44] The Children's Commissioner is accountable to the responsible Ministers, which appear to be the Minister for Finance and the Minister for Social Development.

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41 Children's Commissioner, *About Us* (Webpage) <https://www.occ.org.nz/about-us/>.

42 *Children's Commissioner Act 2003* s 6(2).

43 Children's Commissioner, *About Us* (Webpage) <https://www.occ.org.nz/about-us/>. .

44 *Children's Commissioner Act 2003* ss 3, 11.

Appointments are made by the Governor-General by recommendation from the Minister for Social Development, which may detract from the Commissioner's independence.[45] The term of office is 5 years, or any shorter period stated in a notice of appointment.[46]

Human rights mandate

The Commissioner is legislatively mandated with specific functions to both promote and protect human rights. The Commissioner's key functions include raising the awareness and understanding of children's interests, rights, and welfare; raising awareness and understanding of the Convention; undertaking and promoting research into any matter that relates to the welfare of children; acting as an advocate for children's interests, rights, and welfare generally (except before any court or tribunal); and, in that regard, advancing and monitoring the application of the Convention by State departments and Crown bodies.[47]

The Commissioner's powers extend to the acts and omissions of both the public and private sectors, and the Commissioner has the competence to freely address public opinion by receiving and inviting representations from members of the public on any matter that relates to the welfare of children and raising public awareness on matters that relate to the welfare of children, the Convention and children's interests, rights, and welfare.[48]

Powers of inquiry and investigation

The Commissioner can inquire generally into, and report on, any matter, including any enactment or law, or any practice or procedure, that relates to the welfare of children, and one of its key functions is to promote the establishment of accessible and effective complaints mechanisms for children and to monitor the nature and level of complaints.[49] In conducting an investigation, the Commissioner must have regard to the question of whether the rights or the welfare and interests of 1 or more children have been prejudiced.[50]

The Commissioner also has the power to obtain statements or documents in order to assess situations raising human rights issues, as it has powers to compel a person to provide information or documents to the Commissioner it if it is reasonably necessary for an investigation; a person does not provide it after being requested to and it is not reasonably practicable to obtain the information or document from another source; or it is necessary to verify or refute information from another source.[51] The Commissioner can also apply to the court to access court records if it believes on reasonable grounds this is required for an investigation.[52]

Oranga Tamariki is the Ministry for Children government department that provides services to approximately 30,000 children and young people each day. Around 6000 of those children and young people are in the care or custody of Oranga Tamariki, and at any one time, approximately 200 young people are placed in Oranga Tamariki residences.[53] Specifically with regard to Oranga Tamariki, the Commissioner has the mandate to review decisions or recommendations made, and policies and practices of government departments in relation to Oranga Tamariki and its governing Act.[54] The Commissioner investigates any concerns on a case by case basis and can also monitor Oranga Tamariki's investigations and resolutions of any complaint.

An example of the Commissioner using its powers in this regard is in relation to the 2018 case of a teenager, Sonny Marks, who died in state care from what appeared to be a suicide attempt in

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45 *Children's Commissioner Act 2003* s 28(1)(b).

46 *Crown Entities Act 2004* s 32(1)(b).

47 *Children's Commissioner Act 2003* (NZ) s 12(1).

48 *Children's Commissioner Act 2003* (NZ) s 12(1).

49 *Children's Commissioner Act 2003* (NZ) s 12(1).

50 *Children's Commissioner Act 2003* (NZ) s 17.

51 *Children's Commissioner Act 2003 (*NZ) s 20.

52 *Children's Commissioner Act 2003* (NZ) s 24.

53 Children's Commissioner, *Why We Monitor* (Webpage) available at <https://www.occ.org.nz/our-work/monitoring/monitoring-work/why-we-monitor/>.

54 Children's Commissioner Act 2003 (NZ) s 13(1).

circumstances where the caregiver was unaware of his mental health issues and his risk of suicide.[55] In addition, his mother was not informed by Oranga Tamariki that her son was admitted to hospital and the Ministry waited hours after he died the following day before notifying her of his death.[56] The current Commissioner, Judge Becroft, has publicly expressed that this case would warrant his attention and is awaiting the outcome of the coronial inquest and the recommendations under it before making a decision on next steps.[57]

Functional Immunity

The *Children's Commissioner Act 2003* provides protection from criminal and civil liability for acts or omissions undertaken in good faith by the Commissioner or its employees, which is consistent with the Paris Principles. No civil or criminal proceedings may be brought against any Commissioner or against a person who is or has been an employee of a Commissioner for anything done or not done when exercising the functions under the *Children's Commissioner Act 2003* (unless it is shown that the person concerned acted in bad faith). A Commissioner or any person who is or has been an employee of a Commissioner cannot be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything that comes to the knowledge of the person concerned in the exercise of functions or powers under the *Children's Commissioner Act 2003*.

Ratification / accession to international human rights instruments

The Commissioner is specifically required to promote compliance with international human rights instruments, engage in public reporting and facilitates national working groups and is substantially compliant with the relevant requirements.

The Commissioner has a clear role to play in the effective implementation of the Convention and the Convention against Cruel, Inhuman or Degrading Treatment or Punishment in relation to Oranga Tamariki residences,[58] both of which New Zealand is a party to, which is consistent with the Paris Principles.

A key part of the Commissioner's functions includes raising awareness and understanding of the Convention.[59] If there are issues in proceedings before any court or tribunal that relate to the Convention or to the interests, rights, or welfare of children generally, one of the Commissioner's functions is to present reports on such issues to the court or tribunal, at the request of the court or tribunal or counsel in the proceedings.[60] In performing or exercising the Commissioner's functions or powers, the Commissioner must have regard to the Convention.[61]

The Commissioner co-ordinates the Children's Convention Monitoring Group (**Group**), which monitors the New Zealand Government's implementation of the Convention, its Optional Protocols and the Government's response to recommendations from the UN Committee.[62] Its members include representatives from the Human Rights Commission, UNICEF New Zealand, Action for

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55 Leigh-Marama McLachlan, 'Case of suicide in case warrants further investigation – Children's Commissioner', *RNZ* (online, 2 April 2020) <https://www.rnz.co.nz/news/national/413272/case-of-suicide-in-care-warrants-further-investigation-children-s-commissioner>.

56 Leigh-Marama McLachlan, 'Case of suicide in case warrants further investigation – Children's Commissioner', *RNZ* (online, 2 April 2020) <https://www.rnz.co.nz/news/national/413272/case-of-suicide-in-care-warrants-further-investigation-children-s-commissioner>.

57 Leigh-Marama McLachlan, 'Case of suicide in case warrants further investigation – Children's Commissioner', *RNZ* (online, 2 April 2020) <https://www.rnz.co.nz/news/national/413272/case-of-suicide-in-care-warrants-further-investigation-children-s-commissioner>.

58 Oranga Tamariki is the Ministry for Children government department that provides services to approximately 30,000 children and young people each day. Around 6000 of those children and young people are in the care or custody of Oranga Tamariki, and at any one time, approximately 200 young people are placed in Oranga Tamariki residences. See: Children's Commissioner, *Our Role in the Children's Convention,* available at: https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/.

59 *Children's Commissioner Act 2003* (NZ) s 12(1).

60 *Children's Commissioner Act 2003* (NZ) s 12(1).

61 *Children's Commissioner Act 2003* (NZ) s 11.

62 Children's Commissioner, *Our Role in the Children's Convention,* available at: https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/.

Children and Youth Aotearoa and Save the Children New Zealand.[63] The Group meets regularly to monitor and review the progress made on implementing the Convention in New Zealand.[64] The Group also meets twice a year with the Convention Deputy Chief Executives Group who are the permanent coordinating mechanism for the Convention to discuss how the Government is advancing the rights of children in line with the Convention.[65]

The Group has a public reporting function through its publication of the "Getting it Right" series of reports, which focus on legal and policy developments for children and young people in New Zealand and how those developments align with the Convention, and thereby promotes and encourages the harmonisation of national legislation, regulations and practices with the Convention in accordance with the Paris Principles.[66] The reports highlight progress related to children's rights and identify where New Zealand can improve its compliance with the requirements of the Convention.[67]

The Commissioner is also a designated "National Preventive Mechanism", responsible for monitoring New Zealand's compliance with the United Nations Convention against Cruel, Inhuman or Degrading Treatment or Punishment in relation to Oranga Tamariki residences.[68] To this end, the Commissioner issues annual "State of Care" reports, which is an annual summary from the independent monitoring of the policies, practices and services of Oranga Tamariki and includes feedback from children and young people about their experiences in the system.

Interaction with international human rights system

The Commissioner is involved in monitoring compliance with the Convention and engaging with the UN Committee, which is responsible for ensuring compliance with the Convention. This is consistent with the Paris Principles.

The Commissioner has the opportunity to report to the UN Committee from time to time and attend UN Committee sessions. For example, during the Fifth Periodic Report in 2016, the Commissioner attended the 73rd session of the UN Committee and reported on outcomes for children in New Zealand.[69] The Commissioner also issued a Supplementary Report from the Commissioner to the UN Committee in 2016.[70] This is in addition to and separate from Government reporting which is carried out by the Minister for Social Development,[71] which ensures that the Commissioner's independence is maintained, and that it is able to provide information to the UN Committee in its own right.

Cooperation with other human rights bodies

The Commissioner engages in broad-based consultation with sub-national groups and is substantially compliant with the relevant requirements. Consistent with the Paris Principles, the Commissioner regularly engages with relevant stakeholders and maintains working relationships

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63 Children's Commissioner, *Our Role in the Children's Convention,* available at: https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/.

64 Children's Commissioner, *Our Role in the Children's Convention,* available at: https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/.

65 Children's Commissioner, *Our Role in the Children's Convention* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/>.

66 Children's Commissioner, *Our Role in the Children's Convention* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/>.

67 Children's Commissioner, *Our Role in the Children's Convention* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/>.

68 Children's Commissioner, *Why We Monitor* (Webpage) <https://www.occ.org.nz/our-work/monitoring/monitoring-work/why-we-monitor/>.

69 Children's Commissioner, *The Children's Convention Reporting Cycle* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-reporting/>.

70 New Zealand Children's Commissioner, Supplementary report to the UN Committee on the Rights of the Child, available at <http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NZL/INT_CRC_IFN_NZL_24881_E.pdf>.

71 Children's Commissioner, *The Children's Convention Reporting Cycle* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-reporting/>.

with other institutions in New Zealand and the region that have been established for the promotion and protection of human rights.[72] For example, the Commissioner:

(a) works closely with a diverse range of community organisations, groups and individuals involved in aspects of improving the well-being of children;[73]

(b) has a statutory responsibility to monitor and assess the policies and practices provided under by Oranga Tamariki and other organisations contracted by Oranga Tamariki to provide care services for children, young people and their families;[74]

(c) can make referrals of matters to other statutory officers, including:

(i) the Chief Commissioner under the *Human Rights Act 1993*;

(ii) the chief executive of the department responsible for the administration of the *Oranga Tamariki Act 1989*;

(iii) the Commissioner of Police;

(iv) the Health and Disability Commissioner;

(v) the Chief Ombudsman under the *Ombudsmen Act 1975*;

(vi) the Independent Police Conduct Authority; and

(vii) the Privacy Commissioner;[75] and

(d) attends biannual members meetings of the ANZCCG, which aims to promote and protect the safety, wellbeing and rights of children and young people in Australia and New Zealand.[76]

Recommendations

The Commissioner is substantially compliant with the relevant requirements, with broad recommendation powers and follow up provisions. The Commissioner issues a number of annual, special and thematic reports to highlight key concerns about the rights and welfare of children in New Zealand which include recommendations on, and monitoring of respect for, human rights by public authorities. This is consistent with the Paris Principles.

In addition to the "Getting it Right" and "State of Care" report series discussed above, other reporting that includes actionable recommendations includes:

(a) the Waitangi Tribunal Submission issued on 30 July 2020, which was an urgent inquiry into the significant and consistent disparity between the number of Māori and non-Māori children being taken into state care by Oranga Tamariki and its predecessors, the extent to which the legislative, policy and practice changes introduced since 2017, and currently being implemented, change this disparity for the better, and what (if any) additional changes to Crown legislation, policy or practice might be required in order to secure outcomes consistent with the Waitangi Treaty and its principles;[77] and

(b) The "Education Matters to Me" series of reports published in 2018, which draws out key insights from children's' experiences to form a starting point for the Statement of National Education Learning Priorities.[78]

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72 See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

73 Children's Commissioner, *Advocacy* (Webpage) <https://www.occ.org.nz/about-us/our-role-and-purpose/advocacy/>.

74 Children's Commissioner, *Monitoring* (Webpage) available at <https://www.occ.org.nz/our-work/monitoring/>.

75 *Children's Commissioner Act 200* (NZ) s 19(4).

76 Australian Human Rights Commission, *Australian and New Zealand Children's Commissioners and Guardians Communique 15-16 May 2018* (Webpage) <https://humanrights.gov.au/our-work/childrens-rights/publications/australian-and-new-zealand-childrens-commissioners-and>.

77 Children's Commissioner, *Waitangi Tribunal Submission,* 30 July 2020, available at <https://www.occ.org.nz/publications/reports/waitangi-tribunal-submission/>.

78 See eg, Children's Commissioner, *Education Matters to Me: Emotional Wellbeing* (Report, 14 March 2018) < https://www.occ.org.nz/publications/reports/education-matters-to-me-emotional-wellbeing/>.

The Commissioner also undertakes reporting on the follow up action taken on recommendations contained in these reports, including detailed information on the measures taken or not taken by public authorities in implementing specific recommendations or decisions that have been published by the Commissioner. For example, the "Getting It Right: Are We Listening?" report issued on 24 June 2019, which reported on how well the Government was implementing the Convention in respect of children's participation rights.[79] It includes a comment on the Government's response to the recommendation that consultation with children and young people be embedded as part of the Government's standard process for developing the Statement of National Education and Learning Priorities.[80]

Ensuring pluralism

The Commissioner's office demonstrates pluralism through its broader representation of national society, which is consistent with the Paris Principles. The Commissioner seeks to achieve pluralism through its appointment procedures, as in appointing a candidate, the Minister for Social Development must consider consulting any organisations or persons that, in the opinion of the Minister, have a special interest in the functions of the Commissioner, including organisations representing children and children themselves.[81]

The Commissioner also achieves pluralism through procedures enabling effective cooperation with diverse societal groups. It works with a diverse range of organisations, groups and individuals who have responsibilities and powers relating to children, as well as children and youth themselves, to ensure children have access to services and support. The Commissioner works across the education, advocacy, youth, health and social services sectors, with government, non-government and community organisations.[82]

The Commissioner has stated its commitment to providing equal opportunities and is a member of the Equal Employment Opportunities Trust.[83] While there does not appear to be a clear open and transparent selection process for the Commissioner's staff, the selection process is merit-based and when a vacancy exists, the Commissioner focuses on finding the best skilled candidate for the position. As at 30 June 2019, the Commissioner had 30 employees, not including the Commissioner. Of these, 31% were Maori, 7% were Pacific Islander and 62% were European in ethnicity,[84] which reflects some degree of pluralism enhancing the independence and effectiveness of, and public confidence in, the Commissioner.

Selection & appointment of decision-making body

The process for selection and appointment of the Commissioner is set out in the *Children's Commissioner Act 2003.* The appointment process is participatory and merits-based, but not transparent, which is a departure from the Paris Principles. Relevantly, there do not appear to be pre-determined, objective and publicly available criteria for assessment of applications, and a clear intention that members serve in their own individual capacity rather than on behalf of the organization they represent.

Restriction on political representatives

While the Commissioner's appointment process appears to be largely independent of government, the removal of a Commissioner is still heavily reliant on government discretion, which compromises the security of tenure of the Commissioner, as well as the independence of, and public confidence

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79 Children's Commissioner, *Getting it Right: Are We Listening?* (Report, 24 June 2019) <https://www.occ.org.nz/publications/reports/getting-it-right-are-we-listening/>.

80 Children's Commissioner, *Getting it Right: Are We Listening?* (Report, 24 June 2019) <https://www.occ.org.nz/publications/reports/getting-it-right-are-we-listening/>.

81 *Children's Commissioner Act 2003* (NZ) s 7(3).

82 Children's Commissioner, *How We Work* (Webpage) <https://www.occ.org.nz/about-us/how-we-work/>.

83 Office of the Children's Commissioner, *2018-19 Annual Report* (Report, 2019) 4 <https://www.occ.org.nz/assets/Uploads/AnnualReport-FINAL-web.pdf>.

84 Office of the Children's Commissioner, *2018-19 Annual Report* (Report, 2019) 5 <https://www.occ.org.nz/assets/Uploads/AnnualReport-FINAL-web.pdf>.

in, the Commissioner. The Commissioner is therefore partially compliant. The *Children's Commissioner Act 2003* does not explicitly restrict the participation of government representatives or members of parliament in the decision-making of the Commissioner, which is a departure from the Paris Principles.[85] However, Members of Parliament are disqualified from taking up the role of Commissioner.[86] In addition, the responsible Minister for the Commissioner, may not direct the Commissioner to have regard to or to give effect to a government policy.[87]

We note that the Commissioner does not appear to have an independent and objective dismissal process, which is a departure from the requirements of the Paris Principles. The Governor-General may, at any time for just cause, on the advice of the Minister for Social Development which is given after consultation with the Attorney-General, remove the Commissioner from office. While there is a notice requirement, the grounds for dismissal are not clearly defined and are not confined to only those actions which impact adversely on the capacity of the Commissioner to fulfil their functions and mandate. The decision is not made by an independent body with appropriate jurisdiction, but rather, is based on the discretion of the appointing authorities. This compromises the security of tenure of the Commissioner, which is essential to ensure the independence of, and public confidence in, the Commissioner.

The Commissioner role is a full time, remunerated position that is appointed for a minimum term of 5 years,[88] which promotes the independence of the Commissioner and ensures the continuity of its programs and services. It is not clear whether the terms and conditions of the Commissioner's service can be modified to their detriment during their period of appointment, which would be a departure from the Paris Principles.

Adequate funding

The Commissioner appears to receive a level of funding less than Australian jurisdictions containing analogous numbers of children and young people. The Office of the Children's Commissioner states that there are approximately 1.1m children in New Zealand, roughly analogous to the child and young person population of Queensland, with approximately 1.2m. However, the available information indicates that the Queensland Family and Child Commission holds a budget of $11.8m, compared to the Commissioner's 2020/21 annual budget of $4,157,000. However, the funding received by the Commissioner has increased over time to reflect the gradual and progressive realisation of the improvement of the Commissioner's operations and the fulfilment of its mandate.[89] The 2019/20 annual budget was $3,157,000.with an increase of $1 million in the 2020/2021 budget that reflects cost pressures and the Commissioner's need for additional capacity.[90] The Commissioner has also been allocated a total of $250,000 on a capital injection. The Commissioner considers that there are no conditions attached to the government funding it receives.[91] However, funding is at the discretion of the Minister for Social Development, which may be seen to be a departure from the Paris Principles.

Annual reports

The Commissioner is obliged to publish a Statement of Intent, Statement of Performance Expectations and Annual Report each year, and provide these to the Minister for Social Development to present in the House of Representatives.[92] This is a departure from the Paris

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85 See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.9.

86 *Crown Entities Act 2004* (NZ) s 30(2)(f).

87 *Crown Entities Act 2004* (NZ) s 105.

88 *Crown Entities Act 2004* (NZ) s 32(1)(b).

89 Minister for Social Development, *The Estimates of Appropriations 2020/21 - Social Services and Community Sector* (Report, 2020) 201 <https://treasury.govt.nz/sites/default/files/2020-05/est20-v10-socdev_1.pdf>.

90 Minister for Social Development, *The Estimates of Appropriations 2020/21 - Social Services and Community Sector,* available at: https://treasury.govt.nz/sites/default/files/2020-05/est20-v10-socdev_1.pdf, 201.

91 Office of the Children's Commissioner, *2018-19 Annual Report* (Report, 2019) 5 <https://www.occ.org.nz/assets/Uploads/AnnualReport-FINAL-web.pdf>.

92 *Crown Entities Act 2004* (NZ) ss 149, 149L, 150.

Principles, which ideally require NHRI's to have an explicit power to table reports directly in the legislature rather than through the executive and, in so doing, to promote action on them.

Office of the Children's Commissioner for England

The Children's Commissioner is a stand-alone office with independence from the Crown.[93] The Children's Commissioner operates across England, with similar bodies existing in Scotland, Wales and Northern Ireland.[94] The Children's Commissioner's primary function is "promoting and protecting the rights of children in England",[95] which includes promoting awareness of the views and interests of children in England.[96]

We consider the following features of this Commissioner model to be particularly notable:

(a) the Secretary must take reasonable steps to consider children's voices in appointing the Children's Commissioner;

(b) the Children's Commissioner must take into account children's voices in exercising his or her statutory mandate;

(c) the Act requires the Children's Commissioner to produce a Business Plan at the start of each financial year and an Annual Report at the end of each financial year, recording which human rights issues arise from year-to-year, steps to be taken, and steps actually taken;

(d) the Children's Commissioner is supported (and challenged) in his or her role by a diverse Advisory Council;

(e) the legislative framework for the Children's Commissioner affords significant independence from government, as do specifically agreed cooperation frameworks between the Children's Commissioner and relevant government departments; and

(f) the Children's Commissioner does not have the power to handle individual complaints. The Children's Commissioner's role is instead to engage with human rights issues on a systemic level.

Legislative establishment and independence

The Children's Commissioner is largely compliant with the Paris Principles in this respect. The Children's Commissioner is entrenched in law as it was established under and is governed by the *Children Act 2004* (UK).[97] The Act provides the Children's Commissioner with a clear mandate (see below).[98] This mandate is broad, allowing the Children's Commissioner considerable autonomy. For example, the Act states that the Children's Commissioner "may do anything which appears to him to be necessary or expedient for the purpose of, or in connection with, the exercise of his functions".[99]

The Act protects the Children's Commissioner's independence, providing that:

(a) the Children's Commissioner is "not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown";[100] and

(b) the Secretary of State may only remove the Children's Commissioner from office if satisfied that the Commissioner has become unfit or unable to property discharge his or her functions or has behaved in a way that is not compatible with his or her continuing in office.[101]

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93 *Children Act 2004* (UK) Sch 1 s 1.

94 See *Children Act 2004* (UK) ss 5–7.

95 *Children Act 2004* (UK) s 2(1).

96 *Children Act 2004* (UK) s 2(2).

97 *Children Act 2004* (UK) Sch 1 s 1(1).

98 *Children Act 2004* (UK) Part 1.

99 *Children Act 2004* (UK) Sch 1 s 2(1).

100 *Children Act 2004* (UK) Sch 1 s 1(2).

101 *Children Act 2004* (UK) Sch 1 s 3(7).

A framework agreement also exists between the Children's Commissioner and the UK Department of Education that is purposed to protect the Children's Commissioner's independence.[102] This agreement provides that:

(a) it is for the Children's Commissioner to determine what activities to undertake in carrying out their primary function;[103] and

(b) the Children's Commissioner has "freedom to determine their own priorities, and activities, and should be subject to as few constraints as possible in deciding how to carry out their business within their statutory remit".[104]

The Children's Commissioner does not have the power to receive, consider or resolve individual complaints alleging violations of human rights.[105] In the explanatory notes to the Act, the stated rationale for this is that it will "allow him to concentrate on the broader issues that affect children".[106] However, the Children's Commissioner may provide advice and assistance to any child who lives away from home or receives social care[107] and, when Commissioner considers that the case of individual child raises issues of public policy relevant to other children, they may hold an inquiry into that case for the purpose of investigating and making recommendations about those issues.[108]

Human rights mandate

The Children's Commissioner is fully compliant with the Paris Principles in this respect. The Children's Commissioner's has a clear and broad mandate to promote and protect human rights. The mandate extends to the acts and omissions of both the public and private sectors. Additionally, the mandate allows the Children's Commission to address public opinion through the publishing of reports.[109]

Specifically, the Children's Commissioner has the power to:[110]

(a) advise persons exercising functions or engaged in activities affecting children on how to act compatibly with the rights of children;

(b) encourage such persons to take account of the views and interests of children;

(c) advise the Secretary of State on the rights, views and interests of children;

(d) consider the potential effect on the rights of children of government policy proposals and government proposals for legislation;

(e) bring any matter to the attention of either House of Parliament;

(f) monitor the implementation in England of the Convention; and

(g) do anything which appears to be necessary or expedient for the purpose of, or in connection with, the exercise of their functions".[111]

Above and beyond the Paris Principles, the Children's Commissioner must take reasonable steps to involve children in the discharge of their primary function.[112] In particular, the Children's Commissioner must:

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[102] *Department of Education Framework Agreement*.

[103] *Department of Education Framework Agreement* [2.3]; see also, *Children Act 2004* (UK) s 2.

[104] *Department of Education Framework Agreement* [3.1].

[105] *Children Act 2004* (UK) s 2(5).

[106] Explanatory Notes to the *Children Act 2004* (UK), s 2, [30].

[107] *Children Act 2004* (UK) s 2D(1).

[108] *Children Act 2004* (UK) s 3(1).

[109] *Children Act 2004* (UK) s 2(3).

[110] *Children Act 2004* (UK) s 2(3).

[111] *Children Act 2004* (UK) Sch 1 s 2(1).

[112] *Children Act 2004* (UK) s 2B(1).

(a) take reasonable steps to ensure that children are aware of the Commissioner's primary function and how to communicate with the Commissioner; and

(b) consult children and organisations working with children on the matters the Commissioner proposes to consider or investigate in the discharge of the primary function.[113]

The Explanatory Notes to the Act explain that "it is for the Commissioner to decide how best to make children aware … and to put in place arrangements that allow children to contact the Commissioner and comment on his or her proposed work programme".[114] However, in practice, to ensure this duty is met, the Children's Commissioner:

(i) has formed a children and young people's advisory group called "Amplify" who assists in preparing the annual Business Plan;

(ii) works with individual and groups of children and young people with lived experience of the issues being investigated;

(iii) funds research;

(iv) raises the positive profile of children and young people by, for example, obtaining the participation of over 40,000 children and young people in the annual Children's Commissioner's Takeover Day; and

(v) speaks directly to key vulnerable groups identified by the UN Committee.[115]

Powers of inquiry and investigation

The Children's Commissioner has the power to:

(a) at any reasonable time enter any premises other than a private dwelling for the purpose of interviewing a child or for the purpose of observing the standard of care provided to children accommodated or otherwise cared for there or for the purpose of interviewing any person present on the premises who works there;[116] and

(b) reasonably request information relating to the Commissioner's function from any person exercising functions of a public nature.[117]

There has not been any specific consideration of when a request for information, or entry onto premises, is "reasonable". The Explanatory Note makes clear that it excludes, at minimum, a requirement to comply with a request if that request is inconsistent with other legislation. For example, if a public entity holds confidential information that is not able to be legally disclosed, it would not be reasonable for the Children's Commissioner to request access to such information.[118]

Many of the reports published by the Children's Commissioner rely largely on publicly available data. However, the Children's Commissioner regularly supplements this data through the exercise of its powers of investigation and inquiry. For example, in putting together a report on children in custody in May 2019, the Children's Commissioner used data published by the Ministry of Justice, Department of Education, NHS and Local Authorities to conclude that at least 1,465 children in England were officially securely detained in March 2018. However, the Children's Commissioner also undertook its own investigations to supplement this number. The Children's Commissioner requested information from English courts to find out how many other children were informally or

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113 *Children Act 2004* (UK) s 2B(2).

114 Explanatory Notes to the *Children and Families Act 2014* (UK) s 107.

115 See, eg, Children's Commissioner for England, *Business Plan 2011-12*, 21.

116 *Children Act 2004* (UK) s 2E(2), (4).

117 *Children Act 2004* (UK) s 2F(1).

118 See Explanatory Notes to the *Children and Families Act 2014* (UK) s 110.

insecurely detained in 2018 and discovered that at least a further 211 children met this description.[119]

Ratification / accession to international human rights instruments

The Children's Commissioner is fully compliant with the Paris Principles in this respect. The Children's Commissioner must have regard to the Convention in considering what constitutes the rights and interests of children in fulfilling its mandate.[120] This means the work done by the Children's Commissioner is necessarily linked to the implementation and promotion of the Convention.

Furthermore, the Children's Commissioner has the following powers (as recommended under the Paris Principles):

(a) to monitor the implementation in England of the Convention;[121]

(b) to encourage the effective implementation of the Convention by:

  (i) advising persons exercising functions or engaged in activities affecting children on how to act compatibly with the rights of children; and

  (ii) advising the Secretary of State on the rights, views and interests of children;[122] and

(c) to conduct an assessment of the potential effect on the rights of children of government policy proposals and government proposals for legislation, to publish reports, and to bring any matter to the attention of either House of Parliament.[123]

Interaction with international human rights system

The Children's Commissioner largely complies with the Paris Principles in this respect. The Children's Commissioner must have regard to the Convention in exercising its functions.[124] The Children's Commissioner also actively engages with the UN Committee.

The Children's Commissioner engages in advocacy work, including issuing a joint report to the UN Committee with the Commissioners for Scotland, Wales and Northern Ireland, calling for information of the Convention into domestic legislation. Every five years, the UN Committee reviews the UK's progress in terms of compliance. The Children's Commissioner, again in partnership with the Commissioners for Scotland, Wales and Northern Ireland, keeps track of the UK's progress and publishes mid-term reviews in the middle of each review cycle.[125]

Cooperation with other human rights bodies

The Children's Commissioner is partly compliant with the Paris Principles in this respect. The Children's Commissioner works closely with the Children's Commissioners for Scotland, Wales and Northern Ireland. The Commissioners work together in monitoring and reporting to the UN Committee on compliance with the Convention.[126] Additionally, the Commissioners engage in collective advocacy work. For example, in 2014, they united to make a call for a national debate on

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119 Children's Commissioner for England, *Who are they? Where are they?: Children locked up* (May 2019) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/05/cco-who-are-they-where-are-they-may-2019.pdf>.

120 *Children Act 2004* (UK) s 2A(1).

121 *Children Act 2004* (UK) s 2(3).

122 *Children Act 2004* (UK) s 2(3).

123 *Children Act 2004* (UK) s 2(3).

124 *Children Act 2004* (UK) s 2A(1).

125 See, eg, *UK Children's Commissioners' UNCRC mid-term review* (Report, November 2019) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/11/cco-uk-childrens-commissioners-uncrc-mid-term-review.pdf>.

126 See *UK Children's Commissioners' UNCRC mid-term review*, (Report, November 2019) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/11/cco-uk-childrens-commissioners-uncrc-mid-term-review.pdf>.

fatherhood.[127] However, the relationship between the Commissioners is not defined by statute or otherwise formalised. It is a working relationship open to negotiation year-on-year.

Recommendations

The Children's Commissioner is fully compliant with the Paris Principles in this respect. In addition to making ad hoc recommendations and reports, the *Children Act 2004* (UK) obliges the Children's Commissioner to publish annual Business Plans at the start of each financial year that highlight key national human rights concerns and provide recommendations.[128] The Children's Commissioner is required to take reasonable steps to consult children before publishing a Business Plan.[129] By way of example, the 2020/21 Business Plan identifies that children in lower-socio economic areas of England feel themselves to be vulnerable to public disorder, ranging from knife attacks to speeding cars, and that children in these areas do not trust the police to keep them safe. The Children's Commissioner recommends that action needs to be taken to build trust between police and this generation of children in lower-socio economic areas.[130]

However, the Children's Commissioner does more than merely publicise these concerns and recommendations. The Business Plans set forward fully elucidated steps as to how the Children's Commissioner will engage and follow up with public authorities to promote and advocate for the implementation of its recommendations. For example, in relation to the issue of children feeling vulnerable to public disorder, the Business Plan states that the Children's Commissioner will:

(a) continue campaigning for additional police officers to be linked into schools in an effort to rebuild trust between the police and this generation of children; and

(b) work with the National Police Chiefs Council to ensure that its new child-centred policing strategy addresses the concerns of children as raised by research conducted by the Office of the Children's Commissioner.[131]

Ensuring pluralism

The Children's Commissioner is partially compliant with the Paris Principles in this respect. Given that the Children's Commissioner is a single-person decision-making body, pluralism within this body is difficult. However, the *Children Act 2004* (UK) obliges the Children's Commissioner to appoint an advisory board to provide advice and assistance relating to the discharge of the Commissioner's functions.[132] The Act states that the advisory board must consist of persons who (taken together) represent a broad range of interests which are relevant to the Children's Commissioner's functions.[133]

Selection & appointment of decision-making body

The Children's Commissioner is partly compliant with the Paris Principles in this respect. The appointment process for the Commissioner is clear and transparent in practice, but not in law. The *Children Act 2004* (UK) states, with no further detail given, that the Commissioner is appointed by the Secretary of State[134] and the Secretary must take reasonable steps to involve children in the appointment.[135]

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127 Fatherhood institute archived from the original, (webpage, 2 January 2014) available at <https://web.archive.org/web/20140103143655/http://www.fatherhoodinstitute.org/>.

128 *Children Act 2004* (UK) s 7B; see, eg, Children's Commissioner for England, *Business Plan 2020-21* <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/03/cco-business-plan-2020-21.pdf>.

129 *Children Act 2004* (UK) s 7B(4)(a).

130 See, eg, Children's Commissioner for England, *Business Plan 2020-21*, 12 <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/03/cco-business-plan-2020-21.pdf>.

131 See, e.g., Children's Commissioner for England, *Business Plan 2020-21*, 12 <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/03/cco-business-plan-2020-21.pdf>.

132 *Children Act 2004* (UK) s 7A(1).

133 *Children Act 2004* (UK) s 7A(2).

134 *Children Act 2004* (UK) Sch 1 s 3(1).

135 *Children Act 2004* (UK) Sch 1 s 3(2).

In practice, the last Commissioner was appointed as follows:

(a) the Secretary wrote to the Education Committee within the House of Commons that Anne Longfield was the Government's preferred candidate;

(b) the Secretary's letter to the Education Committee stated that the recruitment process involved two rounds of interviews and meetings between short-listed candidates and a panel of children and young people whose views were taken into account;

(c) the Secretary's letter attached the job description, selection criteria, details of how the post was advertised, the selection panel, the process for sifting applications, and the candidate's CV;

(d) the Secretary invited the Committee to hold a pre-appointment hearing with the candidate; and

(e) the Committee held a hearing and, prior to the hearing, invited members of the public to suggest priorities for the incoming Children's Commissioner.[136]

The Act obliges the Children's Commissioner to appoint an advisory board to provide advice and assistance relating to the discharge of the Children's Commissioner's functions.[137] The appointment process for the advisory council is largely transparent in that the Act states that:

(a) the advisory board must consist of persons who (taken together) represent a broad range of interests which are relevant to the Children's Commissioner's functions;[138] and

(b) the Children's Commissioner must from time to time publish a report on the procedure followed and the criteria used when making appointments to the advisory board.[139]

The process could be made more transparent by enshrining the appointment procedure and criteria in the *Children Act 2004* (UK). This would overcome any potential concerns about the adequacy of the Children's Commissioner's reports as to the appointment process.

Restriction on political representatives

The Children's Commissioner is fully compliant with the Paris Principles in this respect. The independence of the Commissioner from the executive and legislature is enshrined in law. The *Children Act 2004* (UK) states that the Children's Commissioner is "not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown".[140] Furthermore, the *House of Commons Disqualification Act 1975* expressly prohibits a person who is the Children's Commissioner or a member of staff of the Children's Commissioner from being a Member of Parliament.[141]

A framework agreement also exists between the Children's Commissioner and the UK Department of Education that is purposed to protect the Children's Commissioner's independence.[142] This agreement provides that it is for the Children's Commissioner to determine what activities to undertake in carrying out his or her primary function.[143]

The Children's Commissioner has "freedom to determine their own priorities, and activities, and should be subject to as few constraints as possible in deciding how to carry out their business within their statutory remit".[144]

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136 Education Committee, *Appointment of the Children's Commissioner for England, Third Report of Session 2014-15*, 11 November 2014, 3–8.

137 *Children Act 2004* (UK) s 7A(1).

138 *Children Act 2004* (UK) s 7A(2).

139 *Children Act 2004* (UK) s 7A(3).

140 *Children Act 2004* (UK) Sch 1 s 1(2).

141 *House of Commons Disqualification Act 1975* (UK) Sch 1 Pt 3; see also, *Children Act 2004* (UK) Sch 1 s 12.

142 *Department of Education Framework Agreement*.

143 *Department of Education Framework Agreement* [2.3]; see also, *Children Act 2004* (UK) s 2.

144 *Department of Education Framework Agreement* [3.1].

The grounds for dismissal of the Children's Commissioner are limited in that the Secretary may only remove the Children's Commissioner from office if satisfied that the Commissioner has become unfit or unable to property discharge his or her functions or has behaved in a way that is not compatible with his or her continuing in office.[145] However, there may be some room for improvement in relation to tenure. The General Observations to the Paris Principles state that the dismissal process must be clearly defined, independent and objective. It could be argued that these grounds of dismissal are too broad and open to subjective opinion. The statutory framework could be rendered more compliant by prescribing objective tests or criteria that go towards a conclusion that the Commissioner is unfit or unable to discharge their functions.

The Children's Commissioner is entitled to appoint any staff considered necessary to assist in carrying out their functions.[146] The Children's Commissioner has the power to determine the terms and conditions of such employment, promoting the independence of the Office of the Children's Commissioner.[147] In practice, it appears the recruitment process is open, transparent and merit-based. All staff roles are advertised on the Children's Commissioner website. The advertisements clearly set out the required skills and experience for the role.[148]

Adequate funding

The Children's Commissioner is fully compliant with the Paris Principles in this respect. The Children's Commissioner is primarily funded by the State and funding is allocated as a separate budget line item applicable only to the Children's Commissioner.

The Act states that the Children's Commissioner is to be funded by payments made by the Secretary of State of "such amounts, at such times and on such conditions (if any) as the Secretary considers appropriate".[149] The Framework Agreement with the Department of Education provides a framework for the funding process:

(a) the budget is voted in the Department's supply estimate as a separate line item and is subject to Parliamentary control; and

(b) by 31 March each year, the Department then sends the Commissioner a formal statement of the annual budgetary provision allocated.[150]

The Framework Agreement further allows the Children's Commissioner to receive some funding from external sources without needing to seek prior approval, provided that such funding complies with various (anti-corruption) regulations and is disclosed to the Department.[151]

In practice, this process provides adequate funding. There has been no suggestion either by the Children's Commissioner or commentators that the role is underfunded. In the 2019-20 financial year, the budget was £2.764m.[152]

The Children's Commissioner also has near complete autonomy to allocate its budget in the exercise of its statutory function as it sees fit.[153] The Framework Agreement requires the Children's Commissioner to manage its budget responsibly and in compliance with good financial practice and to notify the Department of Education promptly if over-spending is anticipated.[154]

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145 *Children Act 2004* (UK) Sch 1 s 3(7).

146 *Children Act 2004* (UK) Sch 1 s 5; See also, *Department of Education Framework Agreement* [13.2].

147 *Department of Education Framework Agreement* [13.1].

148 Children's Commissioner, *Vacancies* (webpage, 2020) available at < https://www.childrenscommissioner.gov.uk/about-us/vacancies/>.

149 *Children Act 2004* (UK) Sch 1 s 7.

150 *Department of Education Framework Agreement* [11.1]–[11.2].

151 *Department of Education Framework Agreement* [11.6]; GANHRI General Observations, G.O. 1.10.

152 Children's Commissioner for England, *Annual Report 2019-20*, [3.5.18].

153 *Children Act 2004* (UK) Sch 1 s 2.

154 See *Department of Education Framework Agreement* [11].

The Children's Commissioner is obliged to comply with the financial accountability requirements applicable to other independent agencies.

The Act states that the Children's Commissioner must:

(a) keep proper accounting records;

(b) prepare a statement of accounts for each financial year; and

(c) send a copy of each such statement to the Secretary and the Comptroller and Auditor General as soon as possible after the end of each financial year.[155]

The Framework Agreement between the Children's Commissioner and the Department of Education further requires that the Children's Commissioner to:

(a) sign off the Annual Report and Accounts;

(b) ensure proper records are kept;

(c) ensure the Annual Report and Accounts are properly prepared and presented;

(d) provide timely forecasts and monitoring information on performance and finance to the Department of Education; and

(e) promptly notify the Department of Education if over or under spends are likely.[156]

Annual reports

The Children's Commissioner is fully compliant with the Paris Principles in this respect. The *Children Act 2004* (UK) obliges the Children's Commissioner to publish:

(a) at the start of each financial year, a Business Plan that highlights key human rights developments, provides a means of public scrutiny, and offers recommendations for change and provides an account of the activities to be undertaken by the Children's Commissioner that year to further its mandate;[157] and

(b) at the end of each financial year, an Annual Report that reports on the Children's Commissioner's progress that year in relation to the Business Plan. The Children's Commissioner must report on the way and extent to which they discharged their functions and what they found in the course of exercising their functions during the year.[158]

The Children's Commissioner must table these reports directly with the legislature.[159]

5.2 Strongest Australian model

On the basis of our desktop review, the legislative structure for the South Australian Commissioner for Children and Young People appears to be the strongest existing Australian model in terms of its compliance with the Paris Principles. However, this assessment is made with the caveat that, as we have necessarily conducted our review from a legal perspective and have focussed on legislative structure and on-paper compliance with the Paris Principles, we have not considered the practical operation of the Commissioner models nor community feedback. Anecdotal evidence suggests that the South Australian Commissioner for Children and Young People may be less effective in practice, largely based on insufficient funding. Nevertheless, we consider this model to have the strongest legislative framework of all Australian models and consider that it provides a good basis for the structure of the National Commissioner role (subject to adequate funding).

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155 *Children Act 2004* (UK) Sch 1 s 8(1).

156 *Department of Education Framework Agreement* [6.2].

157 *Children Act 2004* (UK) s 7B; see, eg, Children's Commissioner for England, *Business Plan 2020-21* <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/03/cco-business-plan-2020-21.pdf>.

158 *Children Act 2004* (UK) s 8.

159 See *Children Act 2004* (UK) ss 2, 8.

We have set out below a summary of the performance of the legislative framework for the South Australian Commissioner against each of the Paris Principles. Further detail in respect of both Commissioner models is set out in the review templates in the Appendix to this paper.

We consider the following features of this Commissioner model to be particularly notable:

(a) **Broad range of reporting and inquiry powers**

The powers (explored in the table and discussion above), including the power to make an immediate report to Parliament, give effect to the broad human rights mandate given to the Commissioner for Children and Young People.

(b) **Information gathering power**

A compulsory information gathering power is an important investigative tool for any statutory body. The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) provides that the Commissioner for Children and Young People or the Guardian may require a person to provide information or documents specified in a written notice where the information or documents are reasonably required by the Commissioner or Guardian to perform their functions under the Act.[160] Refusal or failure to comply with a notice is an offence with a maximum penalty of $10,000.[161]

Additionally, the Act prohibits a person from making a statement knowing that it is false or misleading in a material particular in information provided under the Act, with a maximum penalty of $10,000.[162]

Background

The Commissioner for Children and Young People is an independent statutory officer, established under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA).[163] The Act also establishes the Guardian for Children and Young People ("**Guardian**")[164] and the Child Development Council ("**Council**"),[165] and provides for the continuation of the Child Death and Serious Injury Review Committee ("**Review Committee"**).[166]

The Commissioner for Aboriginal Children and Young People is an independent officer responsible to the Minister for Education.[167] The role is described as "working alongside" the bodies established under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA): the Commissioner for Children and Young People, the Guardian, the Council and the Review Committee.[168]

The Commissioner for Children and Young People was established in response to recommendation 245 of the Child Protection Systems Royal Commission 2014 that there be a statutory office of the Commissioner for Children and Young People and that the Commissioner have the functions and powers set out in the Royal Commission Report.[169] The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) does not have an express section

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160 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 61(1).

161 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 61(3).

162 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 65.

163 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8.

164 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 21.

165 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 46.

166 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 30.

167 South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report December 2019 (Report, December 2019) 8 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

168 South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report December 2019 (Report, December 2019) 8 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

169 Commissioner for Children and Young People, *Candidate information* (November 2016) 2 <https://www.education.sa.gov.au/sites/default/files/ccyp-candidate-information.pdf?acsf_files_redirect>.

setting out statutory objectives (save for being an Act to establish the Commissioner and continue the other bodies).

The following sections deal with the Commissioner for Children and Young People. The Commissioner for Aboriginal Children and Young People, having been established under the *Constitution Act 1934* (SA) as opposed to being legislated for within the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA), also operates within South Australia however is more challenging to analyse as many of the available comparators are less readily apparent. On that basis, we note that our determination of the Commissioner for Children and Young People (SA) as the most compliant Australian model extends only to that Commissioner. We do not include the Commissioner for Aboriginal Children and Young People (SA) in our recommendation of the strongest model.

Legislative establishment and independence

The Commissioner for Children and Young People's role is legislatively enshrined (under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA)).

The Commissioner for Children and Young People is appointed for a seven-year term and, at the end of the term, is eligible for re-appointment, provided the total term in office (including any time as Acting Commissioner) does not exceed 10 years (i.e. the Commissioner may be eligible for a second term to a maximum of three years).[170] The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) specifies the circumstances for suspension and removal from office, however some of the grounds appear to be more discretionary in nature. For example, the ground for suspension that the Commissioner has engaged in "conduct that may bring the office of the Commissioner into disrepute"[171] may be interpreted differently depending on the person holding the officer of Governor (and potentially also the underlying political motivations at the time), as opposed to a more objective factor such as a conviction for a criminal offence.

As a result of the powers and functions of the Commissioner for Children and Young People being contained within the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA), any modifications to those power and functions require the approval of Parliament.

In a broad sense, the Commissioner for Children and Young People has quasi-judicial competence insofar as it has the power to hold inquiries (with the powers of a Royal Commission[172]), gather information compulsorily[173] and publish reports, including the ability to table the report directly with Parliament in certain circumstances[174].

In an inquiry under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA), the Commissioner for Children and Young People has the same protection, privileges and immunities as a Judge of the Supreme Court.[175]

Human rights mandate

The Commissioner for Children and Young People appears to be compliant with the Paris Principles in this respect. The Commissioner is vested with the competence to promote and protect human rights. The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) requires each State authority (which includes the Commissioner), in carrying out its functions or exercising its powers, to protect, respect and seek to give effect to the rights set out from time to time in the Convention and any other relevant international human rights instruments affecting

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170 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 8(1), 8(2).

171 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(9)(b).

172 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 16.

173 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 61.

174 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 44.

175 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 68(5).

children and young people.[176] In this regard, the Commissioner for Children and Young People is obliged to promote and protect human rights.

The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) defines a reference to the "rights" of children and young people as including a reference to rights recognised in accordance with statutory and common law, rights as set out in the Convention and rights set out in any other relevant international human rights instruments.[177] This broad definition of rights is in accordance with the comments in the General Observations about the need to promote a progressive definition of human rights.[178]

The Commissioner for Children and Young People has a legislative mandate with specific statutory functions to promote and protect human rights. The Commissioner for Children and Young People is able to inquire into acts and omissions of both the public and private sectors, as well as providing reports and recommendations through a variety of statutory powers.

There are some limitations on the scope of the powers afforded to the Commissioner for Children and Young People. First, the power to inquire into matters is limited to matters of a systemic nature (i.e. not an isolated case or incident) and it must relate to the policies, practices and procedures of a "State authority" (or authorities) or any other matter provided by the regulations.[179] However, the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) also provides a power to provide an immediate report to Parliament on any matter related to the Commissioner for Children and Young People's functions under the Act if satisfied the matter is of significant importance to the safety or wellbeing of children and young people. The compulsory information gathering power in the Act is limited to the production of documents or provision of information (i.e. does not extend to the ability to inspect premises).[180]

Ratification / accession to international human rights instruments and interaction with international human rights system

General Observations 1.3 and 1.4 are considered together below.

There is no express obligation in the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) to encourage ratification of or accession to international human rights instruments. However, the Act requires each State authority (including both Commissioners), in carrying out its functions or exercising its powers, to protect, respect and seek to give effect to the rights set out from time to time in the Convention and any other relevant international human rights instruments affecting children and young people.[181]

The most recent Reports of the Commissioner for Children and Young People make it clear that the work and functions of the Commissioner are underpinned by the Convention.[182]

The Commissioner for Children and Young People's most recent annual report indicates a "key achievement" has been increased awareness of the Convention and the work of the Commissioner for Children and Young People through six formal presentations to adult stakeholders.[183] In 2019,

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176 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 5.

177 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 4(1).

178 South Australia's Commissioner for Aboriginal Children and Young People, *Inaugural Report* (Report, December 2019) 43 < https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>; *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15.

180 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 61.

181 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 5.

182 Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 2019) 11; South Australia's Commissioner for Aboriginal Children and Young People, *Inaugural Report* (Report, December 2019) 43 < https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf> 8.

183 Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 2019) 8.

the Commissioner for Children and Young People also made a submission to the UN Committee.[184]

Given the Commissioner for Children and Young People is a State-based role (as opposed to national role), it is not surprising that the extent of interactions with the international human rights system is primarily through encouragement and promotion of human rights instruments within South Australia.

Cooperation with other human rights bodies

The Commissioner for Children and Young People interacts with the other human rights bodies within the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA), being the Guardian, the Committee and the Council.

The Commissioner for Children and Young attends meetings of the ANZCCG and has participated in ANZCCG Joint Papers.[185]

The Commissioner for Children and Young People has also co-authored joint reports, such as the 2018 "*Leading for our Future Youth Symposium Report",* a joint report of the CCYP and the Australian Migrant Resource Centre.[186]

Recommendations

The Commissioner for Children and Young People has a specified function to "advise, and make recommendation to, Ministers, State authorities and other bodies (including non-Government bodies) on matters related to the rights, development and wellbeing of children and young people at a systemic level".[187]

Upon completion of an inquiry, the Commissioner for Children and Young People may, by notice in writing, recommend to a State authority that it take particular action.[188] The State authority must respond to such a recommendation to indicate whether the recommendation will or will not be implemented, and either explain why it is not to be implemented or how it is proposed to be implemented.[189] The Commissioner for Children and Young People can escalate the matter to the Minister by submitting a report to the Minister where the Commissioner considers that the State authority had failed or refused to implement a recommendation (despite proposing to implement it).[190]

These powers and functions give the Commissioner for Children and Young People a broad mandate and sufficient mechanisms for effecting change and drawing attention to inadequate implementation of recommendations.

Ensuring pluralism

The Commissioner for Children and Young People's "Front & Centre" strategic agenda for 2018-2022 includes the following aspects relevant to ensuring the pluralism of the CCYP:

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184 Commissioner for Children and Young People*, Annual Report 2018-19* (Report, 2019) 8..

185 See, eg, the 11-12 November 2019 ANZCCG communique, available at <https://ccyp.vic.gov.au/assets/Uploads/FINAL-Communique-ANZCCG-November-2019.pdf>; See, eg, the 2018 ACCG Joint Participation Paper, available at <https://www.ccyp.com.au/wp-content/uploads/2018/07/Final-ACCG-Joint-Participation-Paper-2018.pdf>.

186 Commissioner for Children and Young People, *Leading for our Future, Youth Symposium Report* (Report, October 2018) <https://www.ccyp.com.au/wp-content/uploads/2019/02/AMRC-and-Commissioner-for-Children-and-Young-People-SA-Youth-Symposium-Report-Final-PDF.pdf>.

187 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(c).

188 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 17(1).

189 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 17(2).

190 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 17(3), (4).

(a) a key objective of the CCYP to "champion children and young people's rights and work with the broader community to respect and support their inclusion in laws, policies and decision making";[191] and

(b) a priority of the CCYP is to "Promote equality, equal access, equal rights, equal treatment and acceptance for people from diverse race, gender, sexual, religious and socio-economic backgrounds".[192]

Similarly, the Annual Report refers to a variety of activities involving diversity of participants in the activities conducted by the Commissioner for Children and Young People. However, the position on ensuring pluralism within the Commissioner for Children and Young People as an organisation itself is less clear.

The Commissioner for Children and Young People's staff would be subject to the usual State Government employment conditions and recruitment processes, which are not considered within this paper but would have an impact on the pluralism in the organisation.

Selection & appointment of decision-making body

The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) provides for several decision-making bodies: the Commissioner for Children and Young People, the Guardian, the Council and the Committee.

There is a formal recruitment scheme set out within the regulations to the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA).[193] The recruitment scheme involves, *inter alia,* a selection panel of up to 5 persons (2 of whom must be young people) to propose the appointment of an application to the position of Commissioner for Children and Young People[194] and the inclusion of an exercise in the interview process designed to assess the applicant's ability to engage, communicate and interact with children and young people.[195] The Regulations permit the panel, subject to the Regulations and any direction by the Minister, to determine its own procedures.

The recruitment scheme set out in the Regulations for the appointment of the Commissioner for Children and Young People is broadly in accordance with the recommendation in the General Observations that broad consultation and/or participation in the application, screening and selection process take place.[196] The position description identified for the Commissioner for Children and Young People position was advertised publicly and identified the selection criteria, form of application required and the essential skills for the role.

Restriction on political representatives

The office of Commissioner for Children and Young People becomes vacant if the holder is nominated for election as a member of an Australian Parliament.[197] In effect, this provision achieves the result that a Member of Parliament cannot also hold the office of Commissioner for Children and Young People. However, the office of the Guardian does not become vacant in the same circumstance. Similarly, Members of Parliament are not precluded by the Act from being appointed to the Council or the Review Committee.

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[191] Commissioner for Children and Young People South Australia, *Front & Centre Commissioner for Children and Young People Strategic Agenda 2018-2022* (Report, 2018) 11 <https://www.ccyp.com.au/wp-content/uploads/2019/12/Web-Min-Front-Centre-Report.pdf>.

[192] Commissioner for Children and Young People South Australia, *Front & Centre Commissioner for Children and Young People Strategic Agenda 2018-2022* (Report, 2018) 7 <https://www.ccyp.com.au/wp-content/uploads/2019/12/Web-Min-Front-Centre-Report.pdf>.

[193] *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) reg 6.

[194] *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) reg 6(1)(b).

[195] *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) reg 6(1)(c).

[196] *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) reg 6(1)(a); GANHRI General Observation 1.8 – Selection and appointment of decision-making body of NHRIs.

[197] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(13).

The Commissioner for Children and Young People must not, without the consent of the Minister, engage in any remunerated employment or activity apart from official duties, which provides a form of safeguard for the independence of the Commissioner for Children and Young People role.[198] It is worth noting that this safeguard requires political involvement (from the Minister), as opposed to review by an independent panel or advisory body.

Tenure

The Act specifies the circumstances for suspension and removal from office.[199] The Governor may, on the address of both Houses of Parliament, remove the CCYP from office.[200] The Governor may also suspend the CCYP from office for:[201]

(a) contravention of a condition of appointment; or

(b) misconduct or conduct that may bring the office of Commissioner into disrepute; or

(c) failure or incapacity to carry out official duties satisfactorily.

If the Governor suspends the Commissioner for Children and Young People, a full statement of the reason must be laid before both Houses of Parliament within 7 days.[202] If, at the end of 20 sitting days after the statement is laid before Parliament, neither House has presented an address to the Governor requiring the Commissioner for Children and Young People to be restored to office, then the Commissioner for Children and Young People is remove from office.[203]

The Commissioner for Children and Young People is independent of direction or control by the Crown or any Minister or officer of the Crown.[204] This same provision applies to the Guardian,[205] but does not apply to the Committee.[206]

Adequate funding

The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) has an equivalent provision for each of the Commissioner for Children and Young People, the Guardian, the Review Committee and the Council, requiring the Minister to provide staff and other resources that the body reasonably needs for carrying out their functions.[207] In practice, the Commissioner for Children and Young People's 22018/19 budget of $5,580,000 was among the higher, on a per capita basis, of the Australian Commissioners, noting that this amount includes funding for the Guardian for Children and Young People (SA) and so the final figure allocated to the Commissioner for Children and Young People is likely to be somewhat lower.

Annual reports

The Commissioner for Children and Young People must report to the Minister on or before 31 October each year, addressing the performance of the Commissioner's functions during the preceding financial year.[208] The Minister is required to have copies of the report laid before both Houses of Parliament within six sitting days after receiving the report.

The Commissioner for Children and Young People is empowered to report to Parliament if satisfied the matter is of such importance to the safety and wellbeing of children and young people that Parliament should be made aware as a matter of urgency.[209] The Commissioner for Children and

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198 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(7).
199 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(9)-12.
200 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(8).
201 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(9).
202 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(10).
203 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(11).
204 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 7(2).
205 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 21(2).
206 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 30(3).
207 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 11, 24, 35 and 53.
208 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 13A.
209 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 44.

Young People otherwise has broad-ranging inquiry and reporting powers under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA).

5.3 Summary

We consider the New Zealand and United Kingdom Commissioner models to be the most compliant overall existing Commissioner models. We have made this determination on the basis that the New Zealand and United Kingdom Commissioner models are the most compliant with the Paris Principles. In addition, the United Kingdom and New Zealand Children's Commissioner models may be the most relevant to Australia given the similarities between jurisdictions as each country comes from a common law background with a Westminster parliamentary system.

We consider that the South Australian Commissioner for Children and Young People appears to be the most compliant existing Australian model against the Paris Principles.[210]

The table at the end of this section sets out our assessment of each of the existing Commissioner models against the Paris Principles based on our desktop review. We have conducted our review using a "traffic light" system, whereby green indicates substantial compliance with the relevant principle, yellow indicates partial compliance and red indicates lack of compliance.[211]

[210] For clarity, we note that this refers to the South Australian Commissioner for Children and Young People, rather than the South Australian Commissioner for Aboriginal Children and Young People.

[211] We note that for a number of the "essential requirements" of the Paris Principles, there are various components, a result of which is that a Commissioner model might score as "partially" compliant on a requirement, even where that model notably out-performs other Commissioner models on one or two components of that essential requirement. For example, the Canadian and Norwegian models are largely compliant (and we consider these to be some of the better Commissioner models we have reviewed), however some of the Commissioners' powers are restricted such that it is difficult to state that they are "compliant" with the relevant Paris Principles. For example, whilst the Canadian Commissioner's powers of inquiry are significant, they are limited to public entities.

No.	Commissioner model	Essential requirements of the Paris Principles										
		Legislative establishment and independence	*Human rights mandate* [212]	*Ratification / accession to international human rights instruments*	*Interaction with international human rights system*	*Cooperation with other human rights bodies*	*Recommendations*	*Ensuring pluralism*	*Selection & appointment of decision-making body*	*Restriction on political representatives*	*Adequate funding*	*Annual reports*
Australia – Children's Commissioners												
1	Commissioner for Children and Young People (SA)											
2	National Children's Commissioner											
3	Commissioner for Children and Young People (Tas)											
4	National Aboriginal and Torres Strait Islander Social Justice Commissioner											
5	Advocate for Children and Young People (NSW)											
6	Commissioner for Children and Young People (WA)											
7	Principal Commissioner for Children and Young People (Vic)											

[212] Under the Paris Principles and General Observations, powers of inquiry and investigation are considered under the "Human rights mandate" heading. We provide further detail on these powers below.

No.	Commissioner model	Essential requirements of the Paris Principles										
		Legislative establishment and independence	*Human rights mandate* [212]	*Ratification / accession to international human rights instruments*	*Interaction with international human rights system*	*Cooperation with other human rights bodies*	*Recommendations*	*Ensuring pluralism*	*Selection & appointment of decision-making body*	*Restriction on political representatives*	*Adequate funding*	*Annual reports*
8	Family and Child Commissioner (QLD)											
9	Children's Commissioner (NT)											
10	Children and Young People Commissioner (ACT)											
11	Commissioner for Aboriginal Children and Young People (Vic)											
12	Commissioner for Aboriginal Children and Young People (SA)											
Australia – Other Commissioners												
13	National Commissioner for Defence and Veteran Suicide Prevention[213]											
14	National eSafety Commissioner											

[213] We note that the Bill establishing this Commissioner has only recently been proposed. As such, compliance with the Paris Principles is subject to the Bill being enacted as introduced.

No.	Commissioner model	Essential requirements of the Paris Principles										
		Legislative establishment and independence	*Human rights mandate* [212]	*Ratification / accession to international human rights instruments*	*Interaction with international human rights system*	*Cooperation with other human rights bodies*	*Recommendations*	*Ensuring pluralism*	*Selection & appointment of decision-making body*	*Restriction on political representatives*	*Adequate funding*	*Annual reports*
15	National Rural Health Commissioner											
16	National Data Commissioner[214]											
International Children's Commissioners												
17	Children's Commissioner (New Zealand)											
18	Children's Commissioner (United Kingdom)											
19	Ombudsperson for Children (Norway)											
20	Commissioner for Children and Youth (proposed) (Canada)											

[214] We note that the Bill establishing this Commissioner has not yet been proposed. As such, compliance with the Paris Principles is subject to the introduction of draft and final legislation.

6 Strongest compliance per Paris Principle

This section identifies the Commissioner models that have the strongest compliance for each element of the Paris Principles. A summary table is provided at the end of this section.

6.1 **Entrenchment in law—**The National Commissioner shall be given as broad a mandate as possible, which shall be clearly set forth in a legislative text.[215]

(a) ***Entrenched in law*:**[216] The enabling legislation should specify the National Commissioner's role, functions, powers, funding, and lines of accountability, as well as the appointment mechanism for and terms of office of members.

Best practice under the Paris Principles requires that, to the greatest degree possible, the terms of a commissioner's role be legislated. This promotes a greater degree of permanency and independence, whilst distinguishing the role from state agencies, non-government organisations or ad hoc bodies.

The **Children's Commissioner of the Northern Territory** is subject to its own enacting legislation, the *Children's Commissioner Act 2013* (NT) which sets out the role's functions, structure, accountability and appointment mechanisms. The *Children's Commissioner Act 2013* (NT) sets out the principles informing the exercise of the Children's Commissioner's powers,[217] as well as the Children's Commissioner's powers to promote and report on children's wellbeing,[218] receive and determine complaints,[219] conduct investigations and inquiries,[220] and monitor the administration and implementation of legislation and government decision-making.[221] The legislation also specifies the Children's Commissioner's term of appointment,[222] the nature and staffing of the Children's Commissioner's office,[223] annual reporting obligations,[224] and offences in failing to comply with, or assist, the Children's Commissioner.[225]

The National Commissioner role should be established via standalone legislation. The establishing legislation should clearly articulate the various criteria discussed below. A clear legislative framework for the National Commissioner will promote stability in the role across changes in government and promote transparency and predictability in the nature and scope of the National Commissioner's powers.

(b) ***Independence*:**[226] The enabling legislation must ensure independence by, for example, containing an independent and objective dismissal process.

The independence of the **Children's Commissioner of the Northern Territory** is specifically provided for in its enacting legislation. Section 11 of the *Children's Commissioner Act 2013* (NT) provides that:

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215 Paris Principles, *Competence and responsibilities*, principle 2.

216 GANHRI General Observations, G.O. 1.1.

217 Children's Commissioner Act 2013 (NT) s 5.

218 Children's Commissioner Act 2013 (NT) s 10(1)(g)-(h).

219 Children's Commissioner Act 2013 (NT) s 10(1)(a).; Part 4.

220 Children's Commissioner Act 2013 (NT) s (10(1)(d); Part 5; Part 6.

221 Children's Commissioner Act 2013 (NT) s 10(1)(c), (e).

222 Children's Commissioner Act 2013 (NT) s 12.

223 See *The Ombudsman for Children, Norway (Norway) Act No 5 of March 6 1981*, Instructions for the Ombudsman for Children (Norway) Laid down by Royal Decree of 11 September 1981.

224 Children's Commissioner Act 2013 (NT) Part 9.

225 Children's Commissioner Act 2013 (NT) Part 8.

226 GANHRI General Observations, G.O. 2.1.

Except as otherwise provided by another law of the Territory, the Commissioner is not subject to the direction of anyone in relation to:

(a) the way in which the functions of the Commissioner are performed; or

(b) *the order of priority the Commissioner gives to investigations.*

The Children's Commissioner also benefits from robust provisions limiting the bases upon which their appointment may be suspended or terminated. The Children's Commissioner may only be suspended for misbehaviour, or physical or mental incapacity. Within three sitting days, the relevant Minister must present a statement of reasons in support of this suspension to the Legislative Assembly. In order to terminate the Children's Commissioner, a two-thirds majority of the Legislative Assembly must pass a resolution within seven sitting days of being provided the statement.[227] Additionally, the Children's Commissioner may be terminated for bankruptcy.[228] A clearly defined dismissal process will support the National Commissioner's capacity to exercise their functions with reduced fear of government or other political intervention.

Some Commissioner roles are vested with increased independence in relation to aspects of their functions. The **Commissioner for Children and Young People for South Australia**, in conducting an inquiry, is vested with the same protections, privileges and immunities as a Judge of the Supreme Court of South Australia.[229] Both the powers and independence vested in the judiciary are considerable and privileges of this kind would provide a high degree of independence. In this respect, we note that the recently proposed legislation for the establishment of a **National Commissioner for Defence and Veteran Suicide Prevention** vests the commissioner with the same protections and immunities as a Justice of the High Court.[230]

(c) ***Complaints handling***:[231] Whilst not required under the Paris Principles, the power to hear and determine complaints contributes to a commissioner's ability to provide "end-to-end" oversight of their area of responsibility, by including promotion, monitoring and enforcement powers.

A complaints-handling power was less common among the Commissioner models reviewed. We have not inquired further into the reasoning behind this. Speculatively, complaints-handling powers may be omitted due to budgeting and resourcing limitations, given the potentially significant volume of complaints and resulting burden upon commissioners and their offices.

Should a complaints-handling mechanism be deemed suitable, the **Norwegian Ombudsman for Children** provides an example of a broad-based complaints-handling powers. The Ombudsman holds a mandate to receive, consider and resolve complaints alleging violations of human rights, particularly the 'needs, rights and interests of children'.[232] The Ombudsman may:

(i) receive complaints against both public and private bodies in its jurisdiction;[233]

(ii) receive and consider complaints either of their own initiative or by other persons;[234]

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227 Children's Commissioner Act 2013 (NT) s 16.

228 Children's Commissioner Act 2013 (NT) s 16(6).

229 Children and Young People (Oversight and Advocacy Bodies) Act 2016 (SA) s 68(5).

230 National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 (Cth) s 64(1).

231 GANHRI General Observations, G.O. 2.9.

232 *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 1.

233 *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 1.

234 *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 3.

(iii) investigate complaints (or determine the steps which should be taken to investigate the circumstances of a case);[235] and

(iv) refer cases to relevant bodies (such as to specialised courts or tribunals).[236]

Ideally, such a complaints-handling power should not be unduly limited to hearing complaints only in respect of certain entities. For example, the ***Children's Commissioner Act 2013*** **(NT)** provides a complaints-handling mechanism only in relation to "service providers",[237] being public authorities or operators of child-related services who act, or provide services, in relation to vulnerable children.[238]

Including a complaints-handling mechanism could serve as a useful adjunct to the National Commissioner's reporting, inquiry and recommendation powers. Should any complaints-handling mechanism be included, it is important that this power be adequately resourced. Further analysis of the adequacy of commissioner budgets is considered at section 6.10 below.

6.2 Human rights mandate—The National Commissioner shall hold a range of specific functions to both promote and protect human rights.

(a) ***Nature of mandate*:**[239] "Promotion" of human rights means creating a society where human rights are more broadly understood and respected and can occur by education, training, advising, public outreach and/or advocacy. "Protection" of human rights means addressing and seeking to prevent actual human rights violations and can include monitoring, inquiring, investigating, reporting on human rights violations and individual complaints handling. The National Commissioner's mandate should be interpreted broadly, liberally and in a purposive manner to promote a progressive definition of human rights.

The **Commissioner for Children and Young People (SA)** holds a broad legislative mandate to both promote and protect the rights of children and young people. The Commissioner's mandate is:[240]

(i) to promote and advocate for the rights and interests of all children and young people in South Australia;

(ii) to promote the participation by children and young people in the making of decisions that affect their lives;

(iii) to advise, and make recommendations to, Ministers, State authorities and other bodies (including non-Government bodies) on matters related to the rights, development and wellbeing of children and young people at a systemic level;

(iv) to inquire into matters related to the rights, development and wellbeing of children and young people at a systemic level (whether a Governmental system or otherwise);

(v) to assist in ensuring that the State, as part of the Commonwealth, satisfies its international obligations in respect of children and young people;

(vi) to undertake or commission research into topics related to children and young people;

(vii) to prepare and publish reports on matters related to the rights, development and wellbeing of children and young people at a systemic level; and

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235 *The Ombudsman for Children, Norway (Norway) Act No 5 of March 6 1981,* Instructions for the Ombudsman for Children (Norway) Laid down by Royal Decree of 11 September 1981, s 6.

236 *The Ombudsman for Children, Norway (Norway) Act No 5 of March 6 1981,* Instructions for the Ombudsman for Children (Norway) Laid down by Royal Decree of 11 September 1981, s 4.g.

237 *Children's Commissioner Act 2013* (NT) Part 4.

238 *Children's Commissioner Act 2013* (NT) Part 2.

239 GANHRI General Observations, G.O. 1.2.

240 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14.

(viii) to perform such other functions as may be conferred on the Commissioner by or under the Act or any other Act.

The Commissioner is also required to consult with and engage children and young people in the performance of its functions; particularly those whose ability to make their views known is limited.[241]

A similar legislative mandate would provide the National Commissioner with a broad scope to engage with issues relevant to Aboriginal and Torres Strait Islander children and young people. Further examples of broad legislative mandates include the proposed **Commissioner for Children and Youth in Canada** and the **Children's Commissioner (NZ)**.

It is important that any broad mandate be coupled with specific powers sufficient to enable the National Commissioner to effectively exercise its mandate. These powers predominately involve (a) inquiries and investigations (discussed at section 6.2(b)), (b) reporting (discussed at section 6.11), and (c) complaints-handling (discussed at section 6.1(c)).

It is important that the National Commissioner promotes a broad interpretation of the rights of Aboriginal and Torres Strait Islander children and young people and that this interpretation is capable of evolving in line with international developments. Several of the Commissioner models considered in our review contained specific references to the expressions of children's rights as contained in the Convention.[242] Whilst this may be a current leading articulation of children's rights, best practice requires that NHRIs pursue a broad and progressively evolving understanding of human rights.

The Australian **National Children's Commissioner** is legislatively required to have regard to (i) a number of expressly-recognised international human rights instruments,[243] and (ii) such other instruments relating to human rights as considered relevant.[244] This represents substantial best practice in mandating consideration of the leading international human rights instruments and requiring consideration of such other instruments as and when they become relevant.

In the context of the National Commissioner, the Commissioner's mandate should require consideration and implementation of rights established in the Convention and the Declaration. Whilst a number of the Commissioner models reviewed for the purposes of this paper have legislated observance of the Convention, none required engagement with the Declaration. This is possibly due to its current observed, rather than binding, status.

The National Commissioner should also promote compliance with the Convention and the Declaration. This may be achieved in a number of ways, and a best practice model would likely include most, if not all, of the following:

a. mandatory annual reporting on a government's adoption of, and compliance with, relevant international instruments;[245]

b. advising persons exercising functions or engaged in activities affecting children on how to act compatibly with relevant international instruments;[246]

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241 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(2).

242 Commissioner for Children and Youth in Canada Act s 20(1)(a)(i); *Children Act 2004* (UK) s 2(3); *Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s b).

243 See, eg, the Universal Declaration of Human Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities ; see *Australian Human Rights Commission Act 1986* (Cth) s 46MB(6)(b).

244 *Australian Human Rights Commission Act 1986* (Cth) s 46MB(6)(c).

245 Commissioner for Children and Youth in Canada Act s 20(1)(a)(i).

246 *Children Act 2004* (UK) s 2(3).

c. monitoring and reporting on domestic legislation, to ensure consistency with relevant international instruments;[247] and

d. advocating for human rights and promoting public awareness and understanding of rights and obligations stemming from relevant international instruments.[248]

(b) ***Powers of inquiry and investigation:***[249] A National Commissioner should be empowered to conduct own-motion inquiries and investigations into any matter affecting Aboriginal and Torres Strait Islander children and young people in Australia. This function should be supported by powers to compel information, enter premises, inspect documents and examine individuals, both public and private.

The **Children and Young People Commissioner (ACT)** can conduct inquiries and investigations on its own motion into matters affecting children and young people. Access to premises may be announced or unannounced,[250] and the Commissioner must be given access to information that it believes on reasonable grounds will be relevant to a consideration in relation to a complaint. It is an offence if the person fails to produce the information.[251]

The **Tasmanian Commissioner for Children and Young People** has a broad power of investigation, and may investigate any matter they consider appropriate.[252] The Commissioner has the power to investigate government policies, practices or procedures relating to the wellbeing of children and young people, which should also extend to monitoring human rights affecting children and young people within the relevant public authorities.[253] In conjunction with this (and to assist with this function), the Commissioner has the power to compel information.[254] This extends to requiring a person to answer questions either orally or in writing, and also to produce any specified documents. There is a penalty associated with non-compliance of a request for information.[255] With the information sharing provisions in its establishing legislation, the Commissioner is also able to request non-identifying information relating to a child or young person from an "information sharing entity" (as defined in section 3 of the *Children, Young Persons and Their Families Act 1997* (Cth)).[256]

The **Children's Commissioner (NZ)** has the power to obtain statements or documents in order to assess situations raising human rights issues and has the power to require that a person provides information or documents to the Commissioner it if it is reasonably necessary for an investigation.[257] Fines apply for failure to comply.[258] The Commissioner can also apply to the court to access court records if it believes on reasonable grounds this is required for an investigation.[259]

The proposed **National Commissioner for Defence and Veteran Suicide Prevention** is also vested with broad investigatory powers. Investigations into matters falling within the

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247 *Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s b).

248 *Commissioner for Children and Young People Act 2006* (WA) ss 29, 30.

249 GANHRI General Observations, G.O. 1.2.

250 ACT Human Rights Commission, *Annual Report 2018-2019* (Report) 79, B.2 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

251 *Human Rights Commission Act 2005* (ACT) s 73.

252 *Commissioner for Children and Young People Act 2016* (Tas) s 11(3)(d).

253 *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(d).

254 *Commissioner for Children and Young People Act 2016* (Tas) s 12.

255 *Commissioner for Children and Young People Act 2016* (Tas) s 12. The penalty for non-compliance with this section is a fine not exceeding 100 penalty units and in the case of a continuing offence, a further fine not exceeding 10 penalty units for each day during which the offence continues.

256 *Commissioner for Children and Young People Act 2016* (Tas), s 16.

257 *Children's Commissioner Act 2003* s 20.

258 *Children's Commissioner Act 2003* s 21.

259 *Children's Commissioner Act 2003* s 24.

Commissioner's mandate may be initiated on the Commissioner's own motion,[260] and include such powers as to:

(i) hold a public hearing as the Commissioner sees fit, and in doing so, the Commissioner is not bound by the rules of evidence;

(ii) hold a private hearing, provided that the Commissioner is satisfied that the information to be disclosed is personal and private or operationally sensitive;

(iii) summon a person, by written notice, to attend a hearing in order to give notice or produce documents (including documents subject to legal professional privilege);

(iv) require a witness to take an oath or make an affirmation;

(v) give written notice requiring a person to provide information or produce documents (including information or documents subject to legal professional privilege); and

(vi) apply for search warrants (where the Commissioner believes on reasonable grounds that if a summons were issued, the document may be concealed, lost, mutilated or destroyed).

The General Observations recommend that powers of inquiry and investigation be as unfettered as possible.[261] The powers of inquiry and investigation held by some Commissioners are restricted as to either when they may be exercise or their permissible subject matter. For example, the **Commissioner for Children and Young People (SA)** may conduct own-motion inquiries into:[262]

(i) the policies, practices and procedures of a State authority or authorities as they relate to the rights, development and wellbeing of children and young people generally, or a particular group of children and young people; or

(ii) any other matter declared by the regulations.

However, the Commissioner may only conduct inquiries if it suspects that:[263]

(iii) the matter raises an issue of particular significance to children and young people;

(iv) the matter is of a systemic nature, rather than being limited to an isolated incident; and

(v) it is in the public interest to conduct the inquiry.

The Paris Principles and General Observations suggest that such restrictions are unsuitable as they unduly limit the scope of a commissioner's powers. Such limitations may be characterised as accountability mechanisms, to ensure that a commissioner is exercising its powers appropriately. However, such restrictions may see individual investigations legally challenged and delayed, thus limiting effectiveness. As such, we consider that accountability may be better effected through regular mandatory reporting (at section 6.11), legislated financial oversight (at section 6.10) and transparent accountability and lines of reporting (at section 6.5).

(c) ***Protection from liability*:**[264] Members and staff of the National Commissioner should be protected from both criminal and civil liability for acts undertaken in good faith in their official capacity, including when exercising investigative powers.

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260 *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 26(2).

261 GANHRI General Observations, G.O. 1.2

262 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15.

263 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15(2).

264 GANHRI General Observations, G.O. 2.3.

A number of Commissioner models provide immunity for acts and omissions conducted in the exercise or purported exercise of the powers or functions of the role.[265] These protections are typically be expressed as follows:[266]

> (1) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Act.
>
> …
>
> (3) In this section:
>
> ***exercise***, of a power, includes the purported exercise of the power.
>
> ***performance***, of a function, includes the purported performance of the function.

Protections of this type are consistent with best practice and are constituted of three key elements:

(i) protection from civil and criminal liability;

(ii) for acts and omissions done in good faith; and

(iii) in the exercise or performance of a function under the relevant enacting legislation.

These protections may also extend to a commissioner's immunity from being compelled as a witness in relation to any matter that comes to the commissioner's attention as a result of performing their functions (in addition to being protected from criminal and civil liability in exercising their duties). Such protections are provided in the *Commissioner for Children and Youth in Canada Act*,[267] and the *Children's Commissioner Act 2003* (NZ).[268]

Whilst these protections will often apply to the commissioner and their staff, they may also extend to individuals assisting or cooperating with a commissioner. Under s 48 of the *Children's Commissioner Act 2013* (NT), individuals are protected from civil or criminal liability if acting in good faith when providing information or a complaint to the Commissioner. The inclusion of such a protection may comprise an important adjunct to the National Commissioner's investigative and complaints-handling powers, through incentivising good faith disclosures by members of the public.

6.3 Encouraging ratification or accession to international human rights instruments—The National Commissioner must promote and ensure harmonisation of national legislation and practices with international human rights instruments and encourage ratification of those international human rights instruments.[269]

To satisfy best practice, the National Commissioner should be required to observe key international human rights instruments, such as the Convention, and promote their observance and implementation.

Relevantly, whilst a number of Commissioner models considered in our review required compliance with the Convention, Commissioners typically were not provided with any specific mandate to encourage ratification and observance of other international human rights instruments. For example, the **National Children's Commissioner**, is empowered to:

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[265] Children's Commissioner Act 2013 (NT) s 49; Commissioner for Children and Youth in Canada Act s 27(2); *Children's Commissioner Act 2003* (NZ) s 27.

[266] Children's Commissioner Act 2013 (NT) s 49.

[267] Commissioner for Children and Youth in Canada Act s 27(2).

[268] *Children's Commissioner Act 2003* (NZ) s 27(3).

[269] Paris Principles, *Competence and responsibilities*, principle 3(b), (c).

(a) undertake research, or educational or other programs, for the purpose of promoting respect for the human rights of children in Australia, and promoting the enjoyment and exercise of human rights by children in Australia;[270] and

(b) examine existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of children in Australia, and to report to the Minister the results of any such examination.[271]

Whilst these powers require the scrutiny of government legislation to determine compliance with human rights, such rights being typically derived from international instruments, these powers stop short of promoting ratification of such further international instruments as may be relevant to children's rights.

A National Commissioner should be empowered to scrutinise and promote compliance with, and encourage ratification of, international human rights instruments, particularly those dealing with the rights of Aboriginal and Torres Strait Islander children and young people. Whilst the Convention may be considered a leading articulation of children's rights, a best practice model should likely incorporate relevant international instruments such as:

(i) the Declaration;

(ii) the International Convention on the Elimination of all forms of Racial Discrimination;

(iii) the International Covenant on Economic, Social and Cultural Rights; and

(iv) the International Covenant on Civil and Political Rights.

6.4 Interaction with the international human rights system—The National Commissioner shall contribute to reports which States are required to submit to the United Nations and cooperate with the United Nations and any other organisation in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights.[272]

(a) ***Engagement with human rights system:***[273]

At an international level, the National Commissioner should monitor and engage with the United Nations Human Rights Council (including its Special Procedures and Universal Periodic Review) and the UN Committee. Such engagement could include:

(i) submitting parallel or shadow reports to the Universal Periodic Review, Special Procedure mechanisms and UN Committee (in this respect, see further paragraph (b) below);

(ii) making statements during debates before review bodies and the Human Rights Council;

(iii) assisting, facilitating and participating in country visits by United Nations experts, including special procedures mandate holders, the UN Committee, fact finding missions and commissions of inquiry; and

(iv) monitoring and promoting the implementation of relevant recommendations originating from the human rights system.

To maintain its independence from government, the National Commissioner should not participate in the international human rights system by way of a government delegation during the Universal Periodic Review, during periodic reviews before the UN Committee, or in other international mechanisms where independent participation rights for NHRIs exist. Where independent mechanisms do not exist, the National Commissioner should only

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[270] *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth) s 46MB(1)(c).

[271] *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth) s 46MB(1)(d).

[272] Paris Principles, *Competence and responsibilities*, principle 3(d), (e).

[273] GANHRI General Observations, G.O. 1.4.

participate as part of a national delegation where the manner of its participation clearly distinguishes it as independent of government.

The **Aboriginal and Torres Strait Islander Social Justice Commissioner** is empowered to engage with international bodies, alongside other domestic organisations, to share information, promote good practice and advocate for the rights of Aboriginal and Torres Strait Islander peoples, in the performance of its functions.[274] Examples of the Commissioner's engagement with international human rights bodies include:[275]

(A) in March and August 1999, the Commissioner made submissions to the United Nations Committee on the Elimination of Racial Discrimination, responding to the Committee's requests for information;

(B) in September 2003, the Commissioner made three submissions to the UN Committee, relating to three of the themes to be considered during the Day of General Discussion on the Rights of Indigenous Children;

(C) in 2018, the Commissioner spoke at the 38th regular session of the United Nations Human Rights Council in Geneva to discuss the Wiyi Yani U Thangani (Women's Voices) project for Aboriginal and Torres Strait Islander women;[276] and

(D) in 2019, the Commissioner launched the *Hear Us, See Us* exhibition at the United Nations Human Rights Council in Geneva.[277]

The **Children's Commissioner for England (UK)** actively engages with the UN Committee, including by:[278]

- engaging in advocacy work, including issuing a joint report to the UN Committee with the Commissioners for Scotland, Wales and Northern Ireland, calling for ratification of the Convention into domestic legislation; and
- in partnership with the Commissioners for Scotland, Wales and Northern Ireland, reviewing the UK's progress in compliance with the Convention and publishing mid-term reviews during each of the UN Committee's five year review cycles.

The General Observations recommend that NHRIs engage with the OHCHR, GANHRI, other NHRIs and international and national NGOs and civil society organisations. For the National Commissioner, this could involve engagement with Aboriginal and Torres Strait Islander rights groups (for example, SNAICC), engagement and cooperation with the AHRC and state and territory Commissioners and reporting to or cooperating with the United Nations Permanent Forum on Indigenous Issues and the UN Committee.

(b) ***Preparation of state reports:***[279]

Best practice in contributing to and preparing state reports is expressed in a relatively narrow manner by the Paris Principles, being the contribution to country reports submitted to United Nations bodies and committees, and to regional institutions, in line with the state's treaty

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274 *Australian Human Rights Commission Act 1986* (Cth) s 46C(3)(c).

275 Australian Human Rights Commission, *Submissions made by the Aboriginal and Torres Strait Islander Social Justice Commissioner* (Webpage) <https://humanrights.gov.au/our-work/legal/submissions-made-aboriginal-and-torres-strait-islander-social-justice-commissioner#un>.

276 Australian Human Rights Commission, *Commissioner June Oscar puts the voices of Indigenous women on international stage* (Webpage) <https://humanrights.gov.au/about/news/commissioner-june-oscar-puts-voices-indigenous-women-international-stage>.

277 Australian Human Rights Commission, *Hear Us, See Us exhibition* (Webpage) <https://humanrights.gov.au/about/news/hear-us-see-us-exhibition>.

278 See, eg, *UK Children's Commissioners' UNCRC mid-term review* (November 2019) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/11/cco-uk-childrens-commissioners-uncrc-mid-term-review.pdf>.

279 GANHRI General Observations, G.O. 1.4.

obligations. The General Observations provide some further context, noting that NHRIs should both contribute to country reports and produce independent parallel reports on the state's compliance with its treaty obligations. However, contribution to a country report by an NHRI should not take the form of preparation of the report itself (nor should the NHRI report on behalf of the government), as this would conflict with the fundamental requirement of NHRIs' independence from government.

NHRIs are also to monitor their state's compliance with its reporting obligations through the Universal Periodic Review and international treaty bodies (including through dialogue with the relevant treaty body committee).

The **National Children's Commissioner** has broad reporting powers and is empowered to provide information and consult on reports to human rights mechanisms. In particular, the National Children's Commissioner regularly engages with and reports to the UN Committee. Recent reporting includes:[280]

(i) in November 2018, the National Children's Commissioner prepared an independent report for submission to the UN Committee,[281] setting out information relating to Australia's *joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography and second report on the Optional Protocol on the involvement of children in armed conflict,*[282] which Australia had submitted earlier in the year on 15 January 2018;[283]

(ii) in February 2019, the National Children's Commissioner addressed the UN Committee and assisted them in looking at the major issues facing children living in Australia;

(iii) following this, the UN Committee provided the Australian Government with a list of issues to address in writing by August 2019; and

(iv) in September 2019, the UN Committee provided Australia with its Concluding Observations and recommendations.

The **Children's Commissioner (NZ)** reports to the UN Committee periodically and attends UN Committee sessions. For example, during the Fifth Periodic Report in 2016, the Children's Commissioner attended the 73rd session of the UN Committee and reported on outcomes for children in New Zealand.[284] The Children's Commissioner issued a Supplementary Report to the UN Committee in 2016.[285] This is in addition to and separate from government reporting (which is carried out by the Minister for Social Development)[286] which ensures that the independence of the Children's Commissioner is maintained, and that it is able to provide information to the UN Committee in its own right.

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280 Australian Human Rights Commission, *Reporting to the United Nations on Children's Rights* (Webpage) <https://humanrights.gov.au/our-work/childrens-rights/projects/reporting-united-nations-childrens-rights>.

281 Australian Human Rights Commission, *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict* (Report, 2018) <https://humanrights.gov.au/our-work/childrens-rights/publications/report-un-committee-rights-child-2018?_ga=2.228586138.661288988.1596505623-688638973.1596176623>.

282 United Nations Human Rights Office of the High Commissioner, *CRC/C/AUS/5-6,* available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/5-6&Lang=en>.

283 Attorney-General's Department, *Treaty body reporting* (Webpage) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/united-nations-human-rights-reporting/treaty-body-reporting>.

284 Children's Commissioner, *The Children's Convention Reporting Cycle* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-reporting/>.

285 New Zealand Children's Commissioner, *Supplementary report to the UN Committee on the Rights of the Child* (Report, August 2016) <https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NZL/INT_CRC_IFN_NZL_24881_E.pdf>.

286 Children's Commissioner, *The Children's Convention Reporting Cycle* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-reporting/>.

In respect of the National Commissioner, best practice in the contribution to state reports could involve independent submission of stakeholder or shadow reports in respect of Australia's compliance with the Convention and Declaration. As part of the National Commissioner's independence from government, where appropriate the National Commissioner could draw attention to issues, deficiencies or challenges present in Australia's state report.

6.5 Cooperation with other human rights bodies—The National Commissioner must consult with other bodies responsible for the promotion and protection of human rights and develop relations with the nongovernmental organisations devoted to promoting and protecting human rights.[287]

Given its proposed establishment at the national level, an important aspect of the National Commissioner's role should be the development, formalisation and maintenance of working relationships with other national and subnational Australian institutions and actors established for the promotion and protection of Aboriginal and Torres Strait Islander children and young people. Whilst such a function could be expressed with reference to specific domestic entities (for example SNAICC) such an approach may lack flexibility and fail to effectively capture all relevant entities.

The **South Australian Commissioner for Aboriginal Children and Young People** engages with the Aboriginal Children's Commissioners from other States and Territories. Between December 2018 – December 2019:

(a) the Commissioner, with the Victorian Aboriginal Children's Commissioner, met with the Federal Aboriginal Affairs Minister in relation to the call for a national Aboriginal and Torres Strait Islander Children's Commissioner;[288] and

(b) the Commissioner coordinated the first meeting of the three Aboriginal Children's Commissioners in Australia (SA, Victoria and Queensland).[289]

The South Australian Commissioner for Aboriginal Children and Young People also engaged with other bodies, such as SNAICC, by partnering or participating in events. In September 2019, the Commissioner for Aboriginal Children and Young People facilitated an Aboriginal youth panel at the SNAICC Conference in Adelaide.[290]

The proposed legislation establishing the **Commissioner for Children and Youth in Canada** will require the Commissioner to collaborate with First Nations governing bodies and any authorities across Canada that promote, advocate for or serve children and youth. These requirements are variously expressed as:[291]

> … to collaborate with First Nations, Inuit or Métis governing bodies to include First Nations, Inuit and Métis views and values in the Commissioner's advocacy for First Nations, Inuit and Métis children and youth;
>
> … to assist in the development and implementation, in cooperation with First Nations, Inuit or Métis governing bodies, of programs adapted to the rights, well-being, traditions and needs of First Nations, Inuit and Métis children and youth;

A similar obligation should be adopted for the National Commissioner which would be sufficiently broad to capture Aboriginal and Torres Strait Islander bodies, and bodies dealing with the rights and interests of Aboriginal and Torres Strait Islander children and young people.

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287 Paris Principles, *Methods of operation*, principle (f), (g).

288 South Australia's Commissioner for Aboriginal Children and Young People, *Inaugural Report* (Report, December 2019) 43 < https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

289 South Australia's Commissioner for Aboriginal Children and Young People, *Inaugural Report* (Report, December 2019) 43 < https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>. .

290 South Australia's Commissioner for Aboriginal Children and Young People, *Inaugural Report* (Report, December 2019) 43 < https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

291 *Commissioner for Children and Youth in Canada Act* s 11.

6.6 Recommendations by NHRIs—The power to make recommendations on any matter concerning the promotion and protection of human rights,[292] including the power to address public opinion directly or through press organs to publicise its recommendations.[293]

(a) **Power to make recommendations**

The National Commissioner should be empowered to provide recommendations on all matters relevant to the exercise of its functions. This may include:

(i) reviewing and commenting on draft legislation;[294]

(ii) providing recommendations stemming from inquiries, investigations or complaints;[295] and

(iii) monitoring government compliance with international human rights instruments.[296]

The proposed **Commissioner for Children and Youth in Canada** will be empowered with a broad range of reporting and recommendation powers. The Commissioner will be able to provide recommendations stemming from any inquiry conducted,[297] on the government's implementation of the Convention, on matters relating to child welfare, on the Office of the Commissioner for Children and Youth in Canada's functions and activities, and on an ad hoc basis in response to any issues of urgency or importance.[298] Any reports must be published on the Office of the Commissioner for Children and Youth in Canada's website.[299]

The General Observations state that the power to make recommendations should be broad and unfettered. One example of the type of restriction to be avoided is in the **Commissioner for Children and Young People (SA)'s** recommendation powers. These powers may typically only be exercised in relation to systemic issues.[300] For example, the Commissioner has specified functions to:

(i) advise, and make recommendation to, Ministers, State authorities and other bodies (including non-Government bodies) on matters related to the rights, development and wellbeing of children and young people at a systemic level;[301]

(ii) prepare and publish reports on matters related to the rights, development and wellbeing of children and young people at a systemic level;[302]

(iii) prepare and provide to any responsible Minister reports on matters related to the rights, development and wellbeing of children and young people at a systemic level;[303] and

(iv) make a report to Parliament on any matter related to their functions if satisfied that the matter raises issues of such importance to the safety or wellbeing of children and young people that the Parliament should be made aware of the matter as a matter of urgency.[304]

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292 Paris Principles, *Competence and responsibilities*, principle 3(a).

293 Paris Principles, *Methods of operation*, principle (c).

294 See *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth) s 46MB(1)(d).

295 See *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b)(i).

296 *Commissioner for Children and Youth in Canada Act* s20(2).

297 *Commissioner for Children and Youth in Canada Act* s 19(1).

298 *Commissioner for Children and Youth in Canada Act* s20(2).

299 *Commissioner for Children and Youth in Canada Act s* 19(2).

300 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA)

301 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(c).

302 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(g).

303 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 19(1).

304 *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 44.

(b) ***Annual reports:*** The NHRI should use its annual, special and thematic reports to make recommendations in relation to, and monitor respect for, human rights.

The clear majority of Commissioner models considered were compliant with best practice in respect of annual reporting. Relevant considerations to maximise the efficacy of annual reporting are considered below at section 6.11.

(c) ***Follow up action:*** The NHRI should undertake follow up action on recommendations contained in its reports and should publish detailed information on the measures taken or not taken by public authorities.

Follow-up provisions are essential in ensuring accountability amongst the Commissioner, government and those entities the subject of recommendations or reports made by the commissioner.

The *Commissioner for Children and Youth in Canada Act* s 17(1) will require the government to respond to the **Commissioner for Children and Youth in Canada's** annual report within 90 days.

Similarly, the proposed Bill for the **Commissioner for Defence and Veteran Suicide Prevention** requires the Commonwealth to report on the Commonwealth's responses to the Commissioner's reports (and to table this Commonwealth response report in Parliament). The Commissioner will also have the power to table additional reports related directly to actions that are not adequate or appropriately taken in response to the Commissioner's reports.[305]

Some entities are vested with powers to enforce follow-up requirements. Where an entity receives a report from the Australian Capital Territory's **Children and Young People Commission**, it commits an offence if it fails to inform the Commission how the recommendation has been addressed within the legislatively-prescribed timeframe.[306]

6.7 Ensuring pluralism of the NHRI—The appointment and composition of the National Commissioner must guarantee pluralist representation of the social forces involved in the promotion and protection of human rights, in particular by promoting and enabling effective cooperation with non-governmental organisations, universities and qualified experts, Parliament, and Government departments.[307]

(a) ***Pluralism*:**[308] In order to facilitate an NHRI's capacity to effectively engage with the human rights issues affecting its constituency, the NHRI's membership composition should broadly reflect the diversity of that constituency. This is particularly relevant for single member NHRIs, such as commissioners or ombudspersons.[309]

With this in mind, where the functions of the National Commissioner impact on Aboriginal and Torres Strait Islander peoples, it is imperative that Aboriginal and Torres Strait Islander communities are both:

(i) represented in the National Commissioner's staffing composition; and

(ii) consulted on the National Commissioner's activities and policies (including on the recruitment and appointment of the governing body of the National Commissioner).

These requirements are an important step towards empowering Aboriginal and Torres Strait Islander peoples (in line with their right to self-determination)[310] and should ensure that the policies of the National Commissioner and any recommendations made by the National

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305 *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 61.

306 *Human Rights Commission Act 2005* (ACT) s 85.

307 Paris Principles, *Composition and guarantees of independence and pluralism*, principle 1.

308 GANHRI General Observations, G.O. 1.7.

309 GANHRI General Observations, G.O. 1.7.

310 *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, UN Doc A/RES/61/295 (2 October 2007) art 3 & 18.

Commissioner align closely with the best interests of Aboriginal and Torres Strait Islander peoples.

The significance of the right to self-determination to Indigenous peoples is recognised throughout the Declaration,[311] which was supported by the Australian Government in April 2009.[312] While the Declaration is not binding in international law, it affirms the way in which a number of existing human rights standards, including the right to self-determination,[313] apply to Aboriginal and Torres Strait Islander peoples in Australia.

The principle of self-determination in respect of Aboriginal and Torres Strait Islander peoples is relevant to the operation of the National Commissioner for myriad reasons, including that:

(A) an understanding of the cultural patterns, values, customs and worldviews of Aboriginal and Torres Strait Islander communities is crucial to determining the best interests of those communities (both at a national and local level);[314]

(B) research demonstrates that involving Aboriginal and Torres Strait Islander communities in the design and delivery of policies and programs leads to improved outcomes for those communities across various systems (such as the child protection system);[315]

(C) it may also go towards fostering confidence and forming constructive relations between the National Commissioner and Aboriginal and Torres Strait Islander communities;[316] and

(D) upholding participatory rights is an effective means of promoting reconciliation and of redressing Australia's history of subjugating and marginalising Aboriginal and Torres Strait Islander peoples.[317]

Some of the best-practice models for ensuring pluralism whilst still maintaining the right to self-determination for Aboriginal and Torres Strait Islander peoples within the body of the National Commissioner include:[318]

- legislatively-guaranteed representation of Aboriginal and Torres Strait Islander peoples in the National Commissioner; and
- legislatively-mandated consultation with Aboriginal and Torres Strait Islander communities.

The **Aboriginal and Torres Strait Islander Social Justice Commissioner** must, by way of legislation, be a person that has significant experience in the community life of Aboriginal or Torres Strait Islander peoples.[319]

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311 See, e.g., *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, UN Doc A/RES/61/295 (2 October 2007) art 3, 4, 5, 18, 19 & 34.

312 Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration On the Rights of Indigenous Peoples: speech, Canberra* (3 April 2009).

313 *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1.

314 See, eg, Philip Lynch, 'Keeping them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia' (2001) 23(4) *Sydney Law Review* 501, 508-9; Commonwealth, *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) vol 4 [27.9.2].

315 See, eg, Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2014* (2014) 23 [5.2]; Secretariat of National Aboriginal and Islander Child Care, *Whose Voice Counts? Aboriginal and Torres Strait Islander participation in child protection decision-making* (2013).

316 United Nations Human Rights Office of the High Commissioner *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (Manual) 25.

317 United Nations Human Rights Office of the High Commissioner *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (Manual) 25.

318 United Nations Human Rights Office of the High Commissioner *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (Manual) 22.

319 *Australian Human Rights Commission Act 1986* (Cth) s 46B(2).

In regard to the **Queensland Family and Child Commission**, the legislative requirement that "at least 1 person recommended by the Minister for appointment as commissioner must be an Aboriginal person or a Torres Strait Islander," has been interpreted as a statutory mandate that "at least one commissioner must be an Aboriginal person or a Torres Strait Islander."[320]

The **Commissioner for Children and Youth in Canada Act** will provide that:

- the Minister must consult with representatives from First Nations before making a recommendation as to the appointment of the **Commissioner for Children and Youth in Canada**;[321]
- the Commissioner should collaborate with First Nations governing bodies in the course of exercising his or her functions;[322] and
- First Nations people must be involved in the evaluation of the Act five years after it comes into force.[323]

6.8 Selection and appointment of the decision-making body of NHRIs—The appointment procedure of the National Commissioner shall be by election or otherwise.

(a) **Appointment**:

Best practice in appointing a commissioner or other senior leadership requires:[324]

(i) vacancies to be publicised broadly;

(ii) active steps taken to ensure the maximum number of potential candidates from a wide range of societal groups;

(iii) the promotion of broad consultation and/or participation in the application, screening, selection and appointment process; and

(iv) the assessment of applicants on the basis of pre-determined, objective and publicly available criteria.

We note that SNAICC has expressed the requirement that the National Commissioner be an identified Aboriginal and Torres Strait Islander person with appropriate qualifications, knowledge and experience and appointed through a transparent process.[325]

The legislation governing the appointment of the **Commissioner for Children and Young People for South Australia** broadly complies with these requirements. The position description identified for the Commissioner position was advertised publicly and identified the selection criteria, form of application required and the essential skills for the role. The recruitment scheme requires broad consultation and participation in the application, screening and selection process, [326] most notably a selection panel of up to 5 persons (2 of whom must be young people) to propose the appointment of an application to the position of Commissioner and the inclusion of an exercise in the interview process designed to assess the applicant's ability to engage, communicate and interact with children and young people.[327] The **Office of Children's Commissioner for England** employs a similar recruitment method, in that the relevant Minister must take reasonable steps to involve

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320 *Family and Child Commission Act 2014* (Qld) s 11(5); QFCC, *Annual Report 2018-19* (Report, 2019) 8 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

321 *Commissioner for Children and Youth in Canada Act* s 5(2)(b).

322 *Commissioner for Children and Youth in Canada Act* s 11(1)(b).

323 *Commissioner for Children and Youth in Canada Act* s 29(5).

324 GANHRI General Observations, G.O. 1.8.

325 SNAICC, *Position Paper, Establishment of a national commissioner for Aboriginal and Torres Strait Islander children and young people,* 3 <https://www.snaicc.org.au/wp-content/uploads/2019/10/SNAICC_Family-Matters_Position-Paper_national-commissioner_FINAL.pdf>.

326 *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) reg 6(1)(a).

327 *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) reg 6(1)(c).

children in the appointment,[328] as does the **Commissioner for Children and Young People of Western Australia**.[329]

The requirement that any National Commissioner be an identified Aboriginal and Torres Strait Islander person is not without precedent. Similar requirements are demonstrated by the **Queensland Family and Child Commissioner**, whereby the legislative requirement that "at least 1 person recommended by the Minister for appointment as commissioner must be an Aboriginal person or a Torres Strait Islander," has been interpreted as a statutory mandate that "at least one commissioner must be an Aboriginal person or a Torres Strait Islander."[330]

(b) **Formation of decision-making bodies**:

Not all Commissioner models reviewed for the purposes of this Options Paper had clearly identified standalone decision-making bodies. Should a decision-making or other advisory body be considered appropriate, best practice requires that this body be comprised of individuals from across the public and private sectors that represent a breadth of relevant expertise. The selection process should transparent and involve consultation and assessment against pre-determined and publicly available criteria.

The **Commissioner for Children and Young People (WA)** may establish advisory committees and reference groups to assist with the performance of the Commissioner's functions. These advisory committees include representatives of non-government agencies concerned with the rights, interests and wellbeing of children and young people. The Commissioner must also establish advisory committees consisting of children and young people, who the Commissioner considers are from a broad range of socio-economic and cultural backgrounds and age groups, to assist in the performance of the Commissioner's functions. These committees are required to be established in regional areas as well as metropolitan areas to ensure that these advisory bodies are representative across metropolitan, regional and remote areas. This may be particularly important to the National Commissioner in providing effective representation.

6.9 Political representatives on NHRIs—The National Commissioner shall be independent of government.[331]

Best practice requires independence from government and any government representative to participate in an advisory capacity only. This is considered critical to ensuring that a commissioner is capable of freely considering any question falling within its competence. Whilst the General Observations focus on the degree to which government representatives may form part of NHRI's and participate in their decision-making, we have adopted a broader interpretation of this requirement for the purposes of our review. We have considered the degree to which the Commissioners are afforded legislative independence from government. We have considered best practice to be direct legislative prohibition on government or other political influence or interference. In this context, we have considered each Commissioners' term of appointment and autonomy over staffing as important to an overall assessment of the Commissioner's independence. Best practice in these respects is discussed below.

Very few commissioner models considered in our review were compliant with best practice. Section 11 of the *Children's Commissioner Act 2013* (NT) states that the **Northern Territory's Children's Commissioner** is not subject to the direction of anyone in relation to the way in which the functions of the Commissioner are performed or the order of priority the Commissioner gives to

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328 *Children Act 2004* (UK) Sch 1 s 3(2).

329 *Commissioner for Children and Young People Act 2006* (WA) s 7(3).

330 *Family and Child Commission Act 2014* (Qld) s 11(5); QFCC, *Annual Report 2018-19* (Report, 2019)8 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

331 Paris Principles, *Composition and guarantees of independence and pluralism*, principle 3.

investigations. This does not, however, prevent political influence or representation upon or within the Northern Territory's Office of the Children's Commissioner.

The **Commissioner for Children and Young People (WA)** is expressly not subject to any direction by the Minister or any other person in the performance of their duty,[332] except as specified in the *Commissioner for Children and Young People Act 2006* (WA). The Act states that the Minister may give directions on matters of general policy relevant to the exercise of the Commissioner's functions.[333] Enacting legislation for the National Commissioner could reflect the first component of the Act, namely, that the National Commissioner not subject to any direction by the Minister or any other person in the performance of their duty.

The ***Children Act 2004*** **(UK)** provides that the Children's Commissioner is "not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown"[334] and prohibits a person who is the Children's Commissioner or a member of staff of the Children's Commissioner from being a member of parliament.[335] Whilst this does not militate against any political influence, it does restrict members of government from directly holding office as the Children's Commissioner of a member of their office.

(a) ***Tenure*****:**[336] The enabling legislation should specify a clear term of appointment and must contain an independent and objective dismissal process.

Certainty in the term of appointment and the grounds upon which the National Commissioner may be dismissed are essential to promoting stability, predictability and independence in the role. As a general proposition, the GANHRI recommends an appointment term for decision-makers within a NHRI of between three to seven years.[337] An overview of the terms of appointment for the Commissioner models considered in our review are at Table 1 below. The majority of Australian Commissioners are appointed for terms of 5 years and are eligible for reappointment. International Commissioner appointments range from 5 years to 7 years. We consider a term of between 5 to 7 years to be an appropriate period for the National Commissioner.

Table 1

#	Office	Term of appointment	Source
1	Commission for Children and Young People (Vic)	A specified period not to exceed 5 years, eligible for reappointment	*Commission for Children and Young People Act 2012* (Vic) s 14
2	Advocate for Children and Young People (NSW)	A specified period not to exceed 5 years, eligible for reappointment but cannot be appointed for more than two terms of office	*Advocate for Children and Young People Act 2014* (NSW) s 5
3	The Children and Young People Commissioner (ACT)	5 years, eligible for reappointment	*Human Rights Commission Act 2005* (ACT) 18D(3)

[332] *Commissioner for Children and Young People Act 2006* (WA) s 25.
[333] *Commissioner for Children and Young People Act 2006* (WA) s 26.
[334] *Children Act 2004* (UK) Sch 1 s 1(2).
[335] *House of Commons Disqualification Act 1975* (UK) Sch 1 Pt 3. See also, *Children Act 2004* (UK) Sch 1 s 12.
[336] GANHRI General Observations, G.O. 2.1.
[337] GANHRI General Observations, G.O. 2.2.

#	Office	Term of appointment	Source
4	Commissioner for Children and Young People (SA)	A specified period in the instrument of appointment not exceeding a seven-year term. Eligible for re-appointment, provided the total term in office does not exceed 10 years	*Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8
5	Children's Commissioner (NT)	A specified period not to exceed 5 year, eligible for reappointment.	*Children's Commissioner Act 2013* (NT) s 12
6	Queensland Family & Child Commission (Qld)	A specified period not to exceed 3 year.	*Family and Child Commission Act 2014* (Qld) s 13
7	eSafety Commissioner (Aus)	A specified period not to exceed 5 year, eligible for reappointment.	*Australian Communications and Media Authority Act 2005* (Cth) ss 50, 51
8	Aboriginal and Torres Strait Islander Social Justice Commissioner (Aus)	A specified period not to exceed 7 year, eligible for reappointment.	*Australian Human Rights Commission Act 1986* (Cth) s 46D
9	National Children's Commissioner (Aus)	A specified period not to exceed 7 year, eligible for reappointment.	*Australian Human Rights Commission Act 1986* (Cth) 46MD
10	National Rural Health Commissioner (Aus)	2 years, eligible for reappointment	*Health Insurance Act 1973* (Cth) s 79AR
11	Children's Commissioner (NZ)	5 years or any shorter period stated in a notice of appointment	*Crown Entities Act 2004* s 32(1)(b)
12	Children's Commissioner for England (UK)	6 years, not eligible for reappointment	*Children Act 2004* (UK) Sch 1 s 3(4).
13	Ombudsman for Children (Norway)	7 years	The Ombudsman for Children, Norway (Norway) Act No 5 of March 6 1981, s 2.
14	Commissioner for Children and Youth in Canada (Canada)	7 years, not eligible for reappointment	*Commissioner for Children and Youth in Canada Act* (Canada) s 7

(b) ***Recruitment*:**[338] The National Commissioner should be legislatively empowered to determine the staffing structure and the skills required to fulfil the its mandate, with staff recruited according to an open, transparent and merits-based selection process. In practice, this may require public advertisement of available roles and their associated criteria.

The **Children's Commissioner for England (UK)** is entitled to appoint any staff considered necessary to assist in carrying out their functions.[339] The Commissioner has the power to determine the terms and conditions of such employment, promoting the independence of the Office of the Children's Commissioner.[340] In practice, the recruitment process appears to be open, transparent and merit-based. All staff roles are advertised on the Commissioner website. The advertisements clearly set out the required skills and experience for the role.[341]

6.10 Adequate funding of NHRIs—The National Commissioner shall be adequately funded, with its own staff and premises in order to operation independently of government.[342]

In order to comply with best practice, funding for any proposed commissioner model should satisfy the following requirements:

(a) ***Adequacy of funding***: State funding should be sufficient to allow the National Commissioner to fund its mandated activities, maintain an accessible office, and operate and manage staff.

(b) ***Source of funding:*** the National Commissioner should receive public funds through a mechanism that is not under direct government control (e.g. through Parliament). Funding from external sources, such as private donors, should not compose the core funding of the National Commissioner and the National Commissioner should be free to raise funds from external sources without being disqualified from receiving public funds.

(c) ***Allocation of funding:*** The National Commissioner should have complete autonomy to allocate its budget in accordance with its mandate.

(d) ***Financial accountability:*** The National Commissioner is nevertheless obliged to comply with the financial accountability requirements applicable to other independent agencies of the State.

For example, the **Queensland Family & Child Commission** holds autonomy over the use of its budget, subject only to the financial accountability requirements applicable to other independent agencies of the state and in particular, to the *Financial Accountability Act 2009* (Qld) and the *Statutory Bodies Financial Arrangements Act 1982* (Qld).[343]

It is difficult to determine whether a commissioner's funding is adequate for carrying out its statutory functions. However, one method for assessing the adequacy of a commissioner's funding is to conduct a budget per child review. In 2010, the Department for Education in the United Kingdom conducted an independent review of **the Office of the Children's Commissioner (UK)**. That review noted the importance of a budget per child analysis, stating that it "*… determines the extent to which the [Commissioner] can raise its profile with children and young people and engage with local or individual issues".*[344] The review set out an analysis table, comparing the total budget of various international children's commissioners with the population numbers in those jurisdictions, in order to determine a "budget per child" for comparison.

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338 GANHRI General Observations, G.O. 2.4.

339 *Children Act 2004* (UK) Sch 1, s 5; See also, *Department of Education Framework Agreement* [13.2].

340 *Department of Education Framework Agreement* [13.1].

341 See, Children's Commissioner, *Vacancies* (Webpage) <https://www.childrenscommissioner.gov.uk/about-us/vacancies/>.

342 Paris Principles, *Composition and guarantees of independence and pluralism*, principle 2.

343 GANHRI General Observations, G.O. 1.10; *Family and Child Commission Act 2014* (Qld) s 8(1)(b).

344 United Kingdom Department for Education, *Review of the Office of the Children's Commissioner (England)* 53 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/176457/Cm-7981.pdf>.

For the purposes of preparing this options paper, we have followed a similar approach, comparing the available budgetary data, where available, from each of the Australian commissioners against 2018 data identifying the total number of children and young people per jurisdiction and population projections for Aboriginal and Torres Strait Islander children aged 0 - 17 years as at 30 June 2020 (as provided by the Australia Bureau of Statistics).[345]

We have prepared the following Table 2 for the purpose of demonstrating that a budget per child analysis is an effective framework for funding comparisons. We note that the table is subject to several limitations, including that:

(a) The Commissioners considered below are limited to those whose budgets were readily identifiable by way of desktop review. Often, a Commissioner's funding was not reported as a separate line item in State budgets, annual reports or similar, and was instead included in broader Department-level budgets. For example, the budget for the **Children and Young People Commissioner (ACT)** is reported as part of the Justice and Community Service Directorate, with no separate line item for the Commissioner.

(b) The Commissioners all have a broader mandate than Aboriginal and Torres Strait Islander children and young people. We have provided a "budget per child" analysis and identified the approximate number of Aboriginal and Torres Strait Islander children and young people per jurisdiction. This allows for an indication of the funding range as across the States and Territories. In the context of a desktop review conducted primarily from a legal perspective, we were unable to determine the effectiveness of a particular Commissioner's funding, as this question requires a detailed understanding of the manner in which a Commissioner translates funding into real-world impact. We suggest that SNAICC use the below analysis as a conceptual framework for further conversations around budgetary requirements with communities, stakeholders and Government.

(c) Some commissioners have a restricted mandate which does not cover every child in the State.[346] Additionally, some commissioners have a broad mandate which covers children or young people outside of the 0–17-year age bracket used within the analysis table. Where this is the case, we have footnoted the relevant restriction or age bracket for reference.

(d) The ABS data available does not allow for a direct comparison of population groups. Population data for children in the various jurisdictions is available in the 0 to 19-year range, whilst Aboriginal and Torres Strait Islander children and young people population projections are available in the 0 to 17-year range.

(e) Some States have additional advisory bodies with similar or overlapping mandates in regard to children and young persons.[347] This may impact the total reported budget used within the analysis, as some Commissioners share a budget with these advisory bodies, while others maintain a separate budget. Where this is the case, we have footnoted the relevant advisory body and the budgetary implications in the analysis table.

(f) This analysis is completed on the basis of a desktop review, based on the best possible materials available at the time of writing. As such, the analysis table is necessarily restricted by the transparency and accuracy of the annual financial reporting of each Commissioner and/or the line items set out in the relevant State's budgetary documents.

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[345] Australian Bureau of Statistics, *Estimates and Projections, Aboriginal and Torres Strait Islander Australians* (11 July 2019) < https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-and-projections-aboriginal-and-torres-strait-islander-australians/latest-release>.

[346] See, eg, the Northern Territory Children's Commissioner, whose mandate largely applies to only "vulnerable children" (as that term is defined in the *Children's Commissioner Act 2013* (NT)).

[347] See, eg, the Office of the Public Guardian in Queensland, the Office of the Children's Guardian in New South Wales and the Guardian for Children and Young People in South Australia.

#	Office	Total public budget 2018/19	Children aged 0 – 19 as at 30 June 2018	Aboriginal and Torres Strait Islander children aged 0 – 17 years as at 30 June 2020 (population projection)	Budget per [redacted] child ($AUD)	Source of budgetary data
1.	Children's Commissioner (NT)[348]	$2,015,000[349]	68,645	25,749	29.36	Northern Territory Government, *Agency Budget Statements 2018-19* (page 107)
2.	Queensland Family and Child Commission[350]	$11,879,000	1,293,406	97,757	9.18	Queensland Family and Child Commission, *2018-2019 Annual Report* (page 71)
3.	Commissioner for Children and Young People (SA) and the Commissioner for Aboriginal Children	$5,580,000	409,972	17,977	13.61	Department for Education, *2019 Annual Report* (page 7 of the "Administered Financial Statements" contained therein)

[348] The Children's Commissioner (NT) has a mandate which is largely limited to "vulnerable children", as defined in s 7 of the *Children's Commissioner Act 2013* (NT).

[349] This budget should be considered in light of the $538 million total funding for children and family services in the Northern Territory, which was split between Commonwealth and Northern Territory Government in the 2018-19 financial year ($225 million provided by the Commonwealth, $313 million provided by the Northern Territory Government).

[350] The Office of the Public Guardian (Qld) supports children in care but is not included in the Commission's budget. Notably, the Commission's mandate extends to "young persons" who are at least 18 years, but no more than 21 years, and are transitioning from being a child in care under the *Child Protection Act 1999* (Cth) to independence.

	and Young People (SA)[351]					
4.	Commissioner for Children and Young People (Tas)	$1,175,700[352]	125,319	11,613	9.38	Commissioner for Children and Young People, *Annual Report 2018-19* (page 6)
5.	Commissioner for Children and Young People (WA)	$2,976,629	661,202	40,897	4.50	Commissioner for Children and Young People, *Annual Report 2018-19* (page 45)

[351] This budget also includes funding for the Guardian for Children and Young People (SA). The Guardian advocates for, monitors and promotes the best interests of children and young people under the guardianship of the Minister.

[352] It is not clear from the Commissioner's annual report whether this budget comprises of public funding only, or whether private donors have also been taken into account in this reported figure.

6.11 Annual reports of NHRIs—The National Commissioner shall submit to government, parliament and any other competent body, reports on any matter concerning the promotion and protection of human rights.[353]

(a) ***Annual reports:*** *A*nnual reports should provide a regular audit of the Government's performance, achievements of the National Commissioner and serve as a forum for recommendations.

The proposed **Commissioner for Children and Youth in Canada** will be required to report annually on its activities, investigations and inquiries, all proposed legislation as impacting upon children and young people within the jurisdiction, Canada's compliance with the Convention and any matters affecting the rights and well-being of children and youth.[354]

(b) ***Publication and distribution:*** All reports should be publicised, widely distributed and publicly available. To facilitate transparency, the annual reports should include financial records and employment data.

The majority of the Australian State and Territory Commissioners' annual reports are made available on their respective websites.

The **Commissioner for Children and Young People (SA)** is required to produce annual reports for the Minister, which the Minister must table to both Houses of Parliament within 6 sitting days. The Commissioner's annual reports must set out the performance of the Commissioner's functions during the preceding financial year and are made available on its website.

(c) ***Engagement with legislature:*** All reports should be tabled with the legislature, with a requirement to discuss and consider any recommendations.

The **Queensland Family & Child Commission** tables all annual reports before the Legislative Assembly,[355] whilst the **Tasmanian Commissioner for Children and Young People** tables its annual report before both Houses of Parliament and releases its report on its website.[356]

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353 Paris Principles, *Competence and responsibilities*, principle 3(a).

354 Commissioner for Children and Youth in Canada Act s 20.

355 *Family and Child Commission Act 2014* (Qld) s 29J(3); GANHRI General Observations, G.O. 1.11.

356 *Commissioner for Children and Young People Act 2016* (Tas), s 19(2).

6.12 Summary: Strongest compliance per Paris Principle

The following table summarises the Commissioner models that have the strongest compliance for each element of the Paris Principles.

No.	Paris Principle	Commissioner Model	Comment
1	*Legislative establishment and independence*	Commissioner for Children and Young People (SA) Children's Commissioner (NT) Ombudsman for Children (Norway)	The **Commissioner for Children and Young People (SA)** is vested with robust procedural immunities, consistent with the standard for Supreme Court proceedings. The legislative establishment of the **Children's Commissioner (NT)** is particularly notable (across all aspects), and the Commissioner is vested with quasi-judicial competency (complaints-handling power). The **Ombudsman for Children (Norway)** is vested with quasi-judicial competency (complaints-handling power).
2	*Human rights mandate*	National Children's Commissioner Children and Young People Commissioner (ACT) Commissioner for Children and Young People (SA) Commissioner for Children and Youth (Canada) Children's Commissioner (NZ) Children's Commissioner (UK)	The **National Children's Commissioner** is legislatively required to have regard to a number of expressly-recognised international human rights instruments. The **Children and Young People Commissioner (ACT)** must be given access to information that it believes on reasonable grounds will be relevant to a consideration in relation to a complaint and it is an offence if the person fails to produce the information. The **Commissioner for Children and Young People (SA)** may require a person to provide information or documents (as reasonably required), and the legislative requirements make any refusal to comply, or the provision of false or misleading statements/material, an offence. Both the **Commissioner for Children and Youth (Canada)** and **Children's Commissioner (NZ)** cannot be compelled as witnesses in relation to any matter that comes to their attention as a result of performing their functions (in addition to being protected from criminal and civil liability in exercising its duties). The legislative requirements for the **Children's Commissioner (UK)** provide that the Commissioner must take reasonable steps to involve children in the discharge of their primary function. In practice, this has led to the creation of a young people's advisory group.
2A	*Powers of inquiry and investigation*	Commissioner for Children and Young People (WA) Children and Young People Commissioner (ACT) Children's Commissioner (NZ)	The **Commissioner for Children and Young People (WA)** may give written notice requiring a person to produce any document in their possession, or to attend any place, or take an oath, or answer any question (irrespective of legal professional privilege) (with offences for non-compliance). Authorised persons also have the power to enter and inspect any place for the purposes of an inquiry. The **Children and Young People Commissioner (ACT)** has the power to give written notice requiring a person to provide information or produce a document or thing (with offences for non-compliance).

No.	Paris Principle	Commissioner Model	Comment
			The **Children and Young People Commissioner (ACT)** has the power to give written notice requiring any person to provide the Commissioner with information, documents or extracts that are necessary for a Commissioner's investigation (with offences for non-compliance). The Commissioner may also apply to the Court to inspect a record.
3	*Cooperation with other human rights bodies*	Commissioner for Children and Youth (Canada)	The legislative requirements for the **Commissioner for Children and Youth (Canada)** require the Commissioner to collaborate with First Nations governing bodies and any authorities across Canada that promote, advocate for or serve children and youth.
4	*Recommendations*	Commissioner for Children and Youth (Canada) National Commissioner for Defence and Veteran Suicide Prevention Children and Young People Commission (ACT) Advocate for Children and Young People (NSW)	The **Advocate for Children and Young People (NSW)** is required to provide an evaluation of the response of relevant authorities to its recommendations as part of its annual report to Parliament. The legislative requirements for the **Commissioner for Children and Youth (Canada)** require the government to respond to the Commissioner's annual report within 90 days, providing an accountability mechanism. While the enacting legislation for the **National Commissioner for Defence and Veteran Suicide Prevention** has not yet been released, it has been announced that the government will be required to report annually to the Parliament on the implementation of the Commissioner's recommendations. If an entity receives a report from the **Children and Young People Commission (ACT)**, it commits an offence if it fails to inform the Commission how the recommendation has been addressed within the legislatively-prescribed timeframe.
5	*Ensuring pluralism*	Aboriginal and Torres Strait Islander Social Justice Commissioner Commissioner for Children and Young People (Tas) Family and Child Commissioner (Qld) Advocate for Children and Young People (NSW) Ombudsman for Children (Norway) Commissioner for Children and Youth (Canada) National Rural Health Commissioner	The legislative requirements for the **Aboriginal and Torres Strait Islander Social Justice Commissioner** state that the Commissioner must be a person that has significant experience in the community life of Aboriginal Persons or Torres Strait Islander peoples. The legislative requirements for the **Commissioner for Children and Young People (Tas)** are drafted in such a way as to include pluralism in the establishment of Committees (e.g. must have regards to ensure the Committee represents persons from groups which represent the diversity of the Tasmanian population). The legislative requirements for the **Family and Child Commissioner (Qld)** provide that at least one person recommended for appointment as Commissioner must be an Aboriginal person or a Torres Strait Islander and requires that, if one of the commissioners is not an Aboriginal or Torres Strait Islander person, then the Minister must appoint

No.	Paris Principle	Commissioner Model	Comment
		Children's Commissioner (NZ)	a person who is as deputy chairperson of the Child Death Review Board. The **Advocate for Children and Young People (NSW)** is advised by a Youth Advisory Council, which must consist of at least 6 people under the age of 25, and any appointments should reflect the diversity of young people in the State. The legislative requirements for the **Ombudsman for Children (Norway)** mandate that the Ombudsman and its Executive Officers should have "varied professional backgrounds". In recommending the **Commissioner for Children and Youth (Canada)**, the relevant Minister must advertise the vacancy and consult with organisations or persons that have a particular interest in the work of the Commissioner. In recommending the **National Rural Health Commissioner**, the Minister must have due regard to gender balance and geographical balance. In appointing the **Children's Commissioner (NZ)**, the Minister must consider consulting any organisations or persons that have a special interest in the functions of the Commissioner.
6	*Selection & appointment of decision-making body*	Commissioner for Children and Young People (SA) Commissioner for Children and Young People (WA) Children's Commissioner (UK)	The legislatively mandated selection process for the **Commissioner for Children and Young People (SA)** must involve at least 2 young people on the selection panel and the interview must include an exercise designed to assess the applicant's ability to engage, communicate and interact with children and young people. The legislative requirements for the Commissioner for **Children and Young People (WA)** provide that children and young people must be involved in the selection process for the Commissioner. The legislative requirements for the **Children's Commissioner (UK)** provide that the Secretary of State must take reasonable steps to involve children in the Commissioner's appointment.
7	*Restriction on political representatives*	Children's Commissioner (UK) Children's Commissioner (NZ)	The legislative requirements for the **Children's Commissioner (UK)** provide that the Commissioner is not to be regarded as a servant or agent of the Crown and a separate Act expressly prohibits the Commissioner (or a member of the Commissioner's staff) from being a member of parliament. By virtue of a separate NZ Act, the responsible Minister for the **Children's Commissioner (NZ)** may not direct the Commissioner to have regard to or to give effect to a government policy and Members of Parliament are disqualified from taking up the role of Commissioner.

7 Challenges to implementation and effectiveness

This section sets out the challenges to implementation and effectiveness that have been identified across the various Commissioner models reviewed. In particular, our review identified the following requirements of the Paris Principles as lacking across the various Commissioner models:

(a) clear mandate in the relevant Commissioner's establishing legislation;

(b) political impartiality or autonomy from government;

(c) transparency in appointment / selection of Commissioners and/or decision-making bodies;

(d) quasi-judicial competency and complaints handling powers; and

(e) adequate funding.

Further detail in respect of each of these issues is set out below.

7.2 Lack of clear mandate in establishing legislation

South Australian Commissioner for Aboriginal Children and Young People

While the role of the South Australian Commissioner for Children and Young People is enshrined in its establishing legislation, the role of the South Australian Commissioner for Aboriginal Children and Young People is not, and its functions and powers are not clearly defined. The current South Australian Commissioner for Aboriginal Children and Young People, April Lawrie, has criticised the lack of legislative enshrinement, stating that she was unable to investigate "pressing systemic issues" because the role had not been legislated for by the State Government.[357] Additionally, we note that while the role of the Commissioner for Aboriginal Children and Young People is currently filled by an identified Aboriginal or Torres Strait Islander person with appropriate qualifications, knowledge and experience, this does not appear to be a mandated requirement for the position.

Victorian Commissioner for Aboriginal Children and Young People

The role of the Victorian Commissioner for Aboriginal Children and Young People is not enshrined in legislation, and its functions and powers are not clearly defined. While the role is currently filled by an identified Aboriginal or Torres Strait Islander person with appropriate qualifications, knowledge and experience, this is not a mandated requirement for the position. By way of contrast, the role of the Victorian Principal Commissioner for Children and Young People is enshrined in legislation and reasonably clear. Additionally, the interaction of the two Commissioner roles is also unclear, with some resources suggesting they are side-by-side roles and others suggesting that the Commissioner for Aboriginal Children and Young People reports to the Principal Commissioner for Children and Young People.[358]

7.3 Lack of political impartiality or autonomy from government

National Children's Commissioner

The *Australian Human Rights Commission Act 1986* (Cth) does not explicitly restrict the participation of government representatives or members of parliament in the decision-making of the Commission.[359] However, the *Australian Human Rights Commission Act 1986* (Cth) does provide that the National Children's Commissioner must not engage in paid employment outside the duties of his or her office without the approval of the Minister,[360] which might operate to prevent a member of parliament from holding the role of National Children's Commissioner at the same time.

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[357] Stephanie Richards, "Give me power to investigate, commissioner tells Govt", *InDaily*, published 15 November 2019. available at <https://indaily.com.au/news/2019/11/15/give-me-power-to-investigate-commissioner-tells-govt/>.

[358] See, eg, the job listing for the CACYP, available at <https://fisherleadership.com/opportunities/commissioner-for-aboriginal-children-and-young-people/>.

[359] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 1.9.

[360] *Australian Human Rights Commission Act 1986* (Cth) s 46MH.

ACT Children and Young People Commissioner

The *Human Rights Commission Act 2005* (ACT) does not explicitly restrict participation of government representatives or members of parliament in the decision-making of the Commissioner or Commission.

Queensland Family & Child Commission

The *Family and Child Commission Act 2014* (Qld) does not explicitly restrict the appointment of government representatives or members of parliament, or representatives of government agencies, to roles and function that, or where their advice and cooperation is necessary to, assist the Queensland Family & Child Commission in fulfilling its mandate.[361]

Victorian Commissioner for Aboriginal Children and Young People and Principal Commissioner for Children and Young People

The *Commission for Children and Young People Act 2012* (Vic) does not explicitly restrict the participation of government representatives or members of parliament in the decision-making of the Commission.[362] However, the Act does provide that the relevant Commissioner ceases to hold office if they "*nominate for election for the Parliament of Victoria or of the Commonwealth or of another State or a Territory of the Commonwealth".*[363]

Western Australian Commissioner for Children and Young People

The *Commissioner for Children and Young People Act 2006* (WA) does not require the Commissioner to be independent from government. Further, with the authorisation of the Governor, the Commissioner may hold another "office of profit or trust".[364]

eSafety Commissioner

The *Enhancing Online Safety Act 2015* (Cth) does not explicitly restrict participation of government representatives or members of parliament in the decision-making of the Commission. Further, the Minister is entitled to give directions, by legislative instrument, to the Commissioner about the performance of the Commissioner's functions and exercise of their powers.[365] While the *Enhancing Online Safety Act 2015* (Cth) states that such directions 'must be of a general nature only', it also provides that the Commissioner must comply with any such direction.[366]

We note that the establishing Acts of the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Commissioner for Children and Youth in Canada, and the Western Australian Commissioner for Children and Young People do not explicitly ban political representatives from serving as Commissioner.

Additionally, of particular concern across multiple Commissioner roles was the ability for the relevant Commissioner to be removed for subjective or insufficiently transparent reasons, or at the whim of government. For example, while the *Commission for Children and Young People Act 2012* (Vic) provides some functional immunity for the Victorian Commissioner for Aboriginal Children and Young People and Principal Commissioner for Children and Young People, the removal powers provide the Governor in Council with some discretion – which may undermine the independence of the Commissioners.[367] Similarly, the *Enhancing Online Safety Act 2015* (Cth) allows the responsible Minister to remove the Commissioner for 'misbehaviour'. Arguably, this gives the Minister a broad removal power (i.e. this power could be exercised subjectively or in respect of 'misbehaviour' not in the course of their role as Commissioner).

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361 GANHRI General Observations, G.O. 1.9.

362 See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 1.9.

363 *Commission for Children and Young People Act 2012* (Vic) s 15(d).

364 *Commission for Children and Young People Act 2012* (Vic) s 10(2).

365 See *Enhancing Online Safety Act 2015* s 70(1).

366 See *Enhancing Online Safety Act 2015* ss 70(2), 70(4).

367 See GANHRI General Observations, G.O. 2.1.

7.4 Lack of transparency in selection and appointment process

Our review identified insufficient transparency in the appointment and selection of Commissioners and decision-making bodies for numerous Commissioner roles.

National Aboriginal and Torres Strait Islander Social Justice Commissioner

The selection process for the National Aboriginal and Torres Strait Islander Social Justice Commissioner is not particularly transparent in the *Australian Human Rights Commission Act 1986* (Cth). The Commissioner is appointed by the Governor-General under section 46B of the Act, and the only requirement is that the Minister be satisfied the person has significant experience in the community life of Aboriginal people or Torres Strait Islanders.

ACT Children and Young People Commissioner

The *Human Rights Commission Act 2005* (ACT) sets out that the ACT Executive appoints the Commissioner but the appointment process is not transparent.[368] The ACT Executive only has to be satisfied that the person has the experience or expertise necessary to exercise the member's functions.[369] Additionally, the process for how the Commissioner hires their staff is not transparent.

Queensland Family & Child Commission

The Principal Commissioner of the Queensland Family & Child Commission has discretion to appoint anyone that they are satisfied is "appropriately qualified",[370] so long as at least one member of each advisory council is an Aboriginal person or a Torres Strait Islander.[371] The Principal Commissioner also has discretion regarding the length of term an advisory council member should serve, and how the advisory council itself will function.[372]

Tasmanian Commissioner for Children and Young People

The appointment process of the Tasmanian Commissioner for Children and Young People is unclear in the *Commissioner for Children and Young People Act 2016* (Tas), other than to specify that the Governor on recommendation of the Minister for Human Services, is to appoint the Commissioner.[373]

Victorian Commissioner for Aboriginal Children and Young People and Principal Commissioner for Children and Young People

The appointment process is not transparent for either the Victorian Commissioner for Aboriginal Children and Young People and Principal Commissioner for Children and Young People.[374] The Governor in Council may, on the recommendation of the Minister, appoint a person as the relevant Commissioner.[375] The only clear requirement is that the person is "*qualified for appointment as a Commissioner because of his or her knowledge and experience*".[376]

Western Australian Commissioner for Children and Young People

The Commissioner is appointed by the Premier of Western Australia.[377] The *Commissioner for Children and Young People Act 2006* (WA) only prescribes that the Premier, before making a recommendation, advertises "throughout Australia for expressions of interest from people with professional qualifications and substantive experience in matters affecting children" and "consult

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368 *Human Rights Commission Act 2005* (ACT) s 18D(1).

369 *Human Rights Commission Act 2005* (ACT) 18(D)(2).

370 *Family and Child Commission Act 2014* (Qld) s 31(2).

371 *Family and Child Commission Act 2014* (Qld) s 31(3).

372 *Family and Child Commission Act 2014* (Qld) s 34(a) and (b).

373 *Commissioner for Children and Young People Act 2016* (Tas) s 5.

374 But see the job listing for the Commissioner for Aboriginal Children and Young People, available at <https://fisherleadership.com/opportunities/commissioner-for-aboriginal-children-and-young-people/>.

375 *Commission for Children and Young People Act 2012* (Vic), ss 11(1), 12(1).

376 *Commission for Children and Young People Act 2012* (Vic), ss 11(2), 12(2).

377 *Commissioner for Children and Young People Act 2006* (WA) s 7(1).

with the leader of any political party with at least 2 members in either House".[378] The Act does not further prescribe how the Premier should exercise its appointment discretion.

National Rural Health Commissioner

The establishing legislation for the National Rural Health Commissioner specifies general terms of appointment, but otherwise the terms of appointment and the role are determined by the responsible Minister. The only clear criteria of appointment is that the Commissioner has experience in rural health.[379]

Additionally, and of particular relevance, commentary from the Council for the Care of Children noted in 2015 that there has been little formal recognition of the need to include children in the selection process of children's commissioners across Australia.[380] The appointment process for the South Australian Commissioner for Children and Young People is noteworthy in this respect, as the recruitment scheme involves, *inter alia,* a selection panel of up to 5 persons (2 of whom must be young people) to propose the appointment of an application to the position,[381] in addition to the inclusion of an exercise in the interview process designed to assess the applicant's ability to engage, communicate and interact with children and young people.[382] Similarly, while not specifically formalised in its establishing act, the selection process for the position of the inaugural National Children's Commissioner considered children's views about the criteria and characteristics required for the role.[383]

7.5 Lack of quasi-judicial competency and complaints-handling powers

Victorian Commission for Children and Young People

The Victorian Commission for Children and Young People does not have complaints-handling powers. In fact, the Commission's website and resources expressly state that the Commission is not a formal complaints handling body and will refer complainants on to the Department of Health and Human Services or Victorian Ombudsman (depending on the complaint).[384] While the Commission has own-motion powers of inquiry, the inquiries are limited to specific issues, and the power to compel access to information during an inquiry is limited to specific Departments and services.

Commissioner for Children and Youth in Canada

While the Commissioner for Children and Youth in Canada holds the power to inquire into any matter related to the Commissioner's mandate, including both individual and systemic issues,[385] the Commissioner does not hold any power to hear or resolve individual complaints. Additionally, whilst the Commissioner is empowered to provide recommendations on a wide range of issues pertaining to children, the Commissioner has limited mandated follow up obligations.

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[378] *Commissioner for Children and Young People Act 2006* (WA) s 7(1).

[379] *Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Act 2020* (Cth) s 79AF(3).

[380] The Council for the Care of Children, *Conversations Report 2015: Rights and a Commissioner for Children and Young People,* available at <http://childrensa.host.recite.com.au/assets/documents/Conversations_Report2015.pdf>.

[381] *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) reg 6(1)(b).

[382] *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) reg 6(1)(c).

[383] Children (aged 9 to 11 years) from Kingsford Smith Primary School in the Australian Capital Territory participated in the interview process. See Australian Human Rights Commission, About the National Children's Commissioner, available at <https://humanrights.gov.au/our-work/about-national-childrens-commissioner>.

[384] See, eg, Commission for Children and Young People, *General enquiries for the Commission* (Webpage) <https://ccyp.vic.gov.au/contact-us/general-enquiries-for-the-commission/#:~:text=Child%20Protection,-During%20business%20hours&text=You%20can%20submit%20your%20complaint,Box%204057%2C%20Melbourne%20Vic%203000> ; see also Commission for Children and Young People, *Aboriginal Inclusion Action Plan 2016-2019* (2016) 4 <https://ccyp.vic.gov.au/assets/corporate-documents/aboriginal-inclusion-action-plan-2016-19.pdf>.

[385] *Commissioner for Children and Youth in Canada Act* s 17(1).

7.6 Inadequate funding

National Children's Commissioner

There is some suggestion that the National Children's Commissioner does not receive adequate funding. This is particularly difficult to assess given that the National Children's Commissioner does not receive funding as a separate line item, but instead the Australian Human Rights Commission receives funding for the National Children's Commissioner. However, we note that in the 2019 financial year, the Australian Human Rights Commission received $16,709,000 from the Government and $10,100,000 from own-source income against total expenses of $27,994,000 resulting in a deficit attributable to the Australian Government of $1,185,000.[386]

National Aboriginal and Torres Strait Islander Social Justice Commissioner

The funding of the Aboriginal and Torres Strait Islander Social Justice Commissioner is not separate from that of the Australia Human Rights Commission. As noted above, in the 2019 financial year, the Australian Human Rights Commission's expenses exceeded Government funding. It can thus be inferred that the funding of the Aboriginal and Torres Strait Islander Social Justice Commissioner is inadequate.

Northern Territory Children's Commissioner

It is notable that in the report of the Royal Commission into the Detention and Protection of Children in the Northern Territory tabled in Parliament on 17 November 2017, one of the findings was that the Office of the Children's Commissioner was under-resourced to perform its full range of statutory functions in relation to the care and protection of vulnerable children in the Northern Territory.[387]

Office of the Children's Commissioner (New Zealand)

While the New Zealand Children's Commissioner appears to receive an appropriate level of funding and has the power to allocate funding according to its priorities, it is worth noting that funding is at the discretion of the Minister for Social Development, which may be seen to be a departure from the Paris Principles.

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386 The National Children's Commissioner, *Annual Report* (2019) 58.

387 Royal Commission into the Detention and Protection of Children in the Northern Territory – Report Overview, 5, available at <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-report-overview.pdf>.

8 Available commentary on existing models

This section sets out publicly available commentary on the various Commissioner models.

8.1 National Children's Commissioner (NCC)

The Bill digest for the *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth)[388] expressly recognised some criticisms of the proposed Bill.[389]

In addition, a number of public interest groups made submissions on the proposed Bill. These submissions made a number of recommendations on bettering the NCC role (none of which appear to have been implemented before the Bill was passed). In its inquiry report, the Standing Committee on Social Policy and Legal Affairs noted a number of general concerns raised in many of the submissions, including:

(a) that the NCC should have specific regard to the rights of particularly vulnerable children, such as Aboriginal and Torres Strait Islander children, children in immigration detention in Australia and children with disabilities;

(b) that the NCC should have a positive duty to engage with children; and

(c) that the list of international treaties to which the NCC must have regard should be extended.

The submissions of the Australian Children's Commissioners and Guardians, a group consisting of the children's commissioners from across Australia, provide further examples of recommendations with respect to the NCC, such as:[390]

(a) that guiding principles should be included in the legislation to reinforce the Bill's underlying core beliefs (e.g. "*this Act is to be administered under the principle that the best interests of children are paramount*");

(b) that the role of the NCC should not be confined to "*examining existing and proposed Commonwealth enactments*" but should also include the capacity to examine Commonwealth policies, programs and services; and

(c) that a requirement for the NCC to take a lead role in making an independent submission to the UN Committee should be formally included in the legislation.

Furthermore, when the role of the NCC was first announced, a number of political bodies and children's advocates, including the Standing Committee on Social Policy and Legal Affairs,[391] called on the government to ensure that the AHRC's funding was sufficiently increased to ensure that the NCC could appropriately fulfil its functions.[392] A number of these bodies expressed particular concern that only $3.5 million had been allocated to the NCC for its first 4 years,[393] with some noting that the state and territory commissioners received significantly more funding and that limited funding may render the NCC's establishment tokenistic.[394] The AHRC itself expressed

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388 Date of Assent 28 June 2012, Registered 5 July 2012, available at <https://www.legislation.gov.au/Details/C2012A00089>.

389 See Department of Parliamentary Services, *Bills Digest No. 167 2011-12* (page 4), available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/1736213/upload_binary/1736213.pdf;fileType=application/pdf> .

390 Australian Children's Commissioner and Guardians, *Inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012*, available at <https://www.kidsguardian.nsw.gov.au/ArticleDocuments/494/ACCG_response_to_AHRC_AmendmentBillInquiry-1.pdf.aspx?Embed=Y>.

391 Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012*, available at <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%20childrens%20commission/report.htm>.

392 See, eg, The Greens, *Government must fund National Children's Commissioner in next week's budget,* available at <https://greensmps.org.au/articles/government-must-fund-national-childrens-commissioner-next-weeks-budget>.

393 See, eg, Australian Youth Affair Coalition et al., *Media Release: Budget Commitment to Children Needs a Boost,* available <at https://ayac.org.au/uploads/Budget%20Provision%20for%20Commissioner.pdf>; see also Human Rights Law Centre, *Submission no. 2*

394 See Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* (page 6), available at

concerns that the funding would not be adequate to allow the NCC to engage in any substantial project work.[395] Despite these concerns, it does not appear that funding was increased from the initial four-year $3.5 million allocation before the Bill was passed.[396]

8.2 Commissioner for Aboriginal Children and Young People (Vic) and the Principal Commissioner for Children and Young People (Vic)

The Royal Commission into the Protection and Detention of Children in the Northern Territory noted that the Commission and the Commissioner for Children and Young People do not have an individual complaints resolution and investigatory function (unlike the equivalent bodies in the Australian Capital Territory and the Northern Territory).[397]

In 2015, the Council for the Care of Children noted that there has been little formal recognition of the need to include children in the selection process of children's commissioners across Australia.[398]

8.3 Commissioner for Aboriginal Children and Young People (SA)

The Commissioner for Aboriginal Children and Young People's Inaugural Annual Report states that "community expectation is that the role of Commissioner be legislated with the necessary powers to effectively improve better outcomes for Aboriginal children and young people."[399] Legislating for the role of the Commissioner for Aboriginal Children and Young People is the third recommendation in the Inaugural Report.[400] However, the Commissioner for Aboriginal Children and Young People continues not to be legislatively enshrined. Commissioner April Lawrie has criticised the structure of the Commissioner for Aboriginal Children and Young People on the basis that she is unable to investigate "pressing systemic issues" because the role had not been legislated for by the State Government.[401]

The SNAICC Family Matters website has expressed concerns that "the role and powers of the Aboriginal commissioner are not equivalent to the principal children's commissioner in the state."[402]

Additionally, a 2019 Report by SNAICC states:

> *"In an important positive move concerning partnership, the first SA Commissioner for Aboriginal Children and Young People (CACYP) was appointed in the reporting period. While this represents significant progress, the CACYP has no independent powers in legislation yet, limiting the provision of Aboriginal and Torres Strait Islander systems oversight. There also remain no ACCO case management services, no commitment to a state peak body for Aboriginal and Torres Strait Islander children and families, no*

<https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%20childrens%20commission/report.htm>.

395 See Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* (page 6), available at <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%20childrens%20commission/report.htm>.

396 See, eg, Parliamentary Debates, *Senate Official Hansard, Monday 25 June 2012,* available at <https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/52a7506b-a85c-4b40-9001-99a23ed63fe4/toc_pdf/Senate_2012_06_25_1149_Official.pdf;fileType=application%2Fpdf#search=%22chamber/hansards/52a7506b-a85c-4b40-9001-99a23ed63fe4/0008%22>.

397 *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Volume 4, Chapter 40.

398 The Council for the Care of Children, *Conversations Report 2015: Rights and a Commissioner for Children and Young People* (Report, 2015) <http://childrensa.host.recite.com.au/assets/documents/Conversations_Report2015.pdf>.

399 South Australia's Commissioner for Aboriginal Children and Young People, *Inaugural Report* (Report, December 2019) 8.

400 South Australia's Commissioner for Aboriginal Children and Young People, *Inaugural Report* (Report, December 2019) 14.

401 Stephanie Richards, "Give me power to investigate, commissioner tells Govt", *InDaily*, published 15 November 2019. Accessible at: https://indaily.com.au/news/2019/11/15/give-me-power-to-investigate-commissioner-tells-govt/.

402 Family Matters, South Australia (webpage, 2019) <https://www.familymatters.org.au/map-of-australia/south-australia/>.

progress in expansion of the gazetted ACCO role and limited procedures that enable or describe ACCO participation."[403]

8.4 Children's Commissioner (NT)

Following the airing of "Australia's Shame" – a documentary featuring disturbing imagery and footage of children being abused while held in the Don Dale Juvenile Detention Centre in Darwin on 25 July 2016,[404] the Royal Commission into the Protection and Detention of Children in the Northern Territory was established by the Australian Government to inquire into and report upon failings in the child protection and youth detention systems of the Government of the Northern Territory. Its findings in relation to the Commissioner are:

(a) it is constrained by a lack of general power to investigate matters of a systemic nature rather than individual complaints;[405] and

(b) it is under-resourced to perform its full range of stature functions.[406]

One of the most significant recommendations was that the *Children's Commissioner Act* (NT) be repealed and legislation passed establishing a Commission for Children and Young People, with jurisdiction for all children and young people in the Northern Territory. Under this recommendation, the Commission for Children and Young People would have two commissioners, one of whom would be an Aboriginal person, with wider powers of inspection.[407]

8.5 Commissioner for Children and Young People (WA)

No public criticisms have been made about the role of the Commissioner. However, the establishing Act was criticised as it did not follow the recommendation by the 2003 Gordon Inquiry into child sex abuse and violence in Aboriginal communities in Western Australia to establish a Deputy Children's Commissioner with responsibility for issues in relation to Aboriginal children.[408]

8.6 Children's Commissioner (New Zealand)

A 2017 article by then deputy opposition leader, Jacinda Ardern, stated that more funding and more independence is required for the Commissioner to function more effectively in the best interests of children in New Zealand in state care.[409] Ardern was particularly critical of the fact that, while state run residences need better oversight due to issues with bullying and violence, the Commissioner was only able to visit every 18 months, which was seen to be insufficient.

There have also been growing calls to establish a Māori Children's Commissioner, most recently in the New Zealand media in 2019, as Māori children remain over-represented in state care, state abuse and youth detention.[410] The current Commissioner, Judge Andrew Becroft, supports the idea

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403 SNAICC, *Reviewing the Implementation of The Aboriginal and Torres Strait Islander Child Placement Principle South Australia* (Report, 2019) 5, available at <https://www.snaicc.org.au/wp-content/uploads/2020/01/ATSICPP-compliance-review-2019_SA.pdf>.

404 Kate Fitz-Gibbon and Faith Gordon, 'One year on from Royal Commission findings on Northern Territory child detention: what has changed?', *The Conversation* (online, 19 November 2018) <https://theconversation.com/one-year-on-from-royal-commission-findings-on-northern-territory-child-detention-what-has-changed-106993>.

405 Royal Commission into the Protection and Detention of Children in the Northern Territory, *Finding and Recommendations* (report, November 2017) 16 <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-findings-and-recommendations.pdf>.

406 Royal Commission into the Protection and Detention of Children in the Northern Territory, *Finding and Recommendations* (report, November 2017) 23 <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-findings-and-recommendations.pdf>..

407 Royal Commission into the Protection and Detention of Children in the Northern Territory, *Finding and Recommendations* (report, November 2017) 61-62 <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-findings-and-recommendations.pdf>.

408 Commissioner for Children and Young People Act 2006 (WA) (2007) 11(2) Australian Indigenous Law Review <http://138.25.65.17/au/journals/AUIndigLawRw/2007/48.pdf>.

409 Scoop Independent News, 'More oversight by Children's Commissioner needed' (15 May 2017) available at <https://www.scoop.co.nz/stories/PA1705/S00310/more-oversight-by-childrens-commissioner-needed.htm>.

410 Leigh-Marama McLachlan, 'Calls for a Maori Children's Commissioner to give voice and advocacy tamariki' (8 April 2019) *RNZ,* available at <https://www.rnz.co.nz/news/te-manu-korihi/386581/calls-for-a-maori-children-s-commissioner-to-give-voice-and-advocacy-tamariki>.

and has acknowledged gaps in the current structure of the Commission, as it does not embed a Māori voice, a Māori worldview or a Māori approach in legislation.

The Commissioner appointed a Chief Māori Advisor in 2019, responsible for supporting the Commissioner to advocate for improved outcomes for Māori children, as well as undertaking a project development role and scoping exercise for an Assistant Māori Children's Commissioner.[411] The Commissioner has also stated his commitment to appointing an Assistant Māori Commissioner for Children, as:

(a) it is crucial that the leadership structure of the Office contains and presents a clear Māori voice;

(b) Māori children are disproportionately overrepresented in care and protection, and so are in greater need of advocacy and support for their welfare, rights and interests; and

(c) it ensures the Commissioner's staff includes a leader who can support the Commissioner and his Māori staff in encouraging Oranga Tamariki to discharge their duty to Maori children, and to ensure a specific additional culturally appropriate focus on Māori children.[412]

8.7 Children's Commissioner (UK)

Many of the criticisms made about the Children's Commissioner were addressed in the reforms made to the *Children Act 2004* (UK) by the *Children and Families Act 2014* (UK). These reforms involved an extensive consultation process and were directed at ensuring that the Children's Commissioner was human rights compliant.[413]

However, there are several outstanding criticisms from UNICEF UK:

(a) there should be a requirement for Ministers and public authorities to respond to the child rights impact assessments produced by the Children's Commissioner within a reasonable time frame;[414]

(b) the Children's Commissioner could also be given the power to provide a national sign-posting service for children where the Children's Commissioner could put children wishing to make a complaint in touch with the appropriate investigating authority;[415]

(c) UNICEF UK has criticised the fact that the Children's Commissioner is appointed by the executive branch, which is a body that the Children's Commissioner is responsible for monitoring. UNICEF UK suggests that the "better guarantee of independence" is appointment by Parliament. UNICEF further suggests that there should be requirements in terms of skills and experience as well as a wide advertisement of the position in order to ensure a transparent and competitive process;[416] and

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411 Children's Commissioner, *Position Description,* available at: https://www.occ.org.nz/assets/Uploads/Chief-Maori-Advisor-JD.pdf.

412 Children's Commissioner, *Annual Report 2019,* available at: https://www.occ.org.nz/publications/corporate-documents/annual-report-2019/.

413 See, eg, Joint Committee on Human Rights, *The role and independence of the Office of the Children's Commissioner for England* (2012) <https://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf>.

414 UNICEF UK, 'Written Evidence submitted by UNICEF UK (CC 1)', *The role and independence of the Office of the Children's Commissioner for England* (2012) <https://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf>.

415 UNICEF UK, 'Written Evidence submitted by UNICEF UK (CC 1)', *The role and independence of the Office of the Children's Commissioner for England* (2012) <https://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf>.

416 UNICEF UK, 'Written Evidence submitted by UNICEF UK (CC 1)', *The role and independence of the Office of the Children's Commissioner for England* (2012) <https://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf>.

(d) to remove the threat of any financial control, funding should be removed from political control and be guaranteed over a given period.[417]

8.8 Ombudsperson for Children (Norway)

There are limited English resources evidencing the impact of the Norwegian Ombudsman for children. A 1996 evaluation of the Ombudsman found that the Ombudsman was largely seen as being effective and that "*many municipalities, as well as Parliament, had quickly accepted a number of proposals from the Ombudsman"*.[418] Numerous survey participants also viewed the Ombudsman as an effective tool as protecting the rights of children while acting as a supportive tool for parents.[419]

However, in '*Lessons from Norway: The Children's Ombudsman as a Voice for Children*', Gary Melton criticises the structure of an 'Ombudsman'. Melton argues that the Ombudsman role is unconventional and particularly onerous on the individual because it operates without a board of constituents behind it. This is because the Ombudsman model is an individualistic model which assumes a 'great person' theory of social change, which presupposes that the role will be filled by 'one person sufficiently talented and motivated who can really make a difference'. The Ombudsman therefore has a significant degree of control over its jurisdiction and power: "*the barneombud must define the job and then find a means of fulfilling it*". This may limit accountability and create an issue of consistency as the Ombudsman changes after each tenure, particularly if the appointment criteria are ambiguous.[420]

Melton also criticises the 'vagueness of the statutory authority' for the Ombudsman. The discretionary powers of the Ombudsman are wide and the jurisdiction for its operation is broad. This allows for potentially 'contrasting' approaches to the Ombudsman role. From a statutory perspective, this raises issues of consistency and accountability.[421]

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417 UNICEF UK, 'Written Evidence submitted by UNICEF UK (CC 1)', *The role and independence of the Office of the Children's Commissioner for England* (2012) <https://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf>.

418 Malfrid Grude Flekkoy, 'The Children's Ombudsman as an Implementor of Children's Rights' (1996) *Symposium: Implementation of the United Nations Convention on the Rights of the Child*, 358 <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/tlcp6&id=385&men_tab=srchresults>.

419 Malfrid Grude Flekkoy, 'The Children's Ombudsman as an Implementor of Children's Rights' (1996) *Symposium: Implementation of the United Nations Convention on the Rights of the Child*, 358 <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/tlcp6&id=385&men_tab=srchresults>.

420 Gary Melton, 'Lessons from Norway: The Children's Ombudsman as a Voice for Children' (1991) 23(2) *Case Western Reserve Journal of International Law* 198, 207.

421 Gary Melton, 'Lessons from Norway: The Children's Ombudsman as a Voice for Children' (1991) 23(2) *Case Western Reserve Journal of International Law* 198, 207-208.

9 Recommendations: Key requirements for a Proposed Model

The following table summarises the key requirements for the establishment of the National Commissioner for each element of the Paris Principles.

No.	Paris Principle	Key requirements for the National Commissioner
1)	**The establishment of NHRIs**	The National Commissioner should be established in a legislative text with sufficient detail to ensure a clear mandate and independence. This should include the National Commissioner's role, functions, powers, funding, lines of accountability, appointment mechanisms and term of office.
a)	*Entrenched in law*	The role of the National Commissioner should be formally established via standalone enacting federal legislation. The establishing legislation should clearly distinguish the National Commissioner from an agency of state, a non-government organisation or an ad hoc body.
b)	*Mandate and powers*	The establishing legislation should set out the National Commissioner's mandate and powers in sufficient detail.
c)	*Appointment mechanisms*	The establishing legislation should include complete, detailed and transparent provisions on the appointment mechanisms for the National Commissioner.
d)	*Quasi-judicial competency (complaints-handling)*	If the National Commissioner is to be mandated to receive, consider or resolve complaints, the enacting legislation should also set out the necessary functions and powers required for the National Commissioner to adequately fulfil this mandate. For example, the National Commissioner should have the ability to receive complaints against both public and private bodies and, given the vulnerability of the target demographic, the National Commissioner should be empowered to receive complaints which have been filed on behalf of Aboriginal and Torres Strait Islander children (with their consent).
2)	**Human rights mandate**	The National Commissioner should be legislatively empowered to both promote and protect the rights of Aboriginal and Torres Strait Islander children and young people in Australia. In particular, the National Commissioner should be required to consider the implementation and promotion of rights stemming from the Convention and the Declaration.
a)	*Competence and responsibilities*	The National Commissioner's mandate should be broadly set out, such that it allows for a progressive and evolving understanding of human rights and applies to both public and private sectors. In terms of promotion, the legislation should empower the National Commissioner to freely address public opinion and raise public awareness about issues affecting Aboriginal and Torres Strait Islander children and young people in Australia. The legislation should further empower the National Commissioner to assess any matters affecting Aboriginal and

No.	Paris Principle	Key requirements for the National Commissioner
		Torres Strait Islander children and young people in Australia, and to make recommendations to public authorities in relation to these matters.
b)	*Powers of inquiry and investigation*	The National Commissioner should be empowered to conduct own-motion inquiries and investigations into any matter affecting Aboriginal and Torres Strait Islander children and young people in Australia, including any violations of the rights of those children. This function should be supported by powers to freely enter premises, inspect documents and examine individuals, both public and private.
c)	*Functional immunity*	The National Commissioner and their staff should be immune from civil and criminal liability for actions undertaken in good faith in their official capacity.
3)	**Encouraging ratification or accession to international human rights instruments**	The National Commissioner should actively promote the recognition and ratification of, and compliance with, relevant international human rights instruments. This would likely include the Convention and the Declaration.
4)	**Interaction with the international human rights system**	The National Commissioner should engage with and assist United Nations human rights bodies and monitor and promote the implementation of relevant recommendations originating from the human rights system as relevant to Aboriginal and Torres Strait Islander children and young people in Australia.
5)	**Cooperation with other human rights bodies**	The National Commissioner should develop, formalise and maintain working relationships with other domestic institutions established for the promotion and protection of the rights of Aboriginal and Torres Strait Islander children and young people, for example SNAICC.
6)	**Recommendations**	The National Commissioner should provide annual and special reports into matters affecting Aboriginal and Torres Strait Islander children and young people. These reports should be publicly available and tabled with parliament, with requirements that the issues identified in these reports be responded to in a timely manner. The National Commissioner should also be empowered to follow up on any action taken in response to the recommendations contained in its reports, including by publishing information on the measures taken by public and private entities.
7)	**Ensuring pluralism**	Consistent with best practice in self-determination the National Commissioner should be an Aboriginal or Torres Strait Islander person. The office of the National Commissioner should comprise staff representative of the diverse segments of Australian society, with consideration of gender, ethnicity and minority status.

No.	Paris Principle	Key requirements for the National Commissioner
8)	**Selection & appointment of decision-making body**	The enshrining legislation should set out a clear, transparent and participatory selection and appointment process for the National Commissioner, as well as for any accompanying decision-making or advisory bodies (i.e. committees and councils). Pre-determined and objective criteria for the National Commissioner role should be made publicly available and vacancies in the role should be advertised broadly so as to maximise the number of potential applicants. In particular, the selection and appointment process should ensure that job listings are accessible by all Aboriginal and Torres Strait Islander communities. Consistent with best practice in self-determination, the legislation should also mandate that Aboriginal and Torres Strait Islander young people be involved in the selection process for the National Commissioner. In addition, the selection process should be designed to assess the applicant's ability to engage, communicate and interact with Aboriginal and Torres Strait Islander children and young people.
9)	**Restriction on political representatives on NHRIs (independence from government)**	The National Commissioner should be independent from Government and free from political interference. The independence of the National Commissioner from government and other political influences should form part of the National Commissioner's enacting legislation. The enacting legislation should restrict the involvement of political representatives in the National Commissioner's decision-making process. Where such involvement is unavoidable, the legislation should make clear that such persons are unable to participate in the National Commissioner's role in any more than an advisory capacity.
a)	*Tenure*	The grounds for dismissal of the National Commissioner should be both limited and clearly set out in the enshrining legislation. The dismissal process should involve more than just the sole discretion of the appointing authorities. Best practice suggests that the dismissal should be further supported by a decision of an independent body, such as Parliament.
b)	*Recruitment*	The National Commissioner should be empowered, and adequately resourced, to select staff and determine the staffing structure of his or her office. The selection process for the National Commissioner's staff should be open, transparent and merit-based. The National Commissioner should not be required to accept staff assigned by Government.
10)	**Adequacy of funding**	The National Commissioner should have both financial independence and adequate resources.

No.	Paris Principle	Key requirements for the National Commissioner
		In terms of financial independence, the National Commissioner should receive public funding through a mechanism that is not under the direct control of Government, such as through Parliament. The public funds allocated to the National Commissioner should be denoted as a separate line in the public budget and the National Commissioner should be entitled to determine how such funds are used. In addition to public funds, the National Commissioner should be permitted to raise funds from other sources (e.g. private donors) without being disqualified from receiving public funding or having the offices' public funding reduced. The National Commissioner's funding and financial probity should be transparent and easily assessable (e.g. through regular financial reporting and independent audits). In terms of adequate resourcing, the National Commissioner should receive all funds necessary to: ▪ perform his or her mandated activities; ▪ employ and remunerate staff; ▪ maintain an accessible office; and ▪ establish a well-functioning communications system. The National Commissioner should also receive remuneration equivalent to other individuals with similar responsibilities in other independent statutory offices (such any comparable national commissioners).
11)	**Annual reports of NHRIs**	The National Commissioner should be mandated to publish annual and special reports, highlighting any key developments of the office and setting out the National Commissioner's opinions, recommendations and proposals with respect to matters affecting Aboriginal and Torres Strait Islander children and young people. The reports should contain sufficient detail for the National Commissioner's effectiveness to be assessed. These reports should be made publicly available, including to remote communities, and should be discussed and considered by the legislature. Preferably, the National Commissioner should be entitled to table these reports in Parliament directly, as opposed to going through the Executive.

Appendix: Commissioner Model Review Templates

10 The Commissioner for Aboriginal Children and Young People and The Commissioner for Children and Young People in South Australia

A. The Commissioner for Aboriginal Children and Young People and The Commissioner for Children and Young People in South Australia: Summary table

Question	Summary response
Country/State/Territory	South Australia, Australia
Commissioner entity name	Commissioner for Children and Young People (**CCYP**) Commissioner for Aboriginal Children and Young People (**CACYP** (together, the **Commissioners**)
Date established	• ***CCYP:*** The *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA)[422] (the **Act**) was assented on 27 October 2016 to establish the CCYP. ○ Section 2(1) of the *Children and Young People (Oversight and Advocacy Bodies) Act (Commencement) Proclamation*[423] provided that the Act came into operation on 10 November 2016. ○ Helen Connolly was appointed as SA's first CCYP and commenced the role on 18 April 2017.[424] Commissioner Connolly remains in the role today. • ***CACYP:*** The role of the CACYP was created in 2018 under s 68 of the *Constitution Act 1934* (SA)[425] (the **Constitution Act**), which allows for the appointment of officers. ○ On 18 October 2018, April Lawrie was appointed as SA's first CACYP.[426] Commissioner Lawrie commenced the role on 3 December 2018.[427] Commissioner Lawrie remains in the role today.
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The CCYP and CACYP roles are partially compliant with the Paris Principles, however there are significant gaps (mostly in respect of the CACYP role): • The role of the CACYP is not enshrined in legislation, whereas the role of the CCYP is formally entrenched in law, pursuant to the Act.

[422] Available at <https://www.legislation.sa.gov.au/LZ/C/A/CHILDREN%20AND%20YOUNG%20PEOPLE%20(OVERSIGHT%20AND%20ADVOCACY%20BODIES)%20ACT%202016.aspx>.

[423] South Australian Government, *The South Australian Government Gazette No 72,* (10 November 2016) 4391, available at <https://governmentgazette.sa.gov.au/sites/default/files/public/documents/gazette/2016/November/2016_072.pdf>.

[424] Commissioner for Children & Young People, *The Commissioner,* available at <https://www.ccyp.com.au/the-commissioner/.

[425] Available at <https://www.legislation.sa.gov.au/LZ/C/A/Constitution%20Act%201934.aspx>.

[426] South Australian Government, *The South Australian Government Gazette No 62,* (18 October 2018) 3810, available at <https://governmentgazette.sa.gov.au/sites/default/files/public/documents/gazette/2018/October/2018_062.pdf>.

[427] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural report* (report, December 2019) 7, available at <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

Question	Summary response
	• The role of the CCYP is relatively clear under the Act and the CCYP's mandate is expressed in broad terms. However, the functions and powers of the CACYP are not clearly defined. • The Act provides the CCYP with some functional immunity and guarantee of tenure, including a due process that must be followed in order to terminate the CCYP's appointment. • The Act does not set out the terms and conditions of office for the CCYP and, in the absence of any enshrining legislation, the terms and conditions of the CACYP's office are even less clear. • The role of the CACYP is currently filled by an identified Aboriginal or Torres Strait Islander person, however this does not appear to be a mandated requirement for the position. • The appointment process is not sufficiently transparent for either the CACYP or the CCYP (albeit there is a recruitment scheme provided for in the Regulations for the CCYP, which involves children and young people in the recruitment process).[428] • The tenure for the CACYP is comparatively short (three years in comparison to the seven-year initial term / maximum ten-year term if re-appointed of the CCYP). • The CCYP and CACYP do not appear to have complaints-handling powers. However, the CCYP has own-motion powers of inquiry, including the power to compel access to information. The Act imposes penalties for non-compliance. • The CCYP and CACYP both describe their roles as being underpinned by the *United Nations Convention on the Rights of the Child,* and the commissioners may have regard to "*any relevant international human rights instrument*". The CACYP also refers to the *United Nations Declaration on the Rights of Indigenous People.* • Because the CACYP is not a statutory role the CACYP is not included in a regular meeting of all South Australian statutory oversight bodies convened by the CCYP. The CACYP has independently reached out to the Guardian for Children and Young People and the Ombudsman's Office about complaints made to the CACYP by or on behalf of individual children and young people, where these complaints require investigation with powers that CACYP does not have. The CACYP has been invited to participate and regularly participates in the Australian and New Zealand Children's Commissioners and Guardians (ANZCCG) meetings and regularly meets with the Aboriginal Children's Commissioners in Victoria and Queensland. • In practice, the CCYP and CACYP publish a wide range of information on their websites, making that information publicly accessible. • The annual reporting requirements of CCYP are closely aligned with the GANHRI General Observations. • The CACYP is not adequately resourced. There was a three year budget allocation to the CACYP in the 2017-18 budget which is administered by the CCYP. Unlike the CCYP who has adequate budget to fulfil the statutory role, the CACYP who is not appointed under statute does not have sufficient resources to fulfil the role according to the Paris Principles,

[428] *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA), reg 6(1), available at <https://www.legislation.sa.gov.au/LZ/C/R/Children%20and%20Young%20People%20(Oversight%20and%20Advocacy%20Bodies)%20Regulations%202017.aspx>.

Question	Summary response
	and whilst the CACYP is co-located with the CCYP there is a clear demarcation between staff, resources and work priorities.

Structure
 	
Where does the role sit, is it:
 	
(a) a stand-alone office; or
 	
(b) part of an existing institution (specify which institution)
 	
What relationships are there between this role and other Commissioners or institutions?
	• **CCYP:** The CCYP is an independent statutory officer,[429] responsible to the Minister for Education (with some responsibility delegated to the Minister for Child Protection)[430].
	  ○ The Act also establishes the Guardian for Children and Young People (the **Guardian**)[431] and the Child Development Council (the **Council**)[432], and provides for the continuation of the Child Death and Serious Injury Review Committee (the **Committee**).[433]
	  ○ A useful analysis of the unique roles of the oversight and advocacy bodies is set out at Figure 3 (page 11) and Table 1 (pages 16 – 17) of this report, prepared by the Council.
	• **CACYP:** The Commissioner is an independent officer responsible to the Minister for Education.[434]
	• The CACYP role is described as "working alongside" the independent bodies established under the Act: the CCYP, the Guardian, the Council and the Committee.[435]
	• The CCYP and CACYP are located at the same business address.
	• The CCYP Annual Report includes financial expenditure information about the CACYP.[436]

Accountability arrangements What is the reporting line for the role? Who sets the budget?	• Both the CCYP and CACYP are responsible to the Minister for Education. However, the CCYP is independent of direction or control by the Crown or any Minister.[437] **CCYP:** • The CCYP is appointed by the Governor, provided that the Statutory Officers Committee[438] has approved the proposed appointment after receiving a referral from the Minister.[439] • The CCYP holds office for a specified period, which must not exceed 7 years.[440] The CCYP is eligible for re-appointment

[429] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 7(2).

[430] South Australian Government, *The South Australian Government Gazette No 33, 17 May 2018* (pages 1548 & 1597), available at <http://www.governmentgazette.sa.gov.au/2018/May/2018_033.pdf>.

[431] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 21, Part 3.

[432] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 46, Part 6.

[433] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 30, Part 4.

[434] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 8, available at <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[435] Commissioner for Aboriginal Children & Young People, *About Us* (Webpage) <https://cacyp.com.au/about-us/>.

[436] See, eg, South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 77, available at <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[437] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 7(2).

[438] Parliament South Australia, *Statutory Officers Committee* (Webpage) <https://www.parliament.sa.gov.au/en/Committees/Committees-Detail>.

[439] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 8(1), 8(4).

[440] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(1).

Question	Summary response
	but cannot hold office for terms that exceed 10 years in total.[441] • The CCYP holds office on the terms and conditions determined by the Governor and specified in an instrument of appointment.[442] • The CCYP must report to the Minister on the performance of the CCYP's functions during the preceding financial year, on or before 31 October 2020 each year.[443] • The Minister must, within six sitting days after receiving a report from the CCYP, have copies of the report laid before both Houses of Parliament.[444] **CACYP:** • Given the lack of establishing legislation for the CACYP, not much is known about the CACYP's accountability arrangements. However, in practice: o the CACYP reports to the Minister for Education; and o the CCYP's annual reports include sections on the expenditure of both the CCYP and the CACYP.[445]
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	**CCYP:** • The CCYP is appointed by the Governor, provided that the Statutory Officers Committee[446] has approved the proposed appointment after receiving a referral from the Minister.[447] The Act does not contain any fixed experience or qualification requirements for the CCYP role. However, section 8(3) provides that the Governor may establish a scheme for the recruitment of the CCYP (by regulation) and the recruitment of the Commissioner must comply with that scheme. • Regulation 6(1) of the *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA)[448] provides for a scheme of recruitment for the CCYP. The scheme is as follows: *(a) the Minister must make arrangements for the involvement of children and young people in the recruitment and selection process (including, to avoid doubt, by allocating sufficient resources for that purpose);* *(b) the Minister must appoint a selection panel of up to 5 persons (of whom 2 must be young people) to propose the appointment of an applicant to the position of Commissioner;*

[441] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(2).

[442] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 8(1), s 9(2).

[443] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 13A(1).

[444] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 13A(2).

[445] See, eg, South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 77 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[446] Parliament South Australia, *Statutory Officers Committee* (Webpage) <https://www.parliament.sa.gov.au/en/Committees/Committees-Detail>

[447] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 8(1), 8(4).

[448] Available at <https://www.legislation.sa.gov.au/LZ/C/R/Children%20and%20Young%20People%20(Oversight%20and%20Advocacy%20Bodies)%20Regulations%202017.aspx>.

Question	Summary response
	(c) the interview process for the position of Commissioner must include (but need not be limited to) an exercise designed to assess the applicant's ability to engage, communicate and interact with children and young people, conducted in accordance with any requirements determined by the Minister; *(d) the selection panel may propose to the Minister that a specified applicant be appointed as the Commissioner (and the Minister must refer that applicant to the Statutory Officers Committee in accordance with section 8 of the Act);* *(e) the Minister may consult or cooperate with, or be assisted by, such persons and bodies as the Minister thinks fit in relation to the recruitment and selection process;* *(f) subject to these regulations, and to any direction of the Minister, the selection panel may determine its own procedures;* *(g) without limiting a preceding paragraph, the Minister may take such other actions in relation to, or impose such other requirements on, the recruitment and selection process for a Commissioner as the Minister thinks fit.* • Regulation 6(2) provides that a failure to comply with the above requirements does not, of itself, affect the validity of an appointment of a CCYP. • The current CCYP was selected through a process involving children and young people.[449] • There is no requirement for the CCYP to be an Aboriginal or Torres Strait Islander person. **CACYP:** • The qualifications and experience required for the CACYP position, as well as the recruitment process, are not transparent. Those requirements are likely to be set out in the position description at the time of recruitment and, given the absence of a governing stature, are likely to change from time to time. • The Government Gazette announcement for the appointment of Commissioner Lawrie states that Commissioner Lawrie has been appointed for a term of three years (3 December 2018 – 3 December 2021).[450] • The current CACYP, April Lawrie, is an Aboriginal woman who heralds from the Mirning and Kokatha peoples in South Australia.
Scope What is the scope of the role in relation to advocating on a national or state	**CCYP:** • Section 14(1) of the Act sets out the general functions of the CCYP, which are:

[449] Commissioner for Children and Young People, *2016-17 Annual Report* (Report, 2017) 5 <https://www.ccyp.com.au/wp-content/uploads/2017/12/2016-2017-Annual-Report_CCYP.pdf>.

[450] South Australian Government, *The South Australian Government Gazette No 62* (*October 2018*) 3180 <https://governmentgazette.sa.gov.au/sites/default/files/public/documents/gazette/2018/October/2018_062.pdf>.

Question	Summary response
level for the rights, views and needs of the relevant individuals?	○ to promote and advocate for the rights and interests of all children and young people in South Australia; ○ to promote the participation by children and young people in the making of decisions that affect their lives; ○ to advise, and make recommendations to, Ministers, State authorities and other bodies (including non-Government bodies) on matters related to the rights, development and wellbeing of children and young people at a systemic level; ○ to inquire into matters related to the rights, development and wellbeing of children and young people at a systemic level (whether a Governmental system or otherwise); ○ to assist in ensuring that the State, as part of the Commonwealth, satisfies its international obligations in respect of children and young people; ○ to undertake or commission research into topics related to children and young people; ○ to prepare and publish reports on matters related to the rights, development and wellbeing of children and young people at a systemic level; and ○ such other functions as may be conferred on the Commissioner by or under the Act or any other Act. • Section 14(2) of the Act provides that the CCYP should consult with and engage children and young people in the performance of functions under the Act, and particularly those whose ability to make their views known is limited for some reason. **CACYP:** • The appointment of the CACYP under the Constitution Act excludes the granting of powers and functions that would usually occur if appointed under a standalone Act.[451] • The functions of the CACYP (as outlined in the CACYP's Inaugural Report) are underpinned by the articles and principles of the *United Nations Convention on the Rights of the Child* and include:[452] ○ developing culturally safe and informed strategies and promoting Aboriginal voice with regard for the safety and wellbeing of all Aboriginal children and young people; ○ promoting the wellbeing of Aboriginal children, their culture, and both their rights to Aboriginality and indigeneity (underpinned by the *United Nationals Declaration on the Rights of Indigenous People*); and ○ addressing systemic policy and practice barriers to improving outcomes for Aboriginal children and young people under 18 years of age in the areas of health and wellbeing, education, youth justice and child protection.

[451] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 8, <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[452] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 8, <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

Question	Summary response
Purpose What is the purpose and objective of the role?	**CCYP:** • The CCYP role was established in response to the *Child Protection Systems Royal Commission 2014*[453], which recommended that there be a statutory office of the CCYP and that the CCYP have the functions and powers set out in the Royal Commission Report.[454] • The Act itself does not have an express section setting out statutory objectives of the CCYP. • The inaugural position description described the CCYP's role as follows: *"[t]he commissioner promotes and advocates for the rights, interests and wellbeing of all children and young people in South Australia at a systemic level and ensures that South Australia, as a part of the Commonwealth, enacts its international obligations in respect of children and young people."*[455] • The CCYP's website includes a similar statement and further states that *"[t]he purpose of the legislation was to create a statutory officer with powers and functions to advocate at a systemic level to improve the wellbeing of children and young people in South Australia."*[456] • The CCYP's inaugural Annual Report described the purpose or role as follows: "*The [CCYP] is an independent statutory office. The Commissioner promotes and advocates for the rights, development and well-being of all children and young people in South Australia. The Commissioner is committed to advocating for children and young people's involvement in decision-making that affects them, giving particular consideration to the needs of vulnerable and at-risk children and young people."*[457] **CACYP:** • The CACYP's website states the following about the CACYP's purpose and objective: *The Commissioner is empowered to undertake a range of functions related to Aboriginal children and young people and is the only independent body created solely to promote the rights, development and wellbeing of Aboriginal children and young people within South Australia, at a systemic level – this includes developing culturally safe and informed strategies and promoting Aboriginal voice with regard for the safety and wellbeing of all Aboriginal children and young people.*

[453] Government of South Australia Attorney-General's Department, *Child Protection Systems Royal Commission* (recommendation 245), available at <https://www.agd.sa.gov.au/projects-and-consultations/projects-archive/child-protection-systems-royal-commission#:~:text=The%20Child%20Protection%20Systems%20Royal,of%20harm%2C%20abuse%20or%20neglect.>

[454] The Hon Margaret Nyland AM Commissioner, *Child Protection Systems Royal Commission Report, Volume 1: Summary and Report, August 2016* (Report, 2016) 603 <https://www.agd.sa.gov.au/sites/default/files/complete_report_child_protection_systems_royal_commission_report.pdf?acsf_files_redirect>.

[455] Department for Education and Child Development, *Commissioner for Children and Young People Candidate information, November 2016* (Webpage) <https://www.education.sa.gov.au/sites/default/files/ccyp-candidate-information.pdf?acsf_files_redirect>.

[456] Commissioner for Children & Young People, *Why have a Commissioner for Children and Young People?* (Webpage) <https://www.ccyp.com.au/about-ccyp/>.

[457] Commissioner for Children and Young People, *2016-17 Annual Report* (Report, 2017) 4 <https://www.ccyp.com.au/wp-content/uploads/2017/12/2016-2017-Annual-Report_CCYP.pdf>.

Question	Summary response
	… *The Commissioner promotes and advocates for the rights, interests and well-being of Aboriginal children and young people in South Australia in the realm of their indigeneity, and ensures that, as a part of the global community, South Australia enacts its obligations to these key covenants.*[458] • Commissioner Lawrie described her role as follows: *It is my job to advocate for change in the inequalities that impact the most vulnerable people in the Aboriginal community – Aboriginal children and young people.* *In my capacity as Commissioner, I provide agency for Aboriginal voice in promoting the safety and wellbeing of Aboriginal children and young people alongside the importance of family, community and culture. My role is to address policy and practice issues across health, education, youth justice and child protection to improve outcomes for Aboriginal children and young people.*[459]
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access	**CCYP:** • The functions of the CCYP are prescribed by the Act (see above). The CCYP has the powers of a commission, and any such powers as may be necessary or expedient for the performance of its functions.[460] • ***Reporting:*** o One of the CCYP's main functions is to prepare and publish reports on matters related to the rights, development and wellbeing of children and young people at a systemic level.[461] o The CCYP must prepare and give the Minister reports of any inquiries (including details of any recommendations made in respect of the inquiry).[462] ▪ The Minister must table such a report in both Houses of Parliament within 6 sitting days of receiving it.[463] ▪ The Minister must prepare a report setting out the Minister's response to the CCYP's report, any action taken (or proposed to be taken) and, if no action is proposed to be taken, the reasons why.[464] The Minister's report must be tabled in both Houses of Parliament within 6 sitting days of completion.[465] o The CCYP must prepare and give to the Minister annual reports on its functions during the preceding financial

[458] Commissioner for Aboriginal Children & Young People, *About Us* (Webpage) <https://cacyp.com.au/about-us/>.

[459] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report December 2019* (page 7), available at https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf

[460] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 16.

[461] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(g).

[462] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 18(1) of the Act.

[463] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 18(2).

[464] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 18(3).

[465] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 18(4).

Question	Summary response
information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	year.[466] The Minister must table the report in both Houses of Parliament within 6 sitting days.[467] ○ The CCYP may prepare and provide to any responsible Minister reports on matters related to the rights, development and wellbeing of children and young people at a systemic level.[468] That Minister must table the report in both Houses of Parliament within 6 sitting days.[469] ○ The CCYP may publish all or part of its reports once they have been laid before Parliament (and after consultation with the Minister).[470] ○ The CCYP (or the Guardian or the Committee) may make a report to Parliament on any matter related to their functions if satisfied that the matter raises issues of such importance to the safety or wellbeing of children and young people that the Parliament should be made aware of the matter as a matter of urgency.[471] ○ The CCYP (or the Guardian or the Committee) may make a report to the relevant regulatory body if they become aware of matters raising the possibility of professional misconduct or unprofessional conduct.[472] ○ The CCYP also has power to require a State authority to prepare a report, if the CCYP is of the opinion that it is necessary or would otherwise assist the CCYP in the performance of functions under the Act.[473] "State authority" is defined in such a way that it encompasses both the CCYP and the CACYP.[474] • ***Promotion of human rights:*** One of the main functions of the CCYP is to promote and advocate for the rights and interests of all children and young people in South Australia. ○ *NOTE:* References to "rights" in the Act are expressly taken to include rights set out in the *United Nations Convention on the Rights of the Child* and in any other relevant international human rights instruments.[475] • ***Review of laws:*** the CCYP does not have an express power to review legislation, however the following functions of the Commissioner could arguably be used for this purpose: ○ the function to advise, and make recommendations to, Ministers, State authorities and other bodies on matters related to the rights, development and wellbeing of children and young people at a systemic level;[476] ○ the function to assist in ensuring that the State satisfies its international obligations in respect of children and young people;[477] and

[466] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 13A(1).
[467] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 13A(2).
[468] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 19(1).
[469] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 19(2).
[470] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 20.
[471] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 44.
[472] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 41.
[473] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 60(1).
[474] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 3.
[475] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 4(1).
[476] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(c).
[477] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(e).

Question	Summary response
	○ the function to undertake or commission research into topics related to children and young people.[478] • ***Complaints handling:*** the CCYP does not have a specific complaints-handling function under the Act and, in fact, is prevented from conducting inquiries into isolated incidents.[479] However, the CCYP may conduct an inquiry into a matter of a systemic nature as a consequence of becoming aware of a matter affecting a particular child of young person.[480] Furthermore: ○ the CCYP (or the Guardian) may, on behalf of a child or young person, make a complaint in respect of an administrative act or a prescribed child protection complaint to the Ombudsman;[481] and ○ the CCYP (or the Guardian) may make a complaint to the Health and Community Services Complaints Commissioner on behalf of a child or young person, or a class of children or young people, in respect of a ground referred to in the *Health and Community Services Complaints Act 2004* (SA)[482].[483] • ***Inquiries:*** the CCYP has own-motion powers to conduct inquiries into: [484] ○ the policies, practices and procedures of a State authority or authorities as they relate to the rights, development and wellbeing of children and young people generally, or a particular group of children and young people; or ○ any other matter declared by the regulations, provided that the CCYP suspects that: ○ the matter raises an issue of particular significance to children and young people; ○ the matter is of a systemic nature, rather than being limited to an isolated incident; and ○ it is in the public interest to conduct the inquiry. The CCYP also has the power to give notice requiring a specified person to provide such information or documents as are required. A person who fails to comply with such notice is guilty of an offence (maximum penalty $10,000).[485] • ***Regard to human rights instruments:*** In performing its functions of exercising its powers, the CCYP must protect, respect and seek to give effect to the rights set out in the in the *United Nations Convention on the Rights of the Child* and in any other relevant international human rights instruments.[486] **CAYCP:**

[478] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(f).

[479] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15(2)(b).

[480] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15(3)(b).

[481] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 42.

[482] Available at <https://www.legislation.sa.gov.au/LZ/C/A/HEALTH%20AND%20COMMUNITY%20SERVICES%20COMPLAINTS%20ACT%202004.aspx>.

[483] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 43.

[484] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15.

[485] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 61.

[486] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 5.

Question	Summary response
	• In the absence of any enshrining legislation, the CACYP's powers are unclear. • The CACYP does not expressly possess equivalent powers to the CCYP, particularly in respect to initiating investigations and compulsory powers for the provision of documents / information. • The CACYP's website refers to the CACYP being guided by the *United Nations Convention on the Rights of the Child* and the *United Nationals Declaration on the Rights of Indigenous People*.[487]
Budget What is the annual budget for the role?	• Both the CCYP and the CACYP are funded by the Government of South Australia through the Department for Education. • The financial operations of the CCYP & CACYP are consolidated into and audited through the Department for Education and therefore the CCYP does not provide full financial reports as part of its annual reports.[488] • In the 2018-19 reporting period, the Department for Education reported that in 2019 it received $5,580,000 from the SA Government for "Advocacy bodies"[489] (which consists of the CCYP, the CACYP and the Guardian).[490] The Department reports that, after income and expenses, left the "Advocacy bodies" with a net result of $911,000.[491] **CCYP:** • The Act provides that the Minister must provide the CCYP with the staff and other resources that the CCYP reasonably needs for carrying out the CCYP's functions.[492] • In its first year, the CCYP role had a budget of $843,000 for salaries and wages plus goods and services.[493] The position description for the inaugural CCYP role provided that the salary range for the CCYP (an SAES Level 2 role) was $211,810 - $353,017.[494] • The CCYP's most recent Annual Report (2018-19) recorded total expenditure for the CCYP as $1,818,000.[495] **CACYP:** • The CCYP's most recent Annual Report (2018-19) recorded total expenditure for the CACYP as $209,000.[496]

[487] Commissioner for Aboriginal Children & Young People, *About Us* (Webpage) <https://cacyp.com.au/about-us/>.

[488] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 76 available at <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>

[489] Department for Education, *2019 Annual Report* (Report, 2019) 7 <https://www.education.sa.gov.au/sites/default/files/education-annual-report-2019.pdf>.

[490] Department for Education, *2019 Annual Report* (Report, 2019) 10 <https://www.education.sa.gov.au/sites/default/files/education-annual-report-2019.pdf>.

[491] Department for Education, *2019 Annual Report* (Report, 2019) 7 <https://www.education.sa.gov.au/sites/default/files/education-annual-report-2019.pdf>.

[492] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 11.

[493] Commissioner for Children and Young People, *2016-17 Annual Report* (Report, 2017) 7 <https://www.ccyp.com.au/wp-content/uploads/2017/12/2016-2017-Annual-Report_CCYP.pdf>.

[494] Department for Education and Child Development, *Commissioner for Children and Young People Candidate information,* (*November 2016*) 2 <https://www.education.sa.gov.au/sites/default/files/ccyp-candidate-information.pdf?acsf_files_redirect>.

[495] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 76 < https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[496] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 77 < https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

Question	Summary response
	• When comparing the respective expenditures of the CCYP and the CACYP, it is important to note that the CACYP role commenced in December 2018 and accordingly the expenditure for the CACYP recorded is likely to be lower than for a full year. The 2019-20 report (due by 31 October 2020) will likely provide a more accurate comparison of the expenditures of each Commission.
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	• **CCYP:** The role was established by s 7 of the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA). • **CACYP:** The role was established under the *Constitution Act 1934* (SA), pursuant to section 68.
Most recent annual report or equivalent document (link)	• **CCYP:** Annual Report 2018/2019 • **CACYP:** Inaugural Report December 2019

B. The Commissioner for Aboriginal Children and Young People and The Commissioner for Children and Young People in South Australia: Further analysis

1 Essential requirements of the Paris Principles

Note: As a general and introductory statement, the following sections concentrate primarily on the CCYP. The CACYP, having been established under the *Constitution Act 1934* (SA), as opposed to being legislated for within the Act, is more challenging to analyse as many of the available comparators are less readily apparent or available.

1.1 The establishment of NHRIs[497]

Summary: in respect of the CCYP, the Act partially complies with the Paris Principles on the establishment of NHRIs. The CACYP does not comply with the Paris Principles on the establishment of NHRIs.

Entrenched in law[498]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[499]

The Act sets out the CCYP's mandate and powers,[500] including the CCYP's lines of accountability and independence.[501] However, the Act does not comprehensively set out the terms and conditions of office, and states that the CCYP holds office on the terms and conditions determined by the Governor.[502]

As is noted at the outset of this section, despite having been established pursuant to the Constitution Act, the CACYP's mandate is not enshrined in that Act, or in a standalone Act.

As a result of the powers and functions of the CCYP being contained within the Act, any modifications to those power and functions require the approval of Parliament. The same cannot be said for the functions of the CACYP.

[497] See especially GANHRI General Observation, G.O. 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[498] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[499] GANHRI General Observations, G.O. 1.1.

[500] See especially *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14.

[501] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 7(2), 8.

[502] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(1).

Mandate and powers[503]

The Act broadly sets out the functions of the CCYP,[504] including:

- to promote and advocate for the rights and interests of all children and young people in South Australia;
- to promote the participation by children and young people in the making of decisions that affect their lives;
- to advise, and make recommendations to, Ministers, State authorities and other bodies (including non-Government bodies) on matters related to the rights, development and wellbeing of children and young people at a systemic level;
- to inquire into matters related to the rights, development and wellbeing of children and young people at a systemic level (whether a Governmental system or otherwise);
- to assist in ensuring that the State, as part of the Commonwealth, satisfies its international obligations in respect of children and young people;
- to undertake or commission research into topics related to children and young people;
- to prepare and publish reports on matters related to the rights, development and wellbeing of children and young people at a systemic level; and
- such other functions as may be conferred on the Commissioner by or under the Act or any other Act.

Section 14(2) of the Act provides that the CCYP should consult with and engage children and young people in the performance of functions under the Act, and particularly those whose ability to make their views known is limited for some reason.

The appointment of the CACYP under the Constitution Act excludes the granting of powers and functions that would usually occur if appointed under a standalone Act.[505] However, the CACYP's inaugural report provides that the CACYP's functions include:[506]

- developing culturally safe and informed strategies and promoting Aboriginal voice with regard for the safety and wellbeing of all Aboriginal children and young people;
- promoting the wellbeing of Aboriginal children, their culture, and both their rights to Aboriginality and indigeneity (underpinned by the *United Nationals Declaration on the Rights of Indigenous People*)*;* and
- addressing systemic policy and practice barriers to improving outcomes for Aboriginal children and young people under 18 years of age in the areas of health and wellbeing, education, youth justice and child protection.

Appointment mechanisms[507]

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[503] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[504] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14.

[505] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 8 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[506] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 8 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[507] See GANHRI General Observations, G.O. 1.1.

The Act provides that the CCYP is appointed by the Governor, provided that the Statutory Officers Committee[508] has approved the proposed appointment after receiving a referral from the Minister.[509]

The Act does not contain any fixed experience or qualification requirements for the CCYP role, which might suggest that the appointment mechanisms for the CCYP are not sufficiently transparent. However, the Act provides that the Governor may establish a scheme for the recruitment of the CCYP (by regulation) and the recruitment of the Commissioner must comply with that scheme.[510]

The *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA)[511] came into operation in 2017 and regulation 6(1) of the provides for a scheme of recruitment for the CCYP (which is set out in detail at Item 1.8 below). However, the regulation does not provide any further information as to the qualifications of experience required, and there is no requirement for the CCYP to be an Aboriginal or Torres Strait Islander person.

The current CCYP was selected through a process involving children and young people.[512]

In respect of the CACYP position, the recruitment process, and the qualifications and experience required for the role and, are not transparent. Those requirements are likely to be set out in the position description at the time of recruitment and, given the absence of a governing statute, are likely to change from time to time. The current CACYP, April Lawrie, is an Aboriginal woman who heralds from the Mirning and Kokatha peoples in South Australia.

Quasi-judicial competency (complaints-handling)[513]

The CCYP does not have a specific complaints-handling function under the Act and, in fact, is prevented from conducting inquiries into isolated incidents.[514] However, the CCYP *may* conduct an inquiry into a matter of a systemic nature as a consequence of becoming aware of a matter affecting a particular child of young person.[515]

Therefore, the CCYP has quasi-judicial competence in the broad sense, as it has the power to hold inquiries (with the powers of a Royal Commission[516]), gather information compulsorily[517] and publish reports, including the ability to table the report directly with Parliament in certain circumstances.[518] Furthermore:

- the CCYP (or the Guardian) may, on behalf of a child or young person, make a complaint in respect of an administrative act or a prescribed child protection complaint to the Ombudsman;[519] and

- the CCYP (or the Guardian) may make a complaint to the Health and Community Services Complaints Commissioner on behalf of a child or young person, or a class of

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[508] Parliament South Australia, *Statutory Officers Committee,* available at https://www.parliament.sa.gov.au/en/Committees/Committees-Detail

[509] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 8(1), (4).

[510] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(3).

[511] Available at <https://www.legislation.sa.gov.au/LZ/C/R/Children%20and%20Young%20People%20(Oversight%20and%20Advocacy%20Bodies)%20Regulations%202017.aspx>.

[512] Commissioner for Children and Young People, *2016-17 Annual Report* (Report, 2017) 5 <https://www.ccyp.com.au/wp-content/uploads/2017/12/2016-2017-Annual-Report_CCYP.pdf>.

[513] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[514] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15(2)(b).

[515] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15(3)(b).

[516] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 16.

[517] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 61.

[518] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 44.

[519] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 42.

children or young people, in respect of a ground referred to in the *Health and Community Services Complaints Act 2004* (SA).[520]

The CCYP's 2018-19 Annual Report indicates that the CCYP received and responded to a total of 34 enquiries into matters concerning potential rights protection issues and the nature of the enquiries included filing complaints about government and non-government community bodies and organisations in contact with young people.[521]

With regards to the CACYP's powers, the CACYP's Inaugural Report indicated that the Commissioner *"[a]ddressed 15 individual advocacy cases involving children's matters in either regional or metropolitan Adelaide, South Australia*".[522] Therefore, while the CACYP does not have a statutory mandate to deal with complaints, this evidence of the work of the CACYP in the first year of operation indicates that the role has been considered to encompass individual advocacy.

1.2 Human rights mandate[523]

Summary: the Act is largely compliant with the Paris Principles in respect of the CCYP's human rights mandate. The CACYP is largely not compliant with the Paris Principles in respect of its human rights mandate (as a result of being established without a governing statute).

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[524] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[525]

Competence and responsibilities[526]

Both the CCYP and CACYP are vested with the competence to promote and protect human rights. The Act requires each State authority, in carrying out its functions or exercising its powers, to protect, respect and seek to give effect to the rights set out from time to time in the *United Nations Convention on the Rights of the Child* and in any other relevant international human rights instruments affecting children and young people.[527] State authorities are defined in such a way that encompasses both the CCYP and the CACYP.[528] In this regard, both the CCYP and CACYP are obliged to promote and protect human rights through the Act. However, only the CCYP has a legislative mandate with specific statutory functions to promote and protect human rights.

Powers of investigation and inquiry

In addition to the functions set out in the sections above, the CCYP has own-motion powers to conduct inquiries into: [529]

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[520] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 43.

[521] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 56, available at <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[522] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[523] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

[524] GAHNRI General Observations, G.O. 1.2.

[525] GAHNRI General Observations, G.O. 1.2.

[526] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 2.6.

[527] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 5.

[528] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 3.

[529] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15.

- the policies, practices and procedures of a State authority or authorities as they relate to the rights, development and wellbeing of children and young people generally, or a particular group of children and young people; or
- any other matter declared by the regulations.

However, there are some limitations on the scope of the inquiry powers afforded to the CCYP. The CCYP may only conduct inquiries if the CCYP suspects that:[530]

- the matter raises an issue of particular significance to children and young people;
- the matter is of a systemic nature, rather than being limited to an isolated incident; and
- it is in the public interest to conduct the inquiry.

The CCYP (or Guardian) also has the power to give written notice requiring a specified person to provide such information or documents as are reasonably required for the performance of their functions under the Act.[531] The person does not have to be a State authority or an employee or officer of a State employee. A person who fails to comply with such notice is guilty of an offence under the Act (maximum penalty $10,000).[532] This compulsory information gathering power is limited to the production of documents or provision of information (i.e. does not extend to the ability to inspect premises).[533]

In addition, the CCYP is empowered to provide an immediate report to Parliament on any matter related to the CCYP's functions under the Act if satisfied the matter is of significant importance to the safety or wellbeing of children and young people.[534]

The CACYP, despite the absence of statutory mandate, nevertheless appears to achieve a number of the 'promotion' of human rights aspects, such as education, training, advising, public outreach and advocacy.[535] One of the functions set out in the CACYP's inaugural report is the promotion of the wellbeing of Aboriginal children, their culture, and both their rights to Aboriginality and indigeneity (underpinned by the *United Nationals Declaration on the Rights of Indigenous People*).[536]

It is the 'protection' of human rights function that appears most compromised by the absence of statutory mandate for the CACYP – functions and powers for monitoring, inquiring, investigating and reporting on human rights violations.[537] While one of the functions set out in the CACYP's report entails addressing systemic policy and practice barriers to improving outcomes for Aboriginal children and young people,[538] the CACYP has recently called on the SA Government

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[530] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15(2).

[531] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 61.

[532] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 61(3).

[533] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 61.

[534] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 44.

[535] GAHNRI General Observations, G.O. 1.2.; Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 available at <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[536] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 8 available at <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[537] GAHNRI General Observations, G.O. 1.2.

[538] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 8 available at <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

to give her powers, noting that without defined legislated powers she is unable to conduct inquiries or formal investigations into issues brought to her office's attention.[539]

Without investigative powers, the CACYP is not able to rely on the co-operation from agencies when seeking information about matters, especially where there is suspicion human rights abuses may be occurring in child protection, youth justice, education or health. This is compounded by a lack of adequate resources to undertake the role, as well as a lack of any requirement for the Guardian or CCYP to refer matters to the CACYP.

The CCYP has undertaken a number of projects that have resulted in reports being provided to Parliament. =An example is the CCYP's Bullying Project, which was developed as a result of a Listening Tour with children and young people conducted by the CCYP in 2017.[540] One of the top five priorities for the CCYP role based on responses provided by the children and young people consulted in the Listening Tour was for the CCYP to "help stop bullying".[541] In response, Commissioner Helen Connolly established the "Bullying Project" to understand the nature of the issue – in the Commissioner's words "I wanted to be clear about what 'it' is they wanted me to stop".[542] The Bullying Project Report details recommendations from children and young people based on the CCYP's consultations,[543] findings that the CCYP thought have policy implications for the development of an anti-bullying strategy for SA,[544] and includes an Appendix comprising research on the jurisdictional legal responses to bullying in other countries, including a summary of the laws that cover bullying conduct in SA and the Commonwealth.[545] The Bullying Project Report was presented to the South Australian Parliament. Following the release of the Report, the CCYP has continued the work to reduce bullying and in 2020 is undertaking a comprehensive consultation across sporting codes to develop child-designed bullying prevention initiatives to build respectful and inclusive sporting events.[546]

No examples of investigations or inquiries were identified for the CACYP since its commencement, given the structure of the establishment of the role through the Constitution Act and lack of any statutory role or power to investigate or inquire into matters.

The CACYP's Inaugural Report details the work done by the CACYP in the 'Be Seen. Be Heard. Flourish.' community engagement process, which occurred between April and October 2019. The initiative involved "Youth Forums" and "Community Conversation Forums".[547] The 'Be Seen. Be Heard. Flourish.' initiative involved Commissioner April Lawrie speaking with Aboriginal children and young people and the community in relation to 'Aboriginal South Australian children and young people's wellbeing and their right to grow up safe and secure in culturally informed

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[539] InDaily (Stephanie Richards), *Give me the power to investigate, commissioner tells Govt,* available at <https://indaily.com.au/news/2019/11/15/give-me-power-to-investigate-commissioner-tells-govt/>.

[540] Commissioner for Children and Young People, *The Bullying Project, What South Australian children and young people have told us about bullying* (Report, 2018) 5 <*https://www.ccyp.com.au/wp-content/uploads/2018/11/Bullying-Project-Printable.pdf*>.

[541] Commissioner for Children and Young People, *The Bullying Project, What South Australian children and young people have told us about bullying* (Report, 2018) 5 <*https://www.ccyp.com.au/wp-content/uploads/2018/11/Bullying-Project-Printable.pdf*>.

[542] Commissioner for Children and Young People, *The Bullying Project, What South Australian children and young people have told us about bullying* (Report, 2018) 5 <*https://www.ccyp.com.au/wp-content/uploads/2018/11/Bullying-Project-Printable.pdf*>.

[543] Commissioner for Children and Young People, *The Bullying Project, What South Australian children and young people have told us about bullying* (Report, 2018) 10 <*https://www.ccyp.com.au/wp-content/uploads/2018/11/Bullying-Project-Printable.pdf*>.

[544] Commissioner for Children and Young People, *The Bullying Project, What South Australian children and young people have told us about bullying* (Report, 2018) 9 <*https://www.ccyp.com.au/wp-content/uploads/2018/11/Bullying-Project-Printable.pdf*>.

[545] Commissioner for Children and Young People, *The Bullying Project, What South Australian children and young people have told us about bullying* (Report, 2018) 52 <*https://www.ccyp.com.au/wp-content/uploads/2018/11/Bullying-Project-Printable.pdf*>.

[546] Commissioner for Children and Young People, *The Bullying Project,* available at https://www.ccyp.com.au/bullying-consultations/.

[547] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 16, 26 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

ways'.[548] The Inaugural Report described the initiative as "the first of its kind".[549] Over 430 Aboriginal children and young people were involved in the Youth Forums and 362 Aboriginal people were involved in Community Conversation Forums.[550]

Functional immunity[551]

The Act grants the CCYP, and some of those involved in the CCYP's functions, with express protections, privileges and immunities.[552] For example:

- no liability attaches to the CCYP (or the Guardian, a member of the Committee, a member of the Council or any other person) for any act or omission done in good faith in the exercise, or purported exercise, of powers or functions under the Act or any other act;[553]
- in conducting an inquiry under the Act,[554] the CCYP has the same protection, privileges and immunities as a Judge of the Supreme Court;[555]
- a person who provides information or a document to an inquiry has the same protection, privileges and immunities as a witness in proceedings before the Supreme Court;[556]
- a legal practitioner who represents a person in connection with an inquiry has the same protection, privileges, immunities and obligations as counsel involved in Supreme Court proceedings.[557]

These are important procedural immunities and, in being consistent with the standard for Supreme Court proceedings, accord with traditional procedural considerations.

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Act is partially compliant with the Paris Principles in regard to encouraging ratification or accession to international human rights instruments. The CACYP is largely not compliant with the Paris Principles in respect of encouraging ratification or accession to international human rights instruments.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[558] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[559]

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[548] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 10 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[549] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 11 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[550] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 12 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[551] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1, 2.3.

[552] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 68.

[553] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 68(1).

[554] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 15.

[555] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 68(5).

[556] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 68(6).

[557] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 68(7).

[558] GANHRI General Observations, G. O. 1.3.

[559] GANHRI General Observations, G. O. 1.3.

The Act defines a reference to the "rights" of children and young people as including a reference to rights recognised in accordance with statutory and common law, rights as set out in the *United Nations Convention on the Rights of the Child* and rights set out in any other relevant international human rights instruments.[560] This broad definition of rights is in accordance with the comments in the General Observations about the need to promote a progressive definition of human rights.[561]

There is no express obligation in the Act to encourage ratification of or accession to international human rights instruments. However, the CCYP is empowered to:

- to promote and advocate for the rights and interests of all children and young people in South Australia;[562]
- to advise, and make recommendations to, Ministers, State authorities and other bodies (including non-Government bodies) on matters related to the rights, development and wellbeing of children and young people at a systemic level;[563]
- to assist in ensuring that the State, as part of the Commonwealth, satisfies its international obligations in respect of children and young people;[564] and
- to prepare and publish reports on matters related to the rights, development and wellbeing of children and young people at a systemic level.[565]

Arguably, these functions could be used to promote discussion about any laws, policies, practices and services that are inconsistent with the requirements of international human rights standards, particularly in relation to the rights, development and wellbeing of children and young people at a systemic level.

The CCYP has a limited history of consulting on the implementation of human rights instruments in Australia and of invoking international human rights instruments in its submissions and letters. For instance, in February 2020, the CCYP invoked articles of the *United Nations Convention on the Rights of the Child* and *UN General Comment No. 24* in its submissions to the SA Attorney Generals Department with regard to raising the age of criminal responsibility.[566]

In contrast, there is little evidence of the CACYP consulting on the implementation of human rights instruments in Australia and of invoking international human rights instruments in its submissions and letters. This could in part be due to the fact that the CACYP role has not been established for long but this is largely due to the lack of legislated mandate for the CACYP.

One of the key messages raised by Aboriginal children and young people who attended the CACYP's forums in its first year of operation was that they felt the distinct rights afforded to them by the *United Nations Convention on the Rights of the Child* and *United Nations Declaration on the Rights of Indigenous Peoples* are under threat.[567]

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[560] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 4(1).

[561] GAHNRI General Observations, G.O. 1.2.

[562] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(a).

[563] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(c).

[564] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(e).

[565] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(g).

[566] Commissioner for Children and Young People, Submission to the SA Attorney Generals Department, *Raising the Age of Criminal Responsibility* (25 February 2020) <https://www.ccyp.com.au/wp-content/uploads/2020/06/20-02-25-Submission-on-Raising-the-Age-of-Criminal-Responsibility.pdf>.

[567] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 11 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

1.4 Interaction with the international human rights system

Summary: the CCYP is largely compliant with the Paris Principles with respect to interaction with the international human rights system, the CACYP is partially compliant with those same principles.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[568] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[569]

One of the express functions of the CCYP is to assist in ensuring that the State satisfies its international obligations in respect of children and young people.[570] Furthermore, the most recent Reports of both the CCYP and the CACYP make it clear that the work and functions of those bodies is underpinned by the *United Nations Convention on the Rights of the Child* and,[571] in the case of the CACYP, the *United Nations Declaration on the Rights of Indigenous Peoples*.[572]

There are some examples of the CACYP and CCYP interacting with the international human rights system in practice. In addition to the example listed at Item 1.3 above, these include:

- in August 2018, the CACYP authored and co-presented a paper at the 5th International Indigenous Voices in Social Work Practice Conference in Taiwan;[573]
- in the 2018-19 reporting year, the CCYP increased awareness of the *United Nations Convention on the Rights of the Child* and the work of the South Australian Commissioner for Children and Young People through 6 formal presentations to key adult stakeholders;[574]
- in May 2019, the CCYP released a comment to the United Nations Committee on the Rights of the Child in regard to children's rights in relation to the digital environment;[575] and
- in June 2019, the CCYP partnered with UN Youth SA to deliver The Poverty Summit, which workshopped ideas on how poverty could be alleviated, if not eradicated, in South Australia by 2030 in line with the *United Nations Sustainable Development Goal 2030*.[576]

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[568] GAHNRI General Observations, G.O. 1.4.

[569] GAHNRI General Observations, G.O. 1.4.

[570] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(e).

[571] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 11 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[572] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 8 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[573] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[574] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 11 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[575] Commissioner for Children and Young People, *Comment on Concept Note for a General Comment on children's rights in relation to the digital environment by the UN Committee on the Rights of the Child* <https://www.ccyp.com.au/wp-content/uploads/2019/08/2019-05-15-Comment-on-Concept-Note-for-a-General-Comment-on-childrens-rights-in-relation-to-the-digital-environment-A5302414-1.pdf>.

[576] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 65 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

1.5 Cooperation with other human rights bodies

Summary: in practice, both the CCYP & CACYP largely comply with the Paris Principles on the cooperation with other human rights bodies.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[577] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[578]

While the Act does not expressly mandate cooperation with other entities, in practice, the CCYP maintains consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships.[579] For example:

- the CCYP interacts with the other human rights bodies set out within the Act, being the Guardian, the Committee and the Council;
- the CCYP has partnered with the YMCA's Youth Parliament Program to build a platform for young people who are interested in advocacy and policy creation, known as the Policy Advocates program;[580]
- the CCYP is partnering with three youth focused organisations to develop a peer based participation research approach;[581]
- the CCYP has co-authored joint reports. For example, in 2018, the CCYP co-authored the *Leading for our Future: Youth Symposium Report* with the Australian Migrant Resource Centre;[582] and
- in June 2019, the CCYP partnered with UN Youth SA to deliver The Poverty Summit (see more at Item 1.4 above).[583]

Despite the lack of statutory mandate, the CACYP engages with the Aboriginal Children's Commissioners from other States and Territories. Between December 2018 and December 2019:

- the CACYP, with the Victorian Commissioner for Aboriginal Children and Young People, met with the Federal Aboriginal Affairs Minister in relation to the call for a national Aboriginal and Torres Strait Islander Children's Commissioner;[584] and
- the CACYP coordinated the first meeting of the three Aboriginal Children's Commissioners in Australia (SA, Victoria and Queensland).[585]

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[577] GAHNRI General Observations, G.O. 1.5.

[578] GAHNRI General Observations, G.O. 1.5.

[579] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[580] Commissioner for Children & Young People, *Policy Advocates* (Webpage) <https://www.ccyp.com.au/policy-advocates/>.

[581] Commissioner for Children & Young People, *Citizen Researchers* (Webpage) <https://www.ccyp.com.au/citizen-researchers/>.

[582] Australian Migrant Resource Centre and Commissioner for Children and Young People SA, *Leading for our Future: Youth Symposium Report* (Report, October 2018) <https://www.ccyp.com.au/wp-content/uploads/2019/02/AMRC-and-Commissioner-for-Children-and-Young-People-SA-Youth-Symposium-Report-Final-PDF.pdf>.

[583] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 65, available at https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf

[584] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[585] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

The CACYP also engaged with other bodies, such as SNAICC, by partnering or participating in events. In September 2019, the CACYP facilitated an Aboriginal youth panel at the SNAICC Conference in Adelaide.[586]

Both the CCYP and CACYP attend meetings of the Australian and New Zealand Children's Commissioners and Guardians (**ANZCCG**) and the CCYP has participated in ANZCCG Joint papers.[587] The CACYP Inaugural Report indicated that the CACYP had attended three ANZCCG Forums in the reporting period (December 2018 – December 2019).[588]

1.6 Recommendations by NHRIs

Summary: the Act largely complies with the Paris Principles on recommendations by NHRIs. In the absence of a statutory mandate, the CACYP is largely not compliant with those same Paris Principles (although shows some compliance in practice).

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[589] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[590] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[591]

The CCYP has specified functions to:

- advise, and make recommendation to, Ministers, State authorities and other bodies (including non-Government bodies) on matters related to the rights, development and wellbeing of children and young people at a systemic level; [592] and
- to prepare and publish reports on matters related to the rights, development and wellbeing of children and young people at a systemic level.[593]

Upon completion of an inquiry under the Act, the CCYP may, by notice in writing, recommend to a State authority that it take particular action.[594] The responsible authority for that State authority must then provide the CCYP with a report setting out whether the State authority proposes to implement the recommendation, and how, or setting out an explanation as to why the recommendation is not to be implemented.[595] If the CCYP is of the opinion that the State authority has failed or refused to implement a recommendation, the CCYP may require the State authority to provide a report on the reasons for such failure or refusal.[596]

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[586] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[587] See, eg, Australian and New Zealand Children's Commissioners and Guardians, *Communique 11-12 November 2019*, available at <https://ccyp.vic.gov.au/assets/Uploads/FINAL-Communique-ANZCCG-November-2019.pdf>; Australian and New Zealand Children's Commissioners and Guardians, *2018 ACCG Joint Participation Paper* (Paper, 2018) <https://www.ccyp.com.au/wp-content/uploads/2018/07/Final-ACCG-Joint-Participation-Paper-2018.pdf>.

[588] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[589] GAHNRI General Observations, G.O. 1.6.

[590] GAHNRI General Observations, G.O. 1.6.

[591] GAHNRI General Observations, G.O. 1.6.

[592] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(c).

[593] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 14(1)(g).

[594] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 17(1).

[595] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 17(2).

[596] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 17(3).

The CCYP must also prepare and give the Minister reports of any inquiries (including details of any recommendations made in respect of the inquiry).[597] The Minister must table such report in both Houses of Parliament within 6 sitting days of receiving it.[598] Furthermore, the Minister must prepare a report setting out the Minister's response to the CCYP's report, any action taken (or proposed to be taken) and, if no action is proposed to be taken, the reasons why.[599] The Minister's report must be tabled in both Houses of Parliament within 6 sitting days of completion.[600]

The CCYP also has additional reporting powers, such as:

- the CCYP *may* prepare and provide to any responsible Minister reports on matters related to the rights, development and wellbeing of children and young people at a systemic level.[601] That Minister *must* table the report in both Houses of Parliament within 6 sitting days;[602] and

- the CCYP (or the Guardian or the Committee) *may* make a report to Parliament on any matter related to their functions if satisfied that the matter raises issues of such importance to the safety or wellbeing of children and young people that the Parliament should be made aware of the matter as a matter of urgency.[603]

The CCYP may publish all or part of its reports once they have been laid before Parliament (and after consultation with the Minister).[604] The CCYP regularly publishes its reports on its website.[605] These powers and functions give the CCYP a broad mandate and sufficient mechanisms for effecting change and drawing attention to inadequate implementation of recommendations.

The CACYP does not have equivalent powers in the absence of a governing statute. However, the CACYP does have space on its website to publish any reports,[606] and the CACYP's inaugural report set out three recommendations.[607]

1.7 Ensuring pluralism of the NHRI[608]

Summary: the Act and the CCYP partially comply with the Paris Principles with respect to ensuring pluralism of the NHRI. In the absence of enshrining legislation, the CACYP largely does not comply with those same Paris Principles.

A key aspect of the Paris Principles is the requirement for an NHRI to be a diverse decision-making body, composed of a broad representation of national society.[609] This enhances an NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[610]

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[597] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 18(1).

[598] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 18(2).

[599] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 18(3).

[600] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 18(4).

[601] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 19(1).

[602] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 19(2).

[603] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 44.

[604] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 20.

[605] Commissioner for Children & Young People, *CCYP Reports* (Webpage) <https://www.ccyp.com.au/ccyp-reports/>.

[606] Commissioner for Aboriginal Children & Young People, *Our Reports* (Webpage) <https://cacyp.com.au/our-reports/>.

[607] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[608] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[609] GANHRI General Observations, G.O. 1.7.

[610] GANHRI General Observations, G.O. 1.7.

Where the NHRI is a single-member body, such as the CCYP or CACYP, it is important that the NHRI is representative of diverse segments of society.[611] However, there are no clear requirements for the CCYP's role under the Act. The Act instead provides that the Governor may establish a scheme for the recruitment of the CCYP (by regulation) and the recruitment of the Commissioner must comply with that scheme.[612]

As is set out at Item 1.1 above, the *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA)[613] came into operation in 2017. The regulation does not provide any further information as to the qualifications of experience required, and there is no requirement for the CCYP to be an Aboriginal or Torres Strait Islander person, however the scheme does enable children and young people to be involved in the recruitment and selection process:[614]

- the Minister must appoint a selection panel of up to 5 persons (of whom 2 must be young people) to propose the appointment of an applicant to the position of Commissioner; and

- the interview process for the position of Commissioner must include (but need not be limited to) an exercise designed to assess the applicant's ability to engage, communicate and interact with children and young people, conducted in accordance with any requirements determined by the Minister.

The current CCYP was selected through a process involving children and young people.[615]

The CCYP's "Front & Centre" strategic agenda for 2018-2022 includes the following aspects relevant to ensuring the pluralism of the CCYP:

- a key objective of the CCYP to "*champion children and young people's rights and work with the broader community to respect and support their inclusion in laws, policies and decision making*";[616] and

- a priority of the CCYP is to "*Promote equality, equal access, equal rights, equal treatment and acceptance for people from diverse race, gender, sexual, religious and socio-economic backgrounds*".[617]

Similarly, the CCYP's Annual Report refers to a variety of activities involving diversity of participants in the activities conducted by the CCYP. Commissioner Connolly's letter to the Minister within the Report states that the Commissioner's engagement with children and young people involved more than 2,783 children and young people in the past twelve months.[618] Commissioner Connolly noted that the figure "*represents children and young people from diverse backgrounds and ethnicities, age-groups and interests*."[619]

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[611] GANHRI General Observations, G.O. 1.7.

[612] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(3).

[613] Available at <https://www.legislation.sa.gov.au/LZ/C/R/Children%20and%20Young%20People%20(Oversight%20and%20Advocacy%20Bodies)%20Regulations%202017.aspx>.

[614] *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) reg 6.1.

[615] Commissioner for Children and Young People, *2016-17 Annual Report* (Report, 2017) 5 <https://www.ccyp.com.au/wp-content/uploads/2017/12/2016-2017-Annual-Report_CCYP.pdf>.

[616] Commissioner for Children & Young People, *Front & Centre CCYP Strategic Plan (2018-2022)* (Report, 2018) 10 <https://www.ccyp.com.au/strategic-agenda/>.

[617] Commissioner for Children & Young People, *Front & Centre CCYP Strategic Plan (2018-2022)* (Report, 2018) 7 <https://www.ccyp.com.au/strategic-agenda/>.

[618] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 3 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[619] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 3 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

The current CACYP, April Lawrie, is an Aboriginal woman who heralds from the Mirning and Kokatha peoples in South Australia,[620] however there is no legislated requirement for the CACYP to be of Aboriginal or Torres Strait Islander descent.

The CACYP's inaugural report highlights the efforts made by Commissioner Lawrie to reach a broad range of Aboriginal and Torres Strait Islander peoples from a variety of communities in South Australia and in a variety of ways (for example, through family consultations and school-based consultations).[621]

Staff of the CCYP / CACYP

The Paris Principles also require NHRIs to be legislatively empowered to determine its own staffing structure, in a way which allows it to best fulfil its mandate. Staff should be recruited in a transparent and fair selection manner to ensure pluralism and diverse composition.[622]

The Act provides that the CCYP may engage employees on terms and conditions employed by the CCYP and, although the employees are not public service employees, they will be taken to be so for the purposes of the *Public Sector (Honesty and Accountability) Act 1995* (SA)[623].[624] The CCYP may also make an agreement with the Minister responsible for an administrative public service unit to use the staff of that unit.[625]

The position on ensuring pluralism within the CCYP as an organisation itself is less clear. The Annual Report sets out an organisational chart of the agency, indicating there are seven 1 FTE staff (including the CCYP) and four less than 1 FTE staff (ranging from 0.4 – 0.9 FTE).[626]

The recruitment process for the CACYP's staff and diversity of that staff is not transparent.

Full-time members[627]

The CCYP is to be appointed by the Governor on conditions, and for a term (not exceeding 7 years), determined by the Governor and specified in the instrument of appointment.[628] The CCYP is eligible for re-appointment, but cannot hold office for a term of more than 10 years in total.[629] The Act does not expressly require the Commissioner to be appointed on a full-time basis. The Act therefore does not comprehensively set out the terms and conditions of office.

In contrast, the current CACYP was appointed for a three-year period.[630] The Gazette announcement of Commissioner Lawrie's appointment did not specify whether she would be eligible for reappointment, nor any specified terms of office.

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[620] Commissioner for Aboriginal Children & Young People, *About Us* (Webpage) <https://cacyp.com.au/about-us/>.

[621] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[622] GAHNRI General Observations, G.O. 2.4.

[623] Available at <https://www.legislation.sa.gov.au/LZ/C/A/Public%20Sector%20(Honesty%20and%20Accountability)%20Act%201995.aspx>.

[624] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 12.

[625] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 11, 13.

[626] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 74.

[627] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

[628] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(1)

[629] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(2).

[630] South Australian Government, *The South Australian Government Gazette No 62,* (Report, 18 October 2018) 3810 <https://governmentgazette.sa.gov.au/sites/default/files/public/documents/gazette/2018/October/2018_062.pdf>.

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: the CCYP largely complies with the Paris Principles with respect to the selection and appointment of the decision-making body of NHRIs. In the absence of enshrining legislation, the CACYP largely does not comply with those same Paris Principles.

The GANHRI Observations emphasise the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that position is filled by an applicant who has undergone a fair and merit-based selection process.[631]

The Act provides for several decision-making bodies: the CCYP, the Guardian, the Council and the Committee. This section concentrates on the CCYP role in light of the scope of this report, however we note that the recruitment processes set out in the Act for the other advisory roles is sparse and are largely at the discretion of the Governor or Minister.[632]

As summarised in the preceding Items, there is a formal recruitment scheme set out within the regulations to the Act.[633] Regulation 6(1) of the *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) sets out the following:

- the Minister must make arrangements for the involvement of children and young people in the recruitment and selection process (including by allocating sufficient resources for that purpose);
- the Minister must appoint a selection panel of up to 5 persons (of whom 2 must be young people) to propose the appointment of an applicant to the position of Commissioner;
- the interview process for the position of Commissioner must include (but need not be limited to) an exercise designed to assess the applicant's ability to engage, communicate and interact with children and young people, conducted in accordance with any requirements determined by the Minister;
- the selection panel may propose to the Minister that a specified applicant be appointed as the Commissioner (and the Minister must refer that applicant to the Statutory Officers Committee in accordance with section 8 of the Act);
- the Minister may consult or cooperate with, or be assisted by, such persons and bodies as the Minister thinks fit in relation to the recruitment and selection process;
- subject to the regulations, and to any direction of the Minister, the selection panel may determine its own procedures;
- the Minister may take such other actions in relation to, or impose such other requirements on, the recruitment and selection process for a Commissioner as the Minister thinks fit.

Regulation 6(2) provides that a failure to comply with the above requirements does not, of itself, affect the validity of an appointment of a CCYP.

This recruitment scheme is broadly in accordance with the recommendation that broad consultation and/or participation in the application, screening and selection process take place.[634] The position description for the CCYP position was advertised publicly and identified the selection

[631] GANHRI General Observations, G.O. 1.8.

[632] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 22, 30, 31, 46.

[633] See *Children and Young People (Oversight and Advocacy Bodies) Regulations 2017* (SA) reg 6.

[634] GANHRI General Observations, G.O. 1.8.

criteria, form of application required and the essential skills for the role.[635] The current CCYP was selected through a process involving children and young people.[636]

No requirement that the CACYP be an Aboriginal or Torres Strait Islander person was identified in research conducted. The position / role description advertised at the time the CACYP was established was not able to be located from research conducted. Accordingly, it is possible that the position / role description included an eligibility requirement that the successful candidate be an Aboriginal or Torres Strait Islander person.

1.9 Political representatives on NHRIs

Summary: the Act largely complies with the Paris Principles with respect to political representatives on NHRIs. In the absence of enshrining legislation, the CACYP largely does not comply with those same Paris Principles.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[637] An NHRI should also be independent from government.

The Act provides that the office of CCYP becomes vacant if the holder is nominated for election as a member of an Australian Parliament.[638] In effect, this provision achieves the result that a Member of Parliament cannot also hold the office of CCYP. However, the office of the Guardian does not become vacant in the same circumstance. Similarly, Members of Parliament are not precluded by the Act from being appointed to the Council or the Committee.

The position in respect of the CACYP is less clear, given the absence of a governing statute. The current Commissioner is not a Member of Parliament.

Tenure

The Act sets out a specific duration for the CCYP's mandate, which is the period in the instrument of appointment (not exceeding a seven-year term).[639] At the end of the term, the CCYP is eligible for re-appointment, provided the total term in office (including any time as Acting Commissioner) does not exceed 10 years (i.e. the CCYP may be eligible for a second term to a maximum of three years).[640]

The Act specifies the circumstances for suspension and removal from office.[641] The Governor may, on the address of both Houses of Parliament, remove the CCYP from office.[642] The Governor may also suspend the CCYP from office for:[643]

- contravention of a condition of appointment; or
- misconduct or conduct that may bring the office of Commissioner into disrepute; or
- failure or incapacity to carry out official duties satisfactorily.

If the Governor suspends the CCYP, a full statement of the reason must be laid before both Houses of Parliament within 7 days.[644] If, at the end of 20 sitting days after the statement is laid

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[635] Department for Education and Child Development, *Commissioner for Children and Young People Candidate information,* (November 2016) 2 <https://www.education.sa.gov.au/sites/default/files/ccyp-candidate-information.pdf?acsf_files_redirect>.

[636] Commissioner for Children and Young People, *2016-17 Annual Report* (Report, 2017) 5 <https://www.ccyp.com.au/wp-content/uploads/2017/12/2016-2017-Annual-Report_CCYP.pdf>.

[637] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[638] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(13).

[639] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8.

[640] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 8(1), (2).

[641] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(9)-(12).

[642] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(8).

[643] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(9).

[644] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(10).

before Parliament, neither House has presented an address to the Governor requiring the CCYP to be restored to office, then the CCYP is remove from office.[645]

In contrast, the current CACYP was appointed for a three-year period.[646] The Gazette announcement of Commissioner Lawrie's appointment did not specify whether she would be eligible for reappointment, nor any specified terms for her removal from office.

The initial seven-year term of the CCYP allows time for the CCYP to undertake longer-term projects and to develop a deep understanding of the role and the particular needs of the children and young people in South Australia.

The Act provides for the circumstances in which the CCYP may be removed from their role. While these grounds are specified in the Act and are thus transparent and publicly known, some of the grounds appear to be more discretionary in nature. For example, the ground for suspension that the CCYP has engaged in "*conduct that may bring the office of the Commissioner into disrepute*" may be interpreted differently depending on the person holding the officer of Governor (and potentially also the underlying political motivations at the time), as opposed to a more objective factor such as a conviction for a criminal offence. However, the requirement for due process through both Houses of Parliament may go further towards ensuring some objectivity in the removal of the CCYP from office.

The Act also provides that the CCYP must not, without the consent of the Minister, engage in any remunerated employment or activity apart from official duties, which provides a form of safeguard for the independence of the CCYP role.[647] It is worth noting that this safeguard requires political involvement (from the Minister), as opposed to review by an independent panel or advisory body.

The Act also expressly provides that CCYP is independent of direction or control by the Crown or any Minister or officer of the Crown.[648] This same provision applies to the Guardian,[649] but does not apply to the Committee.[650]

In contrast, the three-year term for which the CACYP requires the person fulfilling the role to very quickly get up to speed and implement projects as the timeframe for fulfilment and completion of those projects for that Commissioner is much shorter. To illustrate: the Bullying Project undertaken by the CCYP (summarised in section 1.2 above) arose from a Listening Tour in 2017, was followed by the Bullying Project Report in 2018 (which was presented to Parliament) and in 2020 involves a further process to consider child-designed anti-bullying strategies in sport. The Bullying Project has spanned the entire first term of the CACYP, demonstrating that the CACYP is more likely to be constrained in the work that can be undertaken by the shorter term of appointment.

Recruitment

The CCYP is appointed by the Governor, provided that the Statutory Officers Committee has approved the proposed appointment after receiving a referral from the Minister. The requirement for a referral from the Minister is an inherently politicised process, and the Statutory Officers Committee is comprised of Members of Parliament.[651]

The CACYP is also appointed by the Governor. The recruitment process is less transparent than that of the CCYP and it is therefore difficult to assess the level of independence from government.

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[645] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(11).

[646] South Australian Government, *The South Australian Government Gazette No 62, 18 October 2018* (page 3810), available at https://governmentgazette.sa.gov.au/sites/default/files/public/documents/gazette/2018/October/2018_062.pdf

[647] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 8(7).

[648] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 7(2).

[649] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 21(2).

[650] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 30(3).

[651] Parliament South Australia, *Statutory Officers Committee* (Webpage) <https://www.parliament.sa.gov.au/en/Committees/Committees-Detail>.

1.10 Adequate funding of NHRIs

Summary: the CCYP largely complies with the Paris Principles with respect to adequate funding of NHRIs. In the absence of enshrining legislation, there is a lack of transparency around the funding of the CACYP. However, in practice, the CACYP funding does not comply with the Paris Principles on adequate funding of NHRI's as the CACYP funding is inadequate to effectively discharge the role.

NHRIs must be provided with adequate funding in order to function effectively and independently.[652] The Act has an equivalent provision for each of the CCYP, the Guardian, the Committee and the Council, requiring the Minister to provide staff and other resources that the body reasonably needs for carrying out their functions.[653]

Both the CCYP and the CACYP are funded by the Government of South Australia through the Department for Education. The financial operations of the CCYP & CACYP are consolidated into and audited through the Department for Education and therefore the CCYP does not provide full financial reports as part of its annual reports.[654] In the 2018-19 reporting period, the Department for Education reported that in 2019 it received $5,580,000 from the SA Government for "Advocacy bodies"[655] (which consists of the CCYP, the CACYP and the Guardian).[656] The Department reports that, after income and expenses, left the "Advocacy bodies" with a net result of $911,000.[657] However, the Department is not transparent as to what amounts were allocated to which body.

In its first year, the CCYP role had a budget of $843,000 for salaries and wages plus goods and services.[658] The position description for the inaugural CCYP role provided that the salary range for the CCYP (an SAES Level 2 role) was $211,810 - $353,017.[659] The CCYP's most recent Annual Report (2018-19) recorded total expenditure for the CCYP as $1,818,000.[660]

The position for the CACYP is less clear. The CCYP's most recent annual report recorded the total expenditure for the CACYP as $209,000.[661]

Accessibility and communications infrastructure[662]

Both the CCYP and CACYP share a physical office, which appears to be open to the public. In addition to this office, the CCYP and CACYP maintain a communications system for general enquiries.[663] These systems comprise of an email address and phone number and, for the CACYP, an additional postal address and online form. The CCYP and CACYP are also active on social media platforms such as Facebook.

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[652] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[653] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) ss 11, 24, 35, 53..

[654] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 76 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[655] Department for Education, *2019 Annual Report* (Report, 2019) 7 <https://www.education.sa.gov.au/sites/default/files/education-annual-report-2019.pdf>.

[656] Department for Education, *2019 Annual Report* (Report, 2019) 10 <https://www.education.sa.gov.au/sites/default/files/education-annual-report-2019.pdf>.

[657] Department for Education, *2019 Annual Report* (Report, 2019) 7 <https://www.education.sa.gov.au/sites/default/files/education-annual-report-2019.pdf>.

[658] Commissioner for Children and Young People, *2016-17 Annual Report* (Report, 2017) <https://www.ccyp.com.au/wp-content/uploads/2017/12/2016-2017-Annual-Report_CCYP.pdf>.

[659] Department for Education and Child Development, *Commissioner for Children and Young People Candidate information,* (November 2016) 2 <https://www.education.sa.gov.au/sites/default/files/ccyp-candidate-information.pdf?acsf_files_redirect>.

[660] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 76 < https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[661] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 76 < https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[662] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[663] Commissioner for Aboriginal Children & Young People, *Contact Us* (Webpage) <https://cacyp.com.au/contact-us/>; Commissioner for Children & Young People, *About Us* (Webpage) <https://www.ccyp.com.au/about-us/>.

1.11 Annual reports of NHRIs

Summary: the CCYP largely complies with the Paris Principles on annual reports of NHRIs. In the absence of enshrining legislation, the CACYP is assumed to be partially compliant in practice, however further analysis may be required.

The CCYP is required to produce annual reports for the Minister, which the Minister must table to both Houses of Parliament within 6 sitting days.[664] The CCYP's annual reports must set out the performance of the CCYP's functions during the preceding financial year,[665] and are made available on its website.[666]

In practice, the CCYP's annual reports include key summaries of the CCYP's achievements, highlights and outputs from the reporting period (including lists of direct consultations with children and young people and speeches made by the CCYP). The reports also set out more in-depth detail regarding the CCYP's systemic reporting, project reporting and statutory reporting throughout the reporting period.

GANHRI General Observation 1.11 notes that it is preferable for an NHRI to have an explicit power to table reports directly in the legislature. While the Minister *must* table the CCYP's annual reports, the Act also provides a method by which the CCYP may report directly to Parliament, but only if satisfied that the matter which is the subject of the report is of such importance to the safety and wellbeing of children and young people that Parliament should be made aware as a matter of urgency.[667]

The CACYP has provided one Annual Report since her appointment, which spans the period December 2018 – December 2019.[668] It is assumed that the CACYP will continue to provide annual reports for the December – December period each year.

2 Any criticisms made publicly about this role?

2.1 Criticism regarding the CCYP role

We have been unable to locate any specific criticisms regarding the CCYP role.

2.2 Absence of enshrining legislation for the CACYP

The CACYP's Inaugural Annual Report states:

> *Community expectation is that the role of Commissioner be legislated with the necessary powers to effectively improve better outcomes for Aboriginal children and young people.*[669]

Legislating for the role of the CACYP is also the third recommendation made by the CACYP in the CACYP's Inaugural Report.[670]

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[664] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 13A.

[665] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 13A.

[666] Commissioner for Children & Young People, *CCYP Reports* (Webpage) <https://www.ccyp.com.au/ccyp-reports/>.

[667] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 44.

[668] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[669] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 8 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[670] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 14 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

Commissioner April Lawrie has publicly criticised the lack of legislated mandate for the CACYP role, stating that she is unable to investigate "pressing systemic issues" because the role had not been legislated for by the State Government.[671]

SNAICC itself highlighted this concern in 2019:[672]

> *In an important move, the first SA Commissioner for Aboriginal Children and Young People (CACYP) was appointed by the Government in October 2018. The CACYP's key areas of focus are improving health, education, child protection and justice outcomes for Aboriginal children and young people. While this is a significant step forward, the CACYP has no independent powers in legislation yet, limiting the provision of Aboriginal and Torres Strait Islander systems oversight.*

2.3 Discrepancy between the role and powers of the CCYP and CACYP

Family Matters is a national campaign which aims to eliminate the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 2040 and is led by SNAICC.

The relevant Family Matters webpage, which is not dated, states:

> *On a positive note, South Australia has appointed a Commissioner for Aboriginal Children and Young People, but there are concerns that the role and powers of the Aboriginal commissioner are not equivalent to the principal children's commissioner in the state.*[673]

3 What are the best features of this role?

- The CCYP has strong own-motion investigatory and information-gathering powers, including the power to make an immediate report to Parliament in urgent cases. These powers give effect to the broad human rights mandate given to the CCYP.[674] These powers should be applied to the CACYP to provide the role with like strength.
- The CCYP is vested with robust procedural immunities, consistent with the standard for Supreme Court proceedings.[675]
- The legislatively mandated recruitment and selection process for the CCYP must involve at least 2 young people on the selection panel, and the interview must include an exercise designed to assess the applicant's ability to engage, communicate and interact with children and young people.[676]
- The Act is explicit in providing that the CCYP is independent of direction or control by the Crown or any Minister or officer of the Crown.[677]
- Both commissioners appear to maintain consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships.[678]

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[671] InDaily (Stephanie Richards), *Give me the power to investigate, commissioner tells Govt,* available at <https://indaily.com.au/news/2019/11/15/give-me-power-to-investigate-commissioner-tells-govt/>.

[672] SNAICC, *Reviewing the Implementation of The Aboriginal and Torres Strait Islander Child Placement Principle South Australia 2019* (Report, 2019) 9 <https://www.snaicc.org.au/wp-content/uploads/2020/01/ATSICPP-compliance-review-2019_SA.pdf>.

[673] Family Matters, *South Australia* (Webpage) <https://www.familymatters.org.au/map-of-australia/south-australia/>.

[674] See Paris Principles, *Competence and responsibilities;* GANHRI General Observations, G.O. 1.2.

[675] GANHRI General Observations, G.O. 2.3.

[676] See Paris Principles, *Composition and guarantees of independence and pluralism;* GANHRI General Observations G.O. 1.8.

[677] *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 7(2) of the Act; GANHRI General Observations, G.O. 1.9.

[678] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

- In practice, the CCYP publishes a wide range of information (including comments,[679] opinions,[680] submissions,[681] position briefs,[682] and reports[683]) on its website, making it publicly accessible.

[679] Commissioner for Children & Young People, *Commissioner's Comments* (Webpage) <https://www.ccyp.com.au/comments-on/>.

[680] Commissioner for Children & Young People, *The Commissioner's Opinion* (Webpage) <https://www.ccyp.com.au/commissioners-opinions/>.

[681] Commissioner for Children & Young People, *CCYP Submissions* (Webpage) <https://www.ccyp.com.au/submissions/>.

[682] Commissioner for Children & Young People, *CCYP Position Briefs* (Webpage) <https://www.ccyp.com.au/position-briefs/>.

[683] Commissioner for Children & Young People, *CCYP Reports* (Webpage) <https://www.ccyp.com.au/ccyp-reports/>.

C. The Commissioner for Aboriginal Children and Young People and The Commissioner for Children and Young People in South Australia: Impacts

1 2018-19 Summary

1.1 CCYP Annual Report

The 2018-2019 Annual Report gives a sense of the progress achieved by the CCYP in that year, including:

- engagement with more than 2783 children and young people;[684]
- conducting 42 face-to-face consultations in 20 schools and 22 community venues, connecting with 1,100 children and young people;[685]
- engagement with 113 businesses and industry leaders, who attended workshops in strategic organisation and operational governance relating to children and young people;[686]
- gathering responses from 1,218 children and young people by conducting three surveys;[687]
- responding to 34 enquiries into matters concerning potential rights protection issues related to the safety and wellbeing of South Australian children and young people from the general public;[688]
- making six submissions in relation to rights promotion and protection;[689]
- making six submissions in relation to awareness raising of systemic issues, including one addressed to the Federal Health Minister;[690]
- making 13 submissions in relation to systemic advocacy, including submissions addressed to the Select Committee on Poverty in South Australia, the Independent National Security Monitor and the UN Committee on the Rights of the Child.[691] The Annual Report noted that children and young people's views directly informed 16 formal submissions;[692]
- achieving 39 media mentions/interviews;[693] and

[684] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 3 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[685] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 8 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[686] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 8 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[687] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 8 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[688] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 8, 56 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[689] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 58 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[690] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 60 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[691] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 67 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[692] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 3 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[693] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 73-74 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

- social media engagement with SA children and young people.[694]

1.2 CACYP Inaugural Report

The CACYP's inaugural report gives a sense of the progress achieved by the CACYP in the 2018-19 year, including:

- engaging with more than 400 Aboriginal and non-Aboriginal people and organisations in relation to the safety and wellbeing of Aboriginal children and young people;[695]
- conducting more than 430 face-to-face consultations with Aboriginal children and young people in SA schools;[696]
- convening 16 forums which connected with at least 362 Aboriginal families and communities across SA;[697]
- making five submissions (verbal and written);[698]
- participating in 12 media interviews;[699]
- attending 27 keynote speaking engagements or presentations;[700] and
- participating in various advocacy and regular meetings with Ministers and Government Department executives.[701]

2 CCYP Strategic Agenda 2018-22

The CCYP has also released a document outlining the CCYP's broad focus areas for 2018 to 2022.[702] Broadly, the document outlines:

- platforms that will guide the work of the CCYP;

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[694] South Australian Commissioner for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 70-71 <https://www.ccyp.com.au/wp-content/uploads/2019/11/201909-2019-Annual-Report-%C6%92-web.pdf>.

[695] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[696] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>..

[697] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[698] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[699] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[700] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[701] Commissioner for Aboriginal Children and Young People, *What Matters to Aboriginal Children and Young People, their Families and Communities: South Australia's Commissioner for Aboriginal Children and Young People Inaugural Report* (Report, December 2019) 43 <https://cacyp.com.au/wp-content/uploads/2020/05/South-Australias-Commissioner-for-Aboriginal-Children-and-Young-People-Inaugural-Report-December-2019.pdf>.

[702] Commissioner for Children and Young People, *Front & Centre: CCYP Strategic Agenda 2018-2022,* available at https://www.ccyp.com.au/wp-content/uploads/2019/12/Web-Min-Front-Centre-Report.pdf

- key functions as outlined in the Act;
- key outcome areas identified through consultation with stakeholders, including children and young people; and
- priority projects requested by children and young people on the CCYP's Listening Tour.

11 The National Children's Commissioner

A. The National Children's Commissioner: Summary table

Question	Summary response
Country/State/Territory	Australia
Commissioner entity name	National Children's Commissioner (**NCC**)
Date established	The *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth)[703] (the **Amendment Act**) was passed on 25 June 2012 to establish the National Children's Commissioner position within the Australian Human Rights Commission (**AHRC**). Pursuant to the Amendment Act, the position of the National Children's Commissioner is now enshrined within Part IIAA of the *Australian Human Rights Commission Act 1986* (Cth)[704] (the **Act**). The inaugural NCC was appointed on 25 February 2013 and commenced the role on 25 March 2015.[705]
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The AHRC is accredited by the Global Alliance of national Human Rights Institutions as fully compliant with the Paris Principles.[706] The NCC is largely compliant with the Paris Principles, however there are some gaps: • The role of the NCC is formally entrenched in law, pursuant to Part IIAA of the Act. • The NCC's mandate is expressed in broad enough terms to give the public the protection of a wide range of international human right standards. • The Act provides the NCC with functional immunity and some guarantee of tenure. • While the NCC does not have complaints-handling powers, the AHRC President is able to receive complaints from or about the treatment of children in relation to discrimination and breaches of their human rights. • While the NCC has its own-motion powers of inquiry, these powers are unduly limited to Commonwealth government agencies. • The Act does not comprehensively set out the terms and conditions of office for the NCC. • There is a lack of transparency around the appointment and selection process for the NCC. • The NCC maintains consultation with other bodies responsible for the promotion and protection of human rights

[703] Available at <https://www.legislation.gov.au/Details/C2012A00089> (Date of Assent 28 June 2012, Registered 5 July 2012)

[704] Available at <https://www.legislation.gov.au/Details/C2019C00030> (Date of Assent 6 December 1986)

[705] Australian Human Rights Commission, *About the National Children's Commissioner* (Webpage) <https://humanrights.gov.au/our-work/about-national-childrens-commissioner>.

[706] Global Alliance of National Human Rights Institutions, *Members* (Webpage) <https://ganhri.org/membership/>.

Question	Summary response
	and has formalised a number of clear and workable relationships. • There is some suggestion that the NCC does not receive adequate funding. This is particularly difficult to assess given that the NCC does not receive funding as a separate line item, but instead the AHRC receives funding for the NCC. • The annual reporting requirements of the AHRC and NCC are closely aligned with the GANHRI General Observations, although there could be further clarity around the funding of the NCC specifically.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The AHRC is the head body, it is an independent statutory body corporate.[707] It is a collegiate body made up of a President and seven Commissioners, including the NCC.[708] Each of the seven Commissioner roles has its own functions, which the Commissioner performs on behalf of the AHRC.[709] The President and all other Commissioners (including the NCC) must co-operate with each other to achieve common objectives, where practicable.[710]
Accountability arrangements What is the reporting line for the role? Who sets the budget?	• The NCC has its own functions, which it performs on behalf of the AHRC.[711] • The NCC is appointed by the Governor-General, provided that the Minister[712] is satisfied that the person has the appropriate qualifications, knowledge or experience.[713] • The NCC must be appointed on a full-time basis,[714] and holds office for a specified period, which must not exceed 7 years.[715] • The Governor-General's power of appointment in respect of the NCC is taken to include a power of re-appointment.[716] • Subject to the *Remuneration Tribunal Act 1973* (Cth),[717] the NCC is entitled to be paid: o remuneration, which is to be determined by the Remuneration Tribunal[718] or, in the absence of a determination, by the regulations; and o allowances that are prescribed by the regulations.[719]

[707] Australian Human Rights Commission, *About* (Webpage) <https://humanrights.gov.au/about ; see also *Australian Human Rights Commission Act 1986* (Cth) s 7.

[708] Australian Human Rights Commission, *Commissioners* (Webpage) <https://humanrights.gov.au/about/commissioners>; see also *Australian Human Rights Commission Act 1986* (Cth) s 8.

[709] See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 46MB(2).

[710] *Australian Human Rights Commission Act 1986* (Cth) s 8(2).

[711] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(2).

[712] The relevant minister for the AHRC is the Attorney-General.

[713] *Australian Human Rights Commission Act 1986* (Cth) s 46MC.

[714] *Australian Human Rights Commission Act 1986* (Cth) s 46MC(1).

[715] *Australian Human Rights Commission Act 1986* (Cth) s 46MD.

[716] *Acts Interpretation Act 1901* (Cth) s 33AA.

[717] Available at <https://www.legislation.gov.au/Details/C2019C00081>.

[718] The Remuneration Tribunal is the independent statutory body that handles the remuneration of key Commonwealth offices.

[719] *Australian Human Rights Commission Act 1986* (Cth) s 46MF.

Question	Summary response
	• The NCC holds office on the terms and conditions determined by the Governor-General,[720] and may be dismissed by the Governor-General on specific grounds.[721] • The NCC must give the AHRC such information as is from time to time required.[722] • The NCC may submit reports to the Minister that deal with matters relating to the enjoyment and exercise of human rights by children in Australia.[723] Such report may include recommendations as to the actions that should be taken.[724] • The Minister must cause a copy of each report received from the NCC to be laid before each House of Parliament within 15 sitting days.[725]
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	• The NCC is appointed by the Governor-General, provided that the Minister is satisfied that the person has the appropriate qualifications, knowledge or experience.[726] • The NCC holds office on the terms and conditions determined by the Governor-General.[727] • While not specifically required by the Act, the selection process for the position of the inaugural NCC (Ms Megan Mitchell) considered children's views about the criteria and characteristics required for the role. Children (aged 9 to 11 years) from Kingsford Smith Primary School in the Australian Capital Territory participated in the interview process.[728]

Scope
What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?
	• Section 46MB(1) of the Act sets out the broad functions of the NCC, which are:
	  ○ to promote discussion and awareness of matters relating to the human rights of children in Australia;
	  ○ to undertake research, or educational or other programs, for the purpose of promoting respect for the human rights of children in Australia, and promoting the enjoyment and exercise of human rights by children in Australia; and
	  ○ to examine existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of children in Australia, and to report to the Minister the results of any such examination.
	• In performing its functions, or exercising its powers, the NCC may give particular attention to children who are at risk or vulnerable.[729]

[720] *Australian Human Rights Commission Act 1986* (Cth) s 46MK.

[721] *Australian Human Rights Commission Act 1986* (Cth) s 46MJ; the grounds for termination include 'misbehaviour' or if unable to perform duties for some incapacity; various financial difficulties, such as bankruptcy; or if the NCC is absent without leave beyond specified periods.

[722] *Australian Human Rights Commission Act 1986* (Cth) s 46MM.

[723] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(3).

[724] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(3A).

[725] *Australian Human Rights Commission Act 1986* (Cth) s 46MN.

[726] *Australian Human Rights Commission Act 1986* (Cth) s 46MC.

[727] *Australian Human Rights Commission Act 1986* (Cth)s 46MK.

[728] Australian Human Rights Commission, *About the National Children's Commissioner* (Webpage) <https://humanrights.gov.au/our-work/about-national-childrens-commissioner>.

[729] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(4).

Question	Summary response
	• In performing its functions, or exercising its powers, the NCC must, as appropriate, have regard to a number of specified human rights instruments.[730] • The NCC performs its functions on behalf of the AHRC.[731]

Purpose
What is the purpose and objective of the role?
	• The NCC was established as a dedicated advocate for children and young people at a national level.[732]
	• The NCC's purpose is to: [733]
	  ○ promote public discussion and awareness of issues affecting children;
	  ○ conduct research and education programs; and
	  ○ consult directly with children and representative organisations.
	• The objectives of establishing the NCC were to:[734]
	  ○ improve advocacy at a national level for the rights, wellbeing and development of children and young people up to the age of 18 years;
	  ○ improve monitoring, by examination of enactments and proposed enactments of Commonwealth laws affecting the rights, wellbeing and development of children and young people;
	  ○ promote cooperation between the Commonwealth, States and Territories to promote the rights, wellbeing and development of children and young people;
	  ○ encourage the active involvement of children and young people in decisions that affect them, particularly administrative decisions and development of Government policies, programs and legislation;
	  ○ support Government agencies to develop mechanisms which enhance the active involvement of children and young people; and
	  ○ assist Australia in meeting its international obligations by promoting and advancing the rights of the child, in particular as enshrined in the *Convention on the Rights of the Child.*

Functions and Powers
What functions and powers does the role have, in particular those promoting systemic oversight and accountability?
Reporting: submits reports to the relevant Minister which must also be
	• ***Reporting:***
	  ○ One of the main functions of the NCC is to report to the Minister the results of any examinations of existing and proposed Commonwealth enactments.[735]
	  ○ The NCC may submit reports to the Minister that deal with matters relating to the enjoyment and exercise of human rights by children in Australia, as the NCC

[730] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(6).

[731] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(2).

[732] The Hon Jenny Macklin MP, *First national Children's Commissioner appointed* (Media Release), available at <https://formerministers.dss.gov.au/12737/first-national-childrens-commissioner-appointed/>.

[733] House of Representatives, *Explanatory Memorandum: Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012,* available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4812_ems_9d8e59cd-1eb7-4128-b07c-96f580435b4e/upload_pdf/368646.pdf;fileType=application%2Fpdf>.

[734] House of Representatives, *Explanatory Memorandum: Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012,* available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4812_ems_9d8e59cd-1eb7-4128-b07c-96f580435b4e/upload_pdf/368646.pdf;fileType=application%2Fpdf>

[735] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(1)(d).

Question	Summary response
tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	considers appropriate.[736] Such report may include recommendations as to the actions that should be taken.[737] ○ The Minister must cause a copy of each report received from the NCC to be laid before each House of the Commonwealth Parliament within 15 sitting days.[738] • ***Promotion of human rights:*** the main functions of the NCC include: ○ promoting discussion and awareness of matters relating to the human rights of children in Australia;[739] and ○ undertaking research, or educational or other programs, for the purpose of promoting respect for the human rights of children in Australia and promoting the enjoyment and exercise of human rights by children in Australia.[740] • ***Review of laws:*** one of the main functions of the NCC is to examine existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of children in Australia.[741] • ***Complaints handling:*** the NCC itself does not have a complaint-handling role. However, the AHRC President is able to receive complaints from or about the treatment of children in relation to discrimination and breaches of their human rights.[742] • ***Inquiry and reporting:*** if the NCC has reason to believe that a Commonwealth government agency has information / documents relevant to the performance of the NCC's functions, it may give written notice requiring the agency to: ○ give information to the NCC; or ○ produce the document to the NCC.[743] • ***Regard to human rights instruments:*** in performing its functions or exercising its powers, the NCC must, as appropriate, have regard to:[744] ○ the *Universal Declaration of Human Rights*; ○ the *International Convention on the Elimination of all Forms of Racial Discrimination*; ○ the *International Covenant on Economic, Social and Cultural Rights*; ○ the *International Covenant on Civil and Political Rights*; ○ the *Convention on the Elimination of All Forms of Discrimination Against Women*; ○ the *Convention on the Rights of the Child*; ○ the *Convention on the Rights of Persons with Disabilities*; and

[736] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(3).

[737] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(3A).

[738] *Australian Human Rights Commission Act 1986* (Cth)s 46MN.

[739] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(1)(b).

[740] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(1)(c).

[741] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(1)(d).

[742] *Australian Human Rights Commission Act 1986* (Cth) Part IIB; see also Australian Human Rights Commission, *About the National Children's Commissioner* (Webpage) <https://humanrights.gov.au/our-work/about-national-childrens-commissioner>.

[743] *Australian Human Rights Commission Act 1986* (Cth) s 46ML(1).

[744] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(6).

Question	Summary response
	○ such other instruments relating to human rights as the NCC considers relevant.
Budget What is the annual budget for the role?	• The AHRC receives funding from the Australian Government for the NCC position. • When the NCC role was first announced, the Government allocated $3.5 million over four years to the AHRC for its establishment.[745] This amount was widely denounced as inadequate.[746] • In relation to the AHRC as a whole, the 2019-20 Federal budget: ○ allocated $22,059,000 in agency resourcing for 2019-2020; and ○ estimated an actual allocation of $20,324,000 for 2018-2019.[747] • In relation to the AHRC as a whole, the Attorney-General's Department's Portfolio Budged Statements 2019-20 estimated $27,405,000 in net resourcing for the 2019-20 financial year, broken down as follows: ○ $16,538,000 in annual appropriations from Government; ○ $3,750,000 from related entities; ○ $250,000 from interest; ○ $900,000 from the sale of goods and services; and ○ $985,000 from "other".[748] • The AHRC's statement of comprehensive income for the period ended 30 June 2019 refers to:[749] ○ revenue of $16,709,000 received from the Australian Government in 2019; ○ a deficit of $1,185,000 attributable to the Australian Government in 2019; and ○ $10,100,000 in "total own-source income" in 2019. • In the 2018-19 financial year, the NCC received a base salary of $291,725.96 (and a total remuneration of $346,211.31).[750]
Legislative Requirements	The relevant Act is *Australian Human Rights Commission Act 1986 (Cth)* and the role of the NCC is enshrined within Part IIAA.

[745] Parliament of Australia, *National Children's Commissioner: Budget Review 2012-3 Index.*

[746] House of Representatives Standing Committee on Social Policy and Legal Affairs, *National Children's Commissioner Bill 2012* ([1.29] – [1.34]), available at <https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/bill%20childrens%20commission/report/childcommissioner.htm>.

[747] See *Agency Resourcing Budget Paper No. 4 2019-20, Part 1: Agency Financial Resourcing, Overview of the Agency resourcing table* (Paper, 2020) 4 <https://budget.gov.au/2019-20/content/bp4/download/bp4_05_art.pdf>.

[748] Attorney-General's Department, *Portfolio Budged Statements 2019-20* (page 96), available at <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201213/ChildrensCommissioner>.

[749] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 58 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[750] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 96 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

Question	Summary response
How is the role enshrined in legislation? Specify and link the applicable legislation.	
Most recent annual report or equivalent document (link)	Annual Report 2018-19 (AHRC) Children's Rights Report 2019 (NCC)

B. The National Children's Commissioner: Further analysis

1 Essential requirements of the Paris Principles

Note: The AHRC is accredited 'A' by the Global Alliance of National Human Rights Institutions,[751] which indicates that it is fully compliant with the Paris Principles.[752] An analysis of the NCC's compliance with the Paris Principles is set out below.

1.1 The establishment of NHRIs[753]

Summary: the Act partially complies with the Paris Principles on the establishment of NHRIs. There is a lack of transparency around the appointment mechanisms for the NCC.

Entrenched in law[754]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[755] The role of the NCC is formally entrenched in law, pursuant to Part IIAA of the Act.[756] The Act sets out the NCC's mandate and powers,[757] including the NCC's lines of accountability.[758] However, the Act does not comprehensively set out the terms and conditions of office, and states that the NCC holds office on the terms and conditions determined by the Governor-General.[759]

Mandate and powers[760]

The Act broadly sets out the powers of the NCC,[761] including:

- to promote discussion and awareness of matters relating to the human rights of children in Australia;
- to undertake research, or educational or other programs, for the purpose of promoting respect for the human rights of children in Australia, and promoting the enjoyment and exercise of human rights by children in Australia; and
- to examine existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of children in Australia, and to report to the Minister the results of any such examination.

In performing its functions, or exercising its powers, the NCC may give particular attention to children who are at risk or vulnerable.[762]

This mandate appears to be expressed in broad enough terms to give the public the protection of a wide range of international human right standards and, in fact, the NCC is required to have

[751] Global Alliance of National Human Rights Institutions, *Members* (Webpage) <https://ganhri.org/membership/>.

[752] Global Alliance of National Human Rights Institutions, *Accreditation* (Webpage) <https://ganhri.org/accreditation/>.

[753] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[754] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[755] GANHRI General Observations, G.O. 1.1.

[756] *Australian Human Rights Commission Act 1986* (Cth)s 46MA.

[757] *Australian Human Rights Commission Act 1986* (Cth)s 46MB.

[758] *Australian Human Rights Commission Act 1986* (Cth)s 46MB(2).

[759] *Australian Human Rights Commission Act 1986* (Cth)s 46MK.

[760] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[761] *Australian Human Rights Commission Act 1986* (Cth)s 46MB.

[762] *Australian Human Rights Commission Act 1986* (Cth)s 46MB(4).

regard to a number of international human rights standards when exercising its powers and functions.[763]

Appointment mechanisms[764]

While the appointment mechanisms for the NCC are set out in the Act,[765] it is arguable that they are not sufficiently transparent. The only clear requirement is that the person has "*appropriate qualifications, knowledge or experience.*"[766]

Quasi-judicial competency (complaints-handling)[767]

The Act does not set out an ability for the NCC to receive or investigate complaints. However, the AHRC President is able to receive complaints from or about the treatment of children in relation to discrimination and breaches of their human rights.[768] The NCC may also seek leave to appear as an intervener or as *amicus curiae* in court cases that involve human rights, including children's rights.[769]

1.2 Human rights mandate

Summary: the Act is largely compliant with the Paris Principles with respect to human rights mandate. However, we would note that the NCC's investigatory powers are unduly limited.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[770] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[771]

Competence and responsibilities[772]

As set out above, s 46MB of the Act outlines the broad human rights mandate of the NCC. The broad mandate allows the NCC to consider and involve itself on a wide range of human rights issues within the context of the experiences of children in Australia.

The NCC is also mandated to report to the Minister on the enjoyment and exercise of human rights by children in Australia.[773] Within these reports, the NCC may make recommendations as to the action that should be taken to ensure the enjoyment and exercise of human rights by children in Australia.[774]

Powers of inquiry and investigation

The NCC's investigatory powers are able to be exercised without a Ministerial recommendation. The NCC also has the power to compel access to documents or information, however this power is (unduly) limited to Commonwealth government agencies and requires reasonable written notice to be given.[775] That is, if the NCC has reason to believe that a Commonwealth government agency has information or documents relevant to the performance

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[763] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(6).

[764] See GANHRI General Observations, G.O. 1.1.

[765] See Division 2 of Part IIAA of the Act.

[766] *Australian Human Rights Commission Act 1986* (Cth) s 46MC.

[767] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[768] *Australian Human Rights Commission Act 1986* (Cth) Part IIB; see also Australian Human Rights Commission, *About the National Children's Commissioner*, available at <https://humanrights.gov.au/our-work/about-national-childrens-commissioner>.

[769] Australian Human Rights Commission, *About the National Children's Commissioner*, available at <https://humanrights.gov.au/our-work/about-national-childrens-commissioner>.

[770] See Paris Principles, *Competence and responsibilities*; GANHRI General Observations, G.O. 2.6.

[771] GAHNRI General Observations, G.O. 1.2.

[772] See Paris Principles, *Competence and responsibilities,* principle 2; GANHRI General Observations, G.O. 2.6.

[773] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(3).

[774] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(3A).

[775] *Australian Human Rights Commission Act 1986* (Cth) s 46ML.

of the NCC's functions, it may give written notice requiring the agency to give information to the NCC or to produce the document to the NCC.[776] While a Commonwealth government agency does not have to comply with the NCC's request if it would reveal the identity of a particular individual without that individual's consent, the agency must comply with the request if it is possible to do so by producing a copy with any identifying information deleted.[777]

While the NCC does not have express powers of inquiry under Part IIAA of the Act, the AHRC's powers of inquiry may be delegated to the NCC upon written notice.[778] This would allow the NCC to make an examination or hold an inquiry in such manner as the NCC sees fit and, in informing itself in the course of the inquiry, the NCC would not be bound by the rules of evidence.[779]

AHRC – broader mandate

The NCC also sits within the AHRC, which is empowered to perform its duties with regard for:[780]

- the indivisibility and universality of human rights;
- the principle that every person is free and equal in dignity and rights.

Duties of the AHRC include:[781]

- functions conferred on the Commission by the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*;
- examining enactments and proposed enactments to ascertain if they are inconsistent with human rights;
- inquiring into any act or practice that may be inconsistent with human rights and if appropriate, endeavour to effect a settlement of the matters;
- promoting an understanding and acceptance of human rights in Australia;
- undertaking research and education programs for the purpose of promoting human rights;
- reporting to the Minister as to the laws that should be made by Parliament on matters relating to human rights;
- reporting to the Minister about any actions that needs to be taken by Australia in order of comply with provisions of the Covenant, of the Declarations or any other relevant international instrument;
- preparing and publishing guidelines for the avoidance of acts or practices which are inconsistent with human rights.

As such, the NCC has a specific human rights mandate within an organisation which has an even broader human rights mandate.

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[776] *Australian Human Rights Commission Act 1986* (Cth) s 46ML(1).
[777] *Australian Human Rights Commission Act 1986* (Cth) ss 46ML(4), (5).
[778] *Australian Human Rights Commission Act 1986* (Cth) s 19.
[779] *Australian Human Rights Commission Act 1986* (Cth) s 14(1).
[780] *Australian Human Rights Commission Act 1986* (Cth) s 10A(a).
[781] *Australian Human Rights Commission Act 1986* (Cth) s 11.

***Functional immunity*[782]**

The Act provides the AHRC (and, accordingly, the NCC)[783] with express protection from civil actions or other proceedings for damages for or in relation to an act done, or omitted to be done, in good faith in performance, or purported performance, of any function, or in the exercise of any power conferred on the AHRC.[784]

1.3 Encouraging ratification or accession to international human rights instruments[785]

Summary: the Act is largely compliant with the Paris Principles in regard to encouraging ratification or accession to international human rights instruments.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[786] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[787]

The Act empowers the NCC to:

- undertake research, or educational or other programs, for the purpose of promoting respect for the human rights of children in Australia, and promoting the enjoyment and exercise of human rights by children in Australia;[788] and
- examine existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of children in Australia, and to report to the Minister the results of any such examination.[789]

The NCC may submit reports that deal with matters relating to the enjoyment and exercise of human rights by children in Australia to the Minister,[790] including any recommendations the NCC considers appropriate as to the action that should be taken.[791] In practice, these reports could be used to encourage the ratification or accession to international human rights instruments.

1.4 Interaction with the international human rights system[792]

Summary: the Act is largely compliant with the Paris Principles with respect to interaction with the international human rights system.

In performing its functions or exercising its powers, the NCC *must*, as appropriate, have regard to:[793]

- the *Universal Declaration of Human Rights*;
- the *International Convention on the Elimination of all Forms of Racial Discrimination*;
- the *International Covenant on Economic, Social and Cultural Rights*;

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[782] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.3.

[783] *Australian Human Rights Commission Act 1986* (Cth) s 8(1)(g).

[784] *Australian Human Rights Commission Act 1986* (Cth) s 48.

[785] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.3.

[786] GANHRI General Observations, G. O. 1.3.

[787] GANHRI General Observations, G. O. 1.3.

[788] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(1)(c).

[789] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(1)(d).

[790] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(3).

[791] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(3A).

[792] See Paris Principles, *Methods of operation*; GANHRI General Observations, G.O. 1.4.

[793] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(6).

- the *International Covenant on Civil and Political Rights*;
- the *Convention on the Elimination of All Forms of Discrimination Against Women*;
- the *Convention on the Rights of the Child*;
- the *Convention on the Rights of Persons with Disabilities*; and
- such other instruments relating to human rights as the NCC considers relevant.

The NCC is also entitled to engage with international organisations and agencies and any other organisations, agencies or persons as the NCC considers appropriate.[794] This allows for dialogue with relevant treaty body committees.

In general, the NCC's powers with respect to promoting, recognising, protecting and reporting on human rights are broad (see Item 1.3 above). As such, the NCC is empowered to provide information and consult on reports to human rights mechanisms.

One recent example of this is the NCC's reporting to the United Nations Committee on the Rights of the Child (**UN Committee**):[795]

- in November 2018, the NCC prepared an independent report for submission to the UN Committee,[796] setting out information relating to Australia's *joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography and second report on the Optional Protocol on the involvement of children in armed conflict,*[797] which Australia had submitted earlier in the year on 15 January 2018;[798]
- in February 2019, the NCC addressed the UN Committee and assisted them in looking at the major issues facing children living in Australia;
- following this, the UN Committee provided the Australian Government with a list of issues to address in writing by August 2019;
- in September 2019, the UN Committee provided Australia with its Concluding Observations and recommendations.

Regular engagement with international bodies is an 'important dimension' of NHRIs.[799] Compliance with this Paris Principle ensures that domestic mechanisms are strengthened through communication and cooperation with international organisations.

1.5 Cooperation with other human rights bodies[800]

Summary: the NCC largely complies with the Paris Principles on cooperation with other human rights bodies.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[801] This can involve engagement within a

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[794] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(5)(d), (e).

[795] Australia Human Rights Commission, *Reporting to the United Nations on Children's Rights* (Webpage) <https://humanrights.gov.au/our-work/childrens-rights/projects/reporting-united-nations-childrens-rights>.

[796] Australia Human Rights Commission, *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict,* available at <https://humanrights.gov.au/our-work/childrens-rights/publications/report-un-committee-rights-child-2018?_ga=2.228586138.661288988.1596505623-688638973.1596176623>.

[797] United Nations Human Rights Office of the High Commissioner, *CRC/C/AUS/5-6,* available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/5-6&Lang=en>.

[798] Attorney-General's Department, *Treaty body reporting,* available at <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/united-nations-human-rights-reporting/treaty-body-reporting>.

[799] GANHRI General Observations, G.O. 1.4.

[800] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.5.

[801] GAHNRI General Observations, G.O. 1.5.

national human rights framework or other domestic institutions and actors mandated to promote human rights.[802]

The NCC is empowered to consult with other bodies responsible for the promotion and protection of human rights, including:

- Departments and authorities of the Commonwealth, and of the States and Territories;
- non-governmental organisations;
- international organisations and agencies; and
- such other organisations, agencies or persons as the Commissioner considers appropriate.[803]

In practice, the NCC regularly consults with other bodies and has formalised a number of clear and workable relationships.[804] For example:

- the NCC attends biannual members meetings of the Australia and New Zealand Children's Commissioners and Guardians (**ANZCCG**), which aims to promote and protect the safety, wellbeing and rights of children and young people in Australia and New Zealand;[805]
- in September 2019, the NCC attended the inaugural meeting of the International Network on Infants, Toddlers and Child Protection at Oxford University. This involved representatives from 17 countries sharing data and setting out a forward research agenda in areas like evidence based risk assessment and decision making, pre and post-birth notification policies, child removal practices, placement and reunification;[806]
- in October 2019, the NCC travelled to Indonesia to take part in a two-day conference on children's right to a healthy environment, sponsored by range of agencies including the German and Indonesian Governments, UNICEF, the United Nations and Terre des Hommes.[807]

1.6 Recommendations by NHRIs[808]

Summary: the Act partially complies with the Paris Principles on recommendations by NHRIs. However, while the AHRC is mandated to submit annual reports, the NCC's power to submit reports is not mandated.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[809] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[810]

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[802] GAHNRI General Observations, G.O. 1.5.

[803] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(5).

[804] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[805] See Australian Human Rights Commission, *Updates from Australian and New Zealand Children's Commissioners and Guardians,* available at <https://humanrights.gov.au/our-work/childrens-rights/issues/updates-australian-and-new-zealand-childrens-commissioners-and>.

[806] See Australian Human Rights Commission, *Children's Commissioner Megan Mitchell at the UN,* available at <https://humanrights.gov.au/about/news/childrens-commissioner-megan-mitchell-un>.

[807] See Australian Human Rights Commission, *Children's Commissioner Visit Indonesia,* available at <https://humanrights.gov.au/about/news/childrens-commissioner-visits-indonesia>.

[808] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.6.

[809] GANHRI General Observations, G.O. 1.6.

[810] GANHRI General Observations, G.O. 1.6.

One of the main functions of the NCC is to report to the Minister the results of any examinations of existing and proposed Commonwealth enactments.[811]

The NCC may submit reports that deal with matters relating to the enjoyment and exercise of human rights by children in Australia to the Minister,[812] including any recommendations that the NCC considers appropriate as to the action that should be taken.[813] The Minister must cause a copy of each report received from the NCC to be laid before each House of Parliament within 15 sitting days.[814]

We note that the language of the legislation indicates that these reports and recommendations are not mandatory or annual. This is likely because the NCC sits within the AHRC, which makes its own annual report to Parliament under s 46 of the *Public Governance, Performance and Accountability Act 2013* (Cth).[815]

Publication in practice[816]

The NCC submits a report to federal Parliament each year on the enjoyment and exercise of human rights by children and young people in Australia. These reports contain a number of recommendations for improvement. The NCC publishes the reports, summaries of key findings and children's versions of the report on the AHRC website.[817] In 2019, to mark the 30th anniversary of the *Convention of the Rights of the Child,* the NCC also published a "scorecard" setting out how well children's rights are protected and promoted across Australia.[818]

In addition to the NCC's annual reports, the annual reports produced by the AHRC evaluate the impact of the AHRC's submission work on law and policy by monitoring appearances before committees and inquires and examining the extent to which any AHRC recommendations are reflected in reports.[819]

1.7 Ensuring pluralism of the NHRI[820]

Summary: the Act and the AHRC are partially compliant with the Paris Principles in respect of ensuring the pluralism of the NHRI.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[821] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[822]

The NCC

Where the NHRI is a single-member, such as the NCC, it is important that the NHRI is representative of the diverse segments of society.[823] However, the only clear requirement for

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[811] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(1)(d).

[812] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(3).

[813] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(3A).

[814] *Australian Human Rights Commission Act 1986* (Cth) s 46MN.

[815] *Australian Human Rights Commission Act 1986* (Cth) s 45.

[816] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.6.

[817] See Australian Human Rights Commission, *Children's Rights Reports,* available at <https://humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports>.

[818] See Australian Human Rights Commission, *Children's Rights in Australia: a scorecard,* available at <https://humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-australia-scorecard>.

[819] See Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 43 <file:///C:/Users/lubelcham/Downloads/ahrc_annual_report_2018-2019_final_digital_version.pdf>.

[820] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[821] GANHRI General Observations, G.O. 1.7.

[822] GANHRI General Observations, G.O. 1.7.

[823] GANHRI General Observations, G.O. 1.7.

the NCC under the Act is that the person has "*appropriate qualifications, knowledge or experience.*"[824]

Staff of the AHRC

The AHRC's staff are employed pursuant to the *Public Service Act 1999* (Cth).[825] One of the Australian Public Service (**APS**) Employment Principles which agency heads must uphold and promote[826] is to recognise the diversity of the Australian community and foster diversity in the workplace.[827]

The AHRC's website states that the AHRC "*currently exceeds APS targets for the employment of people from a non-English speaking background, people with a disability and for Aboriginal and Torres Strait Islander peoples*."[828] The AHRC also reports that it supports diversity through its:

- Diversity Strategy (incorporating our Disability Action Plan, Reconciliation Action Plan, Indigenous Employment Strategy, and Agency Multicultural Plan);
- active membership of the Australian Employers Network on Disability;
- Workplace Reasonable Adjustment Policy;
- Internship priority; and
- Mentoring activities.

Full-time members[829]

The NCC is to be appointed by the Governor-General by written instrument, on a full-time basis.[830] The Act sets out a specific duration for the NCC mandate, which is the period specified in the instrument of appointment (not exceeding 7 years),[831] and the Governor-General's power of appointment in respect of the NCC is taken to also include a power of re-appointment.[832] The Act does not appear to limit re-appointment in any way, which may not constitute appropriate mechanisms of pluralism, particularly given the NCC is a single-body NHRI.

The Act states that the NCC is entitled to be paid remuneration, as determined by the Remuneration Tribunal or, in the absence of a determination, by the regulations.[833] The Remuneration Tribunal is the independent statutory body that handles the remuneration of key Commonwealth offices.

The Act does not comprehensively set out the terms and conditions of office, and states that the NCC holds office on the terms and conditions determined by the Governor-General.[834]

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[824] *Australian Human Rights Commission Act 1986* (Cth) s 46MC(2).

[825] *Australian Human Rights Commission Act 1986* (Cth) s 43.

[826] See *Public Service Act 1999* (Cth) s 12, available at https://www.legislation.gov.au/Details/C2019C00057

[827] See s 10A(g) of the *Public Service Act 1999* (Cth).

[828] See Australian Human Rights Commission, *Culture & diversity,* available at <https://humanrights.gov.au/about/jobs/culture-diversity>.

[829] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

[830] *Australian Human Rights Commission Act 1986* (Cth) s 46MC(1).

[831] *Australian Human Rights Commission Act 1986* (Cth) s 46MD.

[832] *Acts Interpretation Act 1901* (Cth) s 33AA.

[833] *Australian Human Rights Commission Act 1986* (Cth) s 46MF.

[834] *Australian Human Rights Commission Act 1986* (Cth) s 46MK.

1.8 Selection and appointment of the decision-making body of NHRIs[835]

Summary: the Act is sparsely drafted and largely does not comply with the Paris Principles with respect to the selection and appointment of the decision-making body of NHRIs. However, the "in practice" selection of the inaugural NCC is commendable.

The GANHRI Observations emphasise the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that position is filled by an applicant who has undergone a fair and merit-based selection process.[836]

The appointment of the NCC is to be made by the Governor-General.[837] While the appointment mechanisms for the NCC are set out in the Act,[838] the only clear requirement is that the person has "*appropriate qualifications, knowledge or experience.*"[839] The Act does not provide further information on the procedures behind the appointment and there is limited statutory or administrative material available as to how the Minister assesses this criteria, which raises concerns about whether the appointment process is sufficiently clear, transparent, and participatory.[840]

However, while not specifically formalised in the Act, the selection process for the position of the inaugural NCC considered children's views about the criteria and characteristics required for the role. Children (aged 9 to 11 years) from Kingsford Smith Primary School in the Australian Capital Territory participated in the interview process.[841] The selection process for the most recently appointed NCC has not yet been publicly disclosed.

We further note that the AHRC has a "*Jobs*" page on its website on which it publicly advertises job vacancies at the AHRC (as a whole).[842]

1.9 Political representatives on NHRIs

Summary: the Act should be better drafted in order to expressly comply with the Paris Principles with respect to political representatives on NHRIs.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[843] An NHRI should also be independent from government.

As outlined above, there is a lack of transparency around the appointment and selection process for the NCC. The Act does not explicitly restrict the participation of government representatives or members of parliament in the decision-making of the Commission.[844]

However, the Act does provide that the NCC must not engage in paid employment outside the duties of his or her office without the approval of the Minister,[845] which might operate to prevent a member of parliament from holding the role of NCC at the same time.

There is nothing express in Part IIAA of the Act to suggest that the NCC is not subject to any direction or oversight by the Minister or Governor-General, and in fact, the Governor-General

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[835] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.8.

[836] GANHRI General Observations, G.O. 1.8.

[837] *Australian Human Rights Commission Act 1986* (Cth) s 46MC(1).

[838] *Australian Human Rights Commission Act 1986* (Cth) Part IIAA, Division 2.

[839] *Australian Human Rights Commission Act 1986* (Cth) s 46MC(2).

[840] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.8.

[841] Australian Human Rights Commission, *About the National Children's Commissioner*, available at <https://humanrights.gov.au/our-work/about-national-childrens-commissioner>.

[842] See Australian Human Rights Commission, *Jobs,* available at <https://humanrights.gov.au/about/jobs>.

[843] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[844] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 1.9.

[845] *Australian Human Rights Commission Act 1986* (Cth) s 46MH.

sets the terms and conditions of the NCC's office.[846] This may undermine the perceived (and real) independence of the NCC office.

Tenure[847]

The Act sets out a specific duration for the NCC mandate, which is the period specified in the instrument of appointment (not exceeding 7 years).[848] The Governor-General's power of appointment in respect of the NCC is taken to also include a power of re-appointment.[849]

Furthermore, the NCC may only be dismissed by the Governor-General on the following specified grounds:[850]

- for misbehaviour;
- if the NCC is unable to perform the duties of his or her office because of physical or mental incapacity;
- if the NCC becomes bankrupt, or applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, or compounds with his or her creditors, or makes an assignment of remuneration for the benefit of his or her creditors;
- if the NCC is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
- if the NCC engages in paid employment outside the duties of his or her office without the approval of the Minister.

While this complies with the Paris Principles, the Act itself does not expressly require the Governor-General to provide specific reasons for the dismissal, nor does the Act expressly provide the NCC with an ability to contest any dismissal.

Recruitment[851]

The Paris Principles also require NHRIs to be legislatively empowered to determine its own staffing structure, in a way which allows it to best fulfil its mandate. Staff should be recruited in a transparent and fair selection manner to ensure pluralism and diverse composition.[852]

There is no evidence that the NCC hires any staff directly. However, the AHRC is entitled to employ "*the staff necessary to assist the Commission*".[853] The recruitment of staff for the AHRC is made under the *Public Service Act 1999* (Cth), thereby making it equivalent to the recruitment of staff of other APS bodies.[854]

1.10 Adequate funding of NHRIs

Summary: there is a lack of transparency around the funding available to the NCC (as opposed to the AHRC as a whole). However, in practice, the NCC partially complies with the Paris Principles on adequate funding of NHRIs.

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[846] *Australian Human Rights Commission Act 1986* (Cth) s 46MK.

[847] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1.

[848] *Australian Human Rights Commission Act 1986* (Cth) s 46MD.

[849] *Acts Interpretation Act 1901* (Cth) s 33AA.

[850] *Australian Human Rights Commission Act 1986* (Cth) s 46MJ.

[851] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

[852] GAHNRI General Observations, G.O. 2.4.

[853] *Australian Human Rights Commission Act 1986* (Cth) s 43.

[854] *Australian Human Rights Commission Act 1986* (Cth) s 21(a).

NHRIs must be provided with adequate funding in order to function effectively and independently.[855]

Allocation for activities and accountability[856]

The NCC position is not allocated funding as a separate budget line item[857] and instead the AHRC receives the funding for the NCC.

The Finance Minister[858] may give directions about the amounts in which, and the times at which, money payable to the AHRC is to be paid to the AHRC.[859]

The Act provides that such funding may only be applied:[860]

- in payment or discharge of the costs, expenses and other obligations incurred by the AHRC in the performance of its functions and the exercise of its powers; and
- in payment of any remuneration or allowances payable under the Act.

Money that is not immediately required for the purposes of the AHRC may be invested pursuant to the *Public Governance, Performance and Accountability Act 2013* (Cth).[861]

The AHRC is obliged to comply with the financial accountability requirements applicable to public sector bodies under the *Public Governance, Performance and Accountability Act 2013* (Cth). The AHRC's statement of comprehensive income in its Annual Report for 2018-19 states that in the 2019 year, the AHRC received $16,709,000 in revenue from the Australian Government.[862] The statement also refers to a deficit of $1,185,000 attributable to the Australian Government, [863] which might suggest that the AHRC as whole does not receive adequate public funding to perform its mandated activities.

As is outlined below, inadequacy in funding was one of the main criticisms of the Bill for the Amendment Act when it was first introduced to Parliament in 2012.

In addition to the funding received from the Australian Government, the AHRC reports that it received $10,100,000 in "own-source income" in 2019.[864]

NHRI staff and members[865]

The Act states that the NCC is entitled to be paid remuneration, as determined by the Remuneration Tribunal or, in the absence of a determination, by the regulations.[866] The AHRC publishes workforce data, such as executive remuneration, in its annual reports.

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[855] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[856] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[857] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[858] The Minister administering the *Public Governance, Performance and Accountability Act 2013* (Cth); see s 44A(4) of the Act.

[859] *Australian Human Rights Commission Act 1986* (Cth) s 44A(2).

[860] *Australian Human Rights Commission Act 1986* (Cth) s 44B.

[861] *Australian Human Rights Commission Act 1986* (Cth) s 44B(2) of the Act; see also *Public Governance, Performance and Accountability Act 2013* (Cth) s 59.

[862] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 58 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[863] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 58 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[864] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 58 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[865] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[866] *Australian Human Rights Commission Act 1986* (Cth) s 46MF.

In the 2018-19 financial year, the NCC received a base salary of $291,725.96 (and a total remuneration of 346,211.31).[867] We note that this is less than the base salary and total remuneration of some of the other AHRC Commissioners, including:

- the Social Justice Commissioner;
- the Sex Discrimination Commissioner;
- the Age Discrimination Commissioner; and
- the Human Rights Commissioner.[868]

This discrepancy may raise questions as to whether the salary awarded to the NCC is comparable to other civil servants performing similar tasks.

Accessibility and communications infrastructure[869]

The AHRC actively seeks submissions from a broad cross section of the community.[870] However, the AHRC does not appear to have a permanent physical regional presence.

The AHRC also maintains a communications system for general enquiries.[871] This system includes a telephone line, email address, mailing address and social media accounts. A National Relay Service is also available for people who are deaf or have a hearing or speech impairment.[872]

While the NCC itself does not have a complaint-handling role, the AHRC President is able to receive complaints from or about the treatment of children in relation to discrimination and breaches of their human rights. These complaints can be submitted online through the AHRC website.[873]

To assist with its complaints-handling function, the AHRC also runs the National Information Service (**NIS**), which is free and confidential service that provides information and referrals for individuals, organisations and employers about a range of human rights and discrimination issues.[874] The NIS can:

- provide information on rights and responsibilities under federal human rights and anti-discrimination law;
- discuss whether individuals are able to make a complaint to the AHRC or how the law might apply to their situation;
- provide information about how to make a complaint, respond to a complaint or deal with specific discrimination issues; and
- refer individuals on to other organisations that might be able to assist (to the extent that the NIS is unable to).

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[867] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 96 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[868] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 96 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[869] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[870] See Australian Human Rights Commission, *Have your say,* available at <https://humanrights.gov.au/have-your-say>.

[871] See Australian Human Rights Commission, *Contact*, available at <https://humanrights.gov.au/about/contact>.

[872] See National Relay Service, available at https://nrschat.nrscall.gov.au/nrs/internetrelay

[873] See Australian Human Rights Commission, *Make a complaint,* available at <https://humanrights.gov.au/complaints/make-complaint>.

[874] See Australian Human Rights Commission, *National Information Service,* available at <https://humanrights.gov.au/our-work/complaint-information-service/enquiries-national-information-service>.

The NIS can be contacted by phone, email, online or by fax. A National Relay Service is available for people who are deaf or have a hearing or speech impairment,[875] and a translating and interpreting service is available for non-English speakers.[876]

1.11 Annual reports of NHRIs[877]

Summary: the Act and the NCC partially comply with the Paris Principles on annual reports of NHRIs. However, the AHRC as a whole largely complies with those same Principles.

The President of the AHRC is required to produce annual reports for the Minister, for presentation to the Parliament, under section 46 of the *Public Governance, Performance and Accountability Act 2013* (Cth).[878] The report must set out the AHRC's activities, annual performance statements and annual financial statements with respect to the reporting period.[879] The AHRC's annual reports are made available on its website.[880]

In practice, the NCC also submits a report to federal Parliament each year. Each report outlines the enjoyment and exercise of human rights by children and young people in Australia. These reports contain a number of recommendations for improvement. The NCC publishes the reports, summaries of key findings and children's versions of the report on the AHRC website.[881]

2 Any criticisms made publicly about this role?

The Bill digest for the Amendment Act expressly recognised some criticisms of the proposed Bill.[882] For example, the Centre for Independent Studies publicly opposed the establishment of the NCC, expressing the view that the NCC would be ineffective in achieving its stipulated tasks.[883]

In addition, a number of public interest groups made submissions on the proposed Bill. These submissions made a number of recommendations on bettering the NCC role (none of which appear to have been implemented before the Bill was passed). In its inquiry report, the Standing Committee on Social Policy and Legal Affairs noted a number of general concerns raised in many of the submissions, including:

- that the NCC should have specific regard to the rights of particularly vulnerable children, such as Aboriginal and Torres Strait Islander children, children in immigration detention in Australia and children with disabilities;
- that the NCC should have a positive duty to engage with children; and
- that the list of international treaties to which the NCC must have regard should be extended.

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[875] See National Relay Service, available at <https://nrschat.nrscall.gov.au/nrs/internetrelay

[876] See Department of Home Affairs, *TIS National Service,* available at <https://www.tisnational.gov.au/>.

[877] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.11.

[878] *Australian Human Rights Commission Act 1986* (Cth) s 45.

[879] *Public Governance, Performance and Accountability Act 2013* (Cth) s 46, available at <https://www.legislation.gov.au/Details/C2017C00269>.

[880] See Australian Human Rights Commission, *Annual Reports Index,* available at <https://humanrights.gov.au/our-work/commission-general/publications/annual-reports-index>.

[881] See Australian Human Rights Commission, *Children's Rights Reports,* available at <https://humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports>.

[882] See Department of Parliamentary Services, *Bills Digest No. 167 2011-12* (page 4), available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/1736213/upload_binary/1736213.pdf;fileType=application/pdf> .

[883] See ABC Life Matters, *National Children's Commissioner: what will it do?,* available at <https://www.abc.net.au/radionational/programs/lifematters/national-childrens-commissioner/4047628>.

The submissions of the Australian Children's Commissioners and Guardians, a group consisting of the children's commissioners from across Australia, provide further examples of recommendations with respect to the NCC, such as:[884]

- that guiding principles should be included in the legislation to reinforce the Bill's underlying core beliefs (e.g. "*this Act is to be administered under the principle that the best interests of children are paramount*");

- that the role of the NCC should not be confined to "*examining existing and proposed Commonwealth enactments*" but should also include the capacity to examine Commonwealth policies, programs and services; and

- that a requirement for the NCC to take a lead role in making an independent submission to the United Nations Committee on the Rights of the Child should be formally included in the legislation.

Furthermore, when the role of the NCC was first announced, a number of political bodies and children's advocates, including the Standing Committee on Social Policy and Legal Affairs,[885] called on the government to ensure that the AHRC's funding was sufficiently increased to ensure that the NCC could appropriately fulfil its functions.[886]

A number of these bodies expressed particular concern that only $3.5 million had been allocated to the NCC for its first 4 years,[887] with some noting that the state and territory commissioners received significantly more funding and that limited funding may render the NCC's establishment tokenistic.[888] The AHRC itself expressed concerns that the funding would not be adequate to allow the NCC to engage in any substantial project work.[889] Despite these

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[884] Australian Children's Commissioner and Guardians, *Inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012*, available at <https://www.kidsguardian.nsw.gov.au/ArticleDocuments/494/ACCG_response_to_AHRC_AmendmentBillInquiry-1.pdf.aspx?Embed=Y>.

[885] Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012*, available at <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%20childrens%20commission/report.htm>.

[886] See, eg, The Greens, *Government must fund National Children's Commissioner in next week's budget,* available at <https://greensmps.org.au/articles/government-must-fund-national-childrens-commissioner-next-weeks-budget>.

[887] See, for example, Australian Youth Affair Coalition et al., *Media Release: Budget Commitment to Children Needs a Boost,* available at <https://ayac.org.au/uploads/Budget%20Provision%20for%20Commissioner.pdf>.

[888] See Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* (Report 2012) 6 <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%20childrens%20commission/report.htm>.

[889] See Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* (Report 2012) 6 <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%20childrens%20commission/report.htm>.

concerns, it does not appear that funding was increased from the initial four-year $3.5 million allocation before the Bill was passed.[890]

The broader AHRC itself has come under criticism for being political,[891] and questions of its effectiveness are raised when Australia is criticised for its human rights record.[892]

3 What are the best features of this role?

- The NCC's functions and powers with respect to promoting, recognising, protecting and reporting on human rights are broad:[893]
    - the NCC is able to provide recommendations to the Minister (which must be laid before Parliament);[894]
    - the NCC must consider certain international human rights instruments;[895]
    - the NCC is able to consult with national and international human rights organisations and bodies.[896]
- Although not legislatively mandated, the selection process for the inaugural NCC involved consultation with, and the participation of, Australian children.[897] The Human Rights Law Centre has described this process as a "*positive guide for other jurisdictions".*[898]
- The NCC appears to maintain consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships.[899]
- In practice, the NCC and AHRC publish a wide range of information (including submissions, reports and inquiries) on the AHRC website, making it publicly accessible.
- The AHRC publicly tracks and reviews the implementation of its recommendations (including those made by the NCC).[900]
- The annual reporting requirements of AHRC are closely aligned with the GANHRI General Observations and may act as a useful model.[901]

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[890] See, eg, Parliamentary Debates, *Senate Official Hansard, Monday 25 June 2012,* available at <https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/52a7506b-a85c-4b40-9001-99a23ed63fe4/toc_pdf/Senate_2012_06_25_1149_Official.pdf;fileType=application%2Fpdf#search=%22chamber/hansards/52a7506b-a85c-4b40-9001-99a23ed63fe4/0008%22>.

[891] Michael Gordon, 'Lauded and vilified: Gillian Triggs, Australian Human Rights Commission president', *Sydney Morning Herald* (17 June 2017) available at <https://www.smh.com.au/politics/federal/lauded-and-vilified-gillian-triggs-australian-human-rights-commission-president-20170616-gwsk3b.html>.

[892] Ben Doherty, 'Unacceptable: UN Committee damns Australia's record on human rights' *The Guardian* (19 October 2017) <https://www.theguardian.com/australia-news/2017/oct/19/unacceptable-un-committee-damns-australias-record-on-human-rights>; Anna Cody and Maria Nawaz, 'UN slams Australia's human rights record' *The Conversation* (10 November 2017) <https://theconversation.com/un-slams-australias-human-rights-record-87169>.

[893] This was also praised by the Australian Children's Commissioner and Guardians in its submissions on the Bill - see *Inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012*, available at <https://www.kidsguardian.nsw.gov.au/ArticleDocuments/494/ACCG_response_to_AHRC_AmendmentBillInquiry-1.pdf.aspx?Embed=Y>.

[894] *Australian Human Rights Commission Act 1986* (Cth) ss 46MB(3)-(3A), 46MN.

[895] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(6).

[896] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(5).

[897] See Paris Principles, *Competence and responsibilities,* principle 2; GANHRI General Observations, G.O. 2.6.

[898] Human Rights Law Centre, *The children's champion – A children's commissioner for South Australia,* available at <https://www.hrlc.org.au/bulletin-content/the-childrens-champion-a-childrens-commissioner-for-south-australia>.

[899] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[900] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.6.

[901] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.11.

C. The National Children's Commissioner: Impacts

In its 2019 Annual Report, which was submitted to the Attorney General on 28 October 2019, the NCC listed a number of recommendations for the Australian Government to act on in order to improve children's rights.[902] The NCC based its 2019 Annual Report on its 2018 Report to the UN Committee on the Rights of the Child (the **UN Committee**).

4 Report to the UN Committee on the Rights of the Child

In November 2018, the NCC prepared a report for the UN Committee,[903] setting out information relating to Australia's *joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography and second report on the Optional Protocol on the involvement of children in armed conflict,*[904] which Australia had submitted earlier in the year on 15 January 2018.[905]

In preparing its report, the NCC consulted widely with children, key advocates, government and non-government stakeholders. In particular, the NCC:[906]

- consulted, in person, with approximately 450 children, and with 22,700 children through an online national poll on children's rights; and
- held 10 roundtables with 162 stakeholders and met with over 100 stakeholders individually, and received 127 written submissions.

In its report, the NCC acknowledged the positive steps taken by the Australian Government to protect children's rights since its last report to the UN Committee but noted that the Australian Government did not respond to the UN Committee's recommendations / Concluding Observations on the fourth periodic report in 2012 until it submitted the joint report in 15 January 2018.[907]

The NCC's report was submitted to the UN Committee in December 2018.

In February 2019 the NCC addressed the UN Committee in Geneva and assisted in looking at the major issues facing children living in Australia.[908] Following this, the UN Committee provided the Australian Government with a list of issues to address in writing by August 2019.[909]

In September 2019, Australia appeared before the UN Committee to answer questions about how it is working to advance the rights of children in Australia. The UN Committee provided a range of Concluding Observations, calling for urgent measures to be taken in order to protect children:

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[902] Australian Human Rights Commission, *Children's Rights Report 2019* (Report, 2019) 13 – 23 <https://humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2019>.

[903] Australian Human Rights Commission, *Report to the UN Committee on the Rights of the Child* (2018) <https://humanrights.gov.au/our-work/childrens-rights/publications/report-un-committee-rights-child-2018>.

[904] United Nations Human Rights Office of the High Commissioner, *CRC/C/AUS/5-6,* available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/AUS/5-6&Lang=en>.

[905] Attorney-General's Department, *Treaty body reporting,* available at <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/united-nations-human-rights-reporting/treaty-body-reporting>.

[906] Australian Human Rights Commission, *Report to the UN Committee on the Rights of the Child* (2018) <https://humanrights.gov.au/our-work/childrens-rights/publications/report-un-committee-rights-child-2018>.

[907] Australian Human Rights Commission, *Report to the UN Committee on the Rights of the Child* (2018) 2 <https://humanrights.gov.au/our-work/childrens-rights/publications/report-un-committee-rights-child-2018>.

[908] Australian Human Rights Commission, *Report to the UN Committee on the Rights of the Child* (2018) <https://humanrights.gov.au/our-work/childrens-rights/publications/report-un-committee-rights-child-2018>.

[909] Australian Human Rights Commission, *Report to the UN Committee on the Rights of the Child* (2018) <https://humanrights.gov.au/our-work/childrens-rights/publications/report-un-committee-rights-child-2018>.

- from violence;
- in alternative care;
- in relation to mental health;
- from environmental damage and climate change;
- who are seeking asylum or are refugees; and
- in the administrations of justice.

In response, in November 2019, the AHRC published a 'scorecard' of children's rights in Australia.[910] The scorecard is intended to help hold the Australian Government to account for the wellbeing of Australian children. The scorecard is available to the public via the AHRC's website, and the Appendix to the scorecard contains a summary of the recommendations made in the UN Committee's Concluding Observations.

5 General actions in 2018-19

Based on the AHRC's Annual Report,[911] in the 2018-19 financial year, the NCC also:

- led the development of the National Principles for Child Safe Organisations, based on the ten 'child safe standards' recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse;[912] and
- provided reflections on justice for children in the NT and Australia more broadly at the inaugural Human Rights Day Oration.[913]

[910] Australian Human Rights Commission, *Children's Rights in Australia: a scorecard,* available at <https://humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-australia-scorecard>.

[911] Australian Human Rights Commission, *Annual Report 2018-2019* (Report, 2019) available at <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019>.

[912] Australian Human Rights Commission, *Annual Report 2018-2019* (Report, 2019) 12-29 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019>.

[913] Australian Human Rights Commission, *Annual Report 2018-2019* (Report, 2019) 26-27 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019>.

12 The Commissioner for Children and Young People (Tasmania):

A. Commissioner for Children and Young People (Tasmania): Summary table

Question	Summary response
Country/State/Territory	Tasmania, Australia
Commissioner entity name	Commissioner for Children and Young People (**Commissioner**)
Date established	The first Commissioner was appointed in 2000,[914] when the statutory Office of the Commissioner for Children (**Commission**) was established on 1 July 2000 by the *Children, Young Persons and Their Families Act 1997* (Tas).[915] Currently, the Commissioner is appointed pursuant to the *Commissioner for Children and Young People Act 2016* (Tas) (**the Act**).
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The Commissioner is mostly compliant with the Paris Principles. Some areas of improvement are required to: - Clearly specify the appointment process of the Commissioner to ensure transparency; - Clearly state the purpose and objective of the Commissioner role in the Act. - While the Act provides some functional immunity for the Commissioners, by including a specified term and limited powers of removal. However, the maximum term of the roles is unduly short, and the removal powers provide the Governor in Council with some discretion – both of which may undermine the independence of the Commissioners.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The Commissioner is an independent statutory officer.[916] The Commissioner is to interact with other agencies and authorities including the Tasmanian Police, the Ombudsman, the Integrity Commission and the Anti-Discrimination Commissioner – to the extent that the matter is received by the Commissioner or identified as part of an inquiry).[917]
Accountability arrangements What is the reporting line for the role? Who sets the budget?	The role is responsible to the Parliament of Tasmania. The Commissioner must prepare an annual report and provide it to the Minister for Human Services (**Minister**) and the Secretary of the Department of Health and Human Services. [918]

[914] Commissioner for Children and Young People, *About* (Webpage) <https://www.childcomm.tas.gov.au/about/>.

[915] Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 2019) <https://www.childcomm.tas.gov.au/wp-content/uploads/ANNUAL-REPORT-2018-19.pdf; Children, Young Persons and Their Families Act 1997 (Tas) (as at 1 July 2000), https://www.legislation.tas.gov.au/view/html/inforce/2000-07-01/act-1997-028#HP9@EN>.

[916] Commissioner for Children and Young People, *About* (Webpage) <https://www.childcomm.tas.gov.au/about/>.

[917] *Commissioner for Children and Young People Act 2016* (Tas) s 14.

[918] *Commissioner for Children and Young People Act 2016* (Tas) s 19.

Question	Summary response
	The Commissioner must also provide the Minister with a copy of all other reports it prepares under the Act within 7 days of the report being finalised.[919] The budget is set by the Tasmanian Government as part of the State Budget.[920]
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	The Governor on recommendation of the Minister, is to appoint the Commissioner.[921] There are no eligibility requirements the Minister or Governor must consider when appointing a Commissioner. The appointed Commissioner is to hold office for no more than 5 years. Commissioners are eligible for reappointment for a further single term (not exceeding 5 years).[922]
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	The main scope of the role is on a state level. Certain functions are in relation to children and young people generally, for example these functions are:[923] • researching, investigating and influencing policy development into matters relating to children and young people generally; and • promoting, monitoring and reviewing the wellbeing of children and young people generally.
Purpose What is the purpose and objective of the role?	The Commissioner is responsible for advocating for children and young people in Tasmania generally, and for promoting, monitoring and reviewing their wellbeing.[924] There is no clear purpose or objective of the role set out in the legislation.
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament?	• General functions including promoting, monitoring and reviewing the wellbeing of children and young people generally.[925] • Section 8(1) of the Act sets out the general functions of the role which include:[926] (a) advocating for all children and young people in the State generally; (b) acting as advocate for a detainee under the Youth Justice Act 1997;

[919] *Commissioner for Children and Young People Act 2016* (Tas) s 20.

[920] Commissioner for Children and Young People, *Annual Report* (2018-19) 6 <https://www.childcomm.tas.gov.au/wp-content/uploads/ANNUAL-REPORT-2018-19.pdf>.

[921] *Commissioner for Children and Young People Act 2016* (Tas) s 5.

[922] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 1(1).

[923] *Commissioner for Children and Young People Act 2016* (Tas) s 8.

[924] Commissioner for Children and Young People, *About* (Webpage) <https://www.childcomm.tas.gov.au/about/>.

[925] *Commissioner for Children and Young People Act 2016* (Tas) s 11.

[926] *Commissioner for Children and Young People Act 2016* (Tas) s 8(1).

Question	Summary response
Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	(c) researching, investigating and influencing policy development into matters relating to children and young people generally; (d) promoting, monitoring and reviewing the wellbeing of children and young people generally; (e) promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives; (f) assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally; (g) encouraging and promoting the establishment by organisations of appropriate and accessible mechanisms for the participation of children and young people in matters that may affect them; (h) such other functions as are prescribed. • Section 11(2) of the Act sets out the general powers of the role which include:[927] (a) require any person to provide information, answer questions, or produce documents, so far as may be relevant to the performance of the functions, or the exercise of the powers, of the Commissioner or the administration of this Act; and (b) require information and data for the purposes of – (i) collating, studying, interpreting and maintaining information in relation to the wellbeing of children and young people in the State; and (ii) identifying and monitoring trends in respect of the wellbeing of children and young people in the State; and (c) investigate, and make recommendations in respect of, the systems, policies and practices of organisations, government or non-government, that provide services that affect children and young people; and (d) investigate, and make recommendations in respect of, the effects of any legislation, proposed legislation, documents, government policies, or practices or procedures, or other matters relating to the wellbeing of children and young people; and (e) advise and make recommendations, in relation to the rights and wellbeing of children and young

[927] *Commissioner for Children and Young People Act 2016* (Tas) s 11(2).

Question	Summary response
	people, to Ministers, State authorities and other organisations; and (f) provide information to other organisations in accordance with this Act or any other Act; and (g) report publicly on the wellbeing of children and young people in the State; and (h) exercise such other powers as are prescribed. • Commissioner has general powers to require any person to provide information in relation to its functions, investigate and make recommendations in relation to legislation, government practices and policies and practices of organisations.[928] • *Annual report:* Before 30 November each year, the Commissioner must cause a copy of the annual report for the preceding financial year to be laid before each House of Parliament.[929] • *Review laws:* The Commissioner does have the power to investigate and make recommendations in relation to any legislation or proposed legislation relating to the wellbeing of children and young people.[930] • *Complaints:* There is no specific power to receive, investigate and determine complaints. • *Inquiry and reporting:* The Commissioner may investigate or review any matter they consider appropriate and also have the power to hold the investigation in public or private.[931] The Commissioner has the power to compel information.[932] • P*romotion of human rights:* The Commissioner must observe relevant provisions of the United Nations Convention on the Rights of the Child.[933]
Budget What is the annual budget for the role?	Budget for 2018-19 financial year was $1,175,700.[934] Budget for 2019-20 is $1,335,000.[935] In the 2017-2018 Budget, the Tasmanian Government allocated $250,000 per annum for 4 years for the Commissioner to provide independent monitoring of Out-of-Home Care Monitoring.[936]
Legislative Requirements	Established under the *Commissioner for Children and Young People Act 2016* (Tas). The role is legislatively enshrined (s 5) of the Act.

[928] *Commissioner for Children and Young People Act 2016* (Tas) s 11.

[929] *Commissioner for Children and Young People Act 2016* (Tas) s 19.

[930] *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(d).

[931] *Commissioner for Children and Young People Act 2016* (Tas) s 11(3).

[932] *Commissioner for Children and Young People Act 2016* (Tas) s 12.

[933] *Commissioner for Children and Young People Act 2016* (Tas) s 3(1)(b).

[934] Commissioner for Children and Young People, *Annual Report* (2018-19) 6 <https://www.childcomm.tas.gov.au/wp-content/uploads/ANNUAL-REPORT-2018-19.pdf>.

[935] Treasury Tasmania, *Budget 2019-20,* available at <https://www.treasury.tas.gov.au/Documents/2019-20-Budget-Paper-No-2-Volume-1.pdf>.

[936] Commissioner for Children and Young People, *Annual Report* (2018-19) 16 <https://www.childcomm.tas.gov.au/wp-content/uploads/ANNUAL-REPORT-2018-19.pdf>.

Question	Summary response
How is the role enshrined in legislation? Specify and link the applicable legislation.	
Most recent annual report or equivalent document (link)	Annual Report 2018-19

B. Commissioner for Children and Young People (Tasmania): Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs[937]

Summary: The Act is partially compliant with the Paris Principles in relation to the establishment of NHRIs. There can be improvement made around transparency of appointment and selection and clear funding sources in the Act.

Entrenched in law[938]/ Mandate and powers[939]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[940]

The Commissioner for Children and Young People (**CCYP**) for Tasmania has been established by legislation and has been given sufficiently broad mandate in relation to children and young people. The role was initially established pursuant to the *Children, Young Persons and Their Families Act 1997* (Tas) and has been transitioned to the *Commissioner for Children and Young People Act 2016* (Tas) (**Act**) which was enacted to enhance the powers and functions of the role.[941]

The CCYP's functions and powers are clearly set out in ss 8 and 11 of the Act.[942] The legislation has however failed to clearly set out the role or purpose or objective of the CCYP in a clear introductory section.

Appointment mechanisms

Terms of appointment of the CCYP are contained in a schedule to the Act,[943] however the mechanism of appointment or appointment process is not clear other than that the Governor on recommendation of the Minister is to appoint the Commissioner[944] – there is no clear criteria of appointment.

Quasi-judicial competency (complaints handling)

In relation to General Observation 2.9, the CCYP does not have express power to deal with, investigate or settle complaints. It does have the power to initiate its own investigations on systemic issues, however, the dealing of individual complaints and concerns has been left to the Ombudsman.[945]

1.2 Human rights mandate[946]

Summary: The Act is compliant with Paris Principles regarding human rights mandate, and this requirement should be broadened in the Act to be more compliant.

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[937] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[938] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[939] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[940] GANHRI General Observations, G.O. 1.1.

[941] Parliament of Tasmania, *Draft Second Reading Speech for the Commissioner for Children and Young People Bill 2015*, available at <https://www.parliament.tas.gov.au/bills/Bills2015/pdf/notes/59_of_2015-SRS.pdf>.

[942] *Commissioner for Children and Young People Act 2016* (Tas) ss 8, 11.

[943] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 1.

[944] *Commissioner for Children and Young People Act 2016* (Tas) s 5.

[945] *Commissioner for Children and Young People Act 2016* (Tas) s 14.

[946] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[947] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[948]

Competence and responsibilities[949]

One of the principles to be observed by the CCYP or any other person performing a function or exercising a power under the Act is to observe relevant provisions of the United Nations Convention of the Rights of the Child.[950] As part of its mandate, the CCYP is to assist in ensuring the State satisfies its national and international obligations in respect of children and young people,[951] which would extend to protecting human rights. Additionally, the CCYP has an enshrined role to act as an advocate for a detainee under the *Youth Justice Act 1997.*[952]

The CCYP has the power to investigate government policies, practices or procedures relating to the wellbeing of children and young people, which should also extend to monitoring human rights affecting children and young people within the relevant public authorities.[953] In conjunction with this (and to assist with this function), the CCYP has the power to compel information. This extends to requiring a person to answer questions either orally or in writing, and also to produce any specified documents. There is a penalty associated with non-compliance of a request for information.[954] The CCYP does not have powers to access premises. With the information sharing provisions in the Act, the CCYP is also able to request non-identifying information relating to a child or young person from an "information sharing entity" [955].[956]

Additionally, the CCYP can advise and make recommendations in relation to the rights and wellbeing of children and young people to any organisation (including the Minister and State authorities).[957]

In relation to General Observation 2.8, besides the general function to promote, monitor and review the wellbeing of children and young people generally,[958] the CCYP does not have specific monitoring oversight of domestic agencies. Its power in this respect is limited to:

- investigating and making recommendations in respect of systems, policies and practices of organisations (government or non-government) that provides services which affect young people;[959] and
- advising and making recommendations to Ministers and State authorities in relation to the wellbeing of children and young people.[960]

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[947] GAHNRI General Observations, G.O. 1.2.

[948] GAHNRI General Observations, G.O. 1.2.

[949] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 2.6.

[950] *Commissioner for Children and Young People Act 2016* (Tas) s 3(1)(b).

[951] *Commissioner for Children and Young People Act 2016* (Tas) s 8(1)(f).

[952] *Commissioner for Children and Young People Act 2016* (Tas) s 10.

[953] *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(d).

[954] *Commissioner for Children and Young People Act 2016* (Tas) s 12. The penalty for non-compliance with this section is a fine not exceeding 100 penalty units and in the case of a continuing offence, a further fine not exceeding 10 penalty units for each day during which the offence continues.

[955] As defined in Children, Young Persons and Their Families Act 1997 (Cth) s 3.

[956] *Commissioner for Children and Young People Act 2016* (Tas) s 16.

[957] *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(e).

[958] *Commissioner for Children and Young People Act 2016* (Tas) s 8(1)(d).

[959] *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(c).

[960] *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(e).

The human rights mandate of the CCYP is narrower than the General Observations and Paris Principles require and does not quite cover the ambit of "promotion" such as specific functions relating to education, training and public outreach.

Functional immunity[961]

In relation to General Observation 2.3, the CCYP and any other person performing a power or function under the Act is protected from liability which is enshrined in the Act.[962] Specifically "The Commissioner, and any other person, performing a function or exercising a power under this Act does not incur any personal liability, civil or criminal, in respect of any act done or omitted to be done in good faith in the performance or exercise, or purported performance or exercise, of that function or power."[963]

Powers of investigation and inquiry

The CCYP may investigate or review any matter they consider appropriate.[964] The drafting of this power is sufficiently broad, however the Act does restrict this by not permitting the CCYP to deal with complaints made by or on behalf of an individual and does not have the authority to investigate or review the circumstances of individual children (unless requested to do so by the Minister).[965] However, the above restriction does not prevent the CCYP from investigating or otherwise dealing with matters affecting the wellbeing of children generally when it is raised through a matter relating to a specific child.[966] An example of the CCYP exercising this power is through the Memorandum of Advice in relation to Searches of children and young people in custody in custodial facilities in Tasmania.[967] The advice enquires into the use of searches of children and young people in custodial facilities, in the context of human rights standards and principles.

In conjunction with the above general powers to investigate and inquire into matters, the CCYP also has the power to compel information.[968]

1.3 Encouraging ratification or accession to international human rights instruments

Summary: While the Act is not strictly compliant with the Paris Principles in relation to encouraging ratification or accession to the international human rights instruments, in practice, the CCYP has been shown to participate relevant discussions.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[969] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[970]

In compliance with General Observation 1.3, one of the CCYP's functions is to assist in ensuring the State is satisfying its national and international obligations in respect of children and young people.[971] This function can be exercised through the CCYP's power to investigate and make

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[961] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1 & 2.3.

[962] *Commissioner for Children and Young People Act 2016* (Tas) s 24.

[963] *Commissioner for Children and Young People Act 2016* (Tas) s 24.

[964] *Commissioner for Children and Young People Act 2016* (Tas) s 11(3)(d).

[965] *Commissioner for Children and Young People Act 2016* (Tas) s 14(a); Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 2019) 6 <https://www.childcomm.tas.gov.au/wp-content/uploads/ANNUAL-REPORT-2018-19.pdf>.

[966] *Commissioner for Children and Young People Act 2016* (Tas) s 14(2)(c).

[967] Commissioner for Children and Young People, *Searches of children and young people in custody in custodial facilities in Tasmania* (Memorandum of Advice, 7 May 2019) <https://www.childcomm.tas.gov.au/wp-content/uploads/2019-05-06-FINAL-Advice-to-Ministers-Searches-of-children-and-young-people-in-custody-in-custodial-facilities.pdf>.

[968] *Commissioner for Children and Young People Act 2016* (Tas) s 12.

[969] GANHRI General Observations, G. O. 1.3.

[970] GANHRI General Observations, G. O. 1.3.

[971] *Commissioner for Children and Young People Act 2016* (Tas) s 8(1)(f).

recommendations in relation to the effects of existing or proposed legislation.[972] As stated above, the CCYP must observe the United Nations Convention of the Rights of the Child in performing its functions or exercising powers. Besides the above, CCYP has broad function to research, investigate and influence policy development, which is sufficiently broad to cover General Observation 1.3.[973]

The CCYP has a history of consulting on the implementation of human rights instruments in Australia. For instance:

- In June 2018, the CCYP provided comments to the National Children's Commissioner on Australia's progress to implement the United Nationals Convention on the Rights of the Child;[974]
- In September 2018, the CCYP contributed to the Australian Human Rights Commission's consultations about the implementation of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**);[975] and
- In December 2019, the CCYP wrote a submission to the Joint Select Committee on Australia's Family Law System which reflected upon the Convention on the Rights of the Child.[976]

1.4 Interaction with the international human rights system

Summary: While the Act is not strictly compliant, the CCYP generally complies with the Paris Principle on interaction with the international human rights system.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[977] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[978]

The Act does not specify a mechanism for the CCYP to engage with or interact with the international human rights system – other than to assist in ensuring the State is satisfying its international obligations.[979] This function must be exercised by the CCYP independently, impartially and in the public interest. Therefore, the Commission could arguably express its independent opinion on a report to be submitted to the United Nations bodies and committees. [980]

The most recent Annual Report outlined the contributions made by the CCYP to the implementation of the OPCAT.[981] The CCYP's history of consulting on the implementation of human rights instruments in Australia and of invoking international human rights instruments in its submissions and letters is detailed above.

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[972] *Commissioner for Children and Young People Act 2016* (Tas) s 11(2)(d).

[973] *Commissioner for Children and Young People Act 2016* (Tas) s 8(1)(c).

[974] See Commissioner for Children and Young People Tasmania, Submission to National Children's Commissioner, *AHRC Report to Committee on the Rights of the Child* (1 June 2018) <https://www.childcomm.tas.gov.au/wp-content/uploads/2018/06/AHRC-Report-to-Committee-on-the-Rights-of-the-Child.pdf>.

[975] See Commissioner for Children and Young People Tasmania, Submission to Human Rights Commissioner, *OPCAT in Australia, Consultation Paper; Stage 2* (19 September 2018) <https://www.childcomm.tas.gov.au/wp-content/uploads/Submissions-2018-09-19-OPCAT-Submission-FINAL.pdf>.

[976] See Commissioner for Children and Young People Tasmania, Submission to the Joint Select Committee on Australia' Family Law System, *Joint Select Committee on Australia's Family Law System* (18 December 2019) < https://www.childcomm.tas.gov.au/wp-content/uploads/2019-12-18-Submission-Joint-Select-Committee-Family-Law.pdf>.

[977] GAHNRI General Observations, G.O. 1.4.

[978] GAHNRI General Observations, G.O. 1.4.

[979] *Commissioner for Children and Young People Act 2016* (Tas) s 8(1)(f).

[980] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.4.

[981] Commissioner for Children and Young People Tasmania , *Annual Report 2018-19* (Report, 2019) 26-27 <https://www.childcomm.tas.gov.au/wp-content/uploads/ANNUAL-REPORT-2018-19.pdf>.

1.5 Cooperation with other human rights bodies

Summary: The Act is largely compliant with General Observation 1.5, as the CCYP has regular and constructive engagement with relevant stakeholders.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[982] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[983]

The CCYP engages with the following entities:

- The CCYP is a member of the Australia and New Zealand Children's Commissioners and Guardians (**ANZCCG**), which is a group of national, state and territory children and young people commissioners, guardians and advocates. The ANZCCG aims to promote and protect the safety, wellbeing and rights of children and young people in Australia and New Zealand.[984] The ANZCCG meet bi-annually to discuss priority areas

- In its 2018-19 Annual Report, the CCYP reflected on the following from the year:

    - Partnering with the Australian Institute of Family Studies to co-host a forum on hearing the voices of children and young people in family law.

    - Joining Anglicare's Social Action and Resource Centre, the Australian Research Alliance for Children and Youth and the Youth Network of Tasmania, to host a forum to export ways to strengthen care responses for unaccompanied homeless children in Tasmania.[985]

- The establishment of the CCYP Expert Advisory Council on Wellbeing with a focus on supporting the CCYP's work. The council meets regularly.[986]

- Development of the CCYP Ambassador Program which is a program that creates an opportunity for children and young people to have their voices heard on how things could be improved for them across Tasmania.

1.6 Recommendations by NHRIs

Summary: While there is no express ability of the CCYP to follow up on recommendations made, its functions are sufficiently broad to allow it to do so. The Act is therefore partially compliant with the Paris Principles regarding recommendations by NHRIs.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[987] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[988] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[989]

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[982] GAHNRI General Observations, G.O. 1.5.

[983] GAHNRI General Observations, G.O. 1.5.

[984] Commissioner for Children and Young People Tasmania , *Annual Report 2018-19* (Report, 2019) 32-33 <https://www.childcomm.tas.gov.au/wp-content/uploads/ANNUAL-REPORT-2018-19.pdf>.

[985] Commissioner for Children and Young People Tasmania , *Annual Report 2018-19* (Report, 2019) 26<https://www.childcomm.tas.gov.au/wp-content/uploads/ANNUAL-REPORT-2018-19.pdf>.

[986] Commissioner for Children and Young People Tasmania , *Annual Report 2018-19* (Report, 2019) 14 <https://www.childcomm.tas.gov.au/wp-content/uploads/ANNUAL-REPORT-2018-19.pdf>.

[987] GAHNRI General Observations, G.O. 1.6.

[988] GAHNRI General Observations, G.O. 1.6.

[989] GAHNRI General Observations, G.O. 1.6.

The CCYP has the power at any time to prepare a report on any matter or issue relating to children that the CCYP considers appropriate.[990] The report may include recommendations relating to changes in law, policy, practice or procedure or to recommendations to take action.[991]

There Act does not prohibit the CCYP from undertaking follow up activities to promote and advocate for the implementation of its recommendations.

The CCYP is quite active in making submissions on policy and law reform relating to issues affecting children and young people (including submissions to government bodies and agencies). The Commission openly publishes its key submissions and reports on its website.

1.7 Ensuring pluralism of the NHRI[992]

Summary: The Act is partially compliant with the Paris Principles in relation to ensuring pluralism of the NHRI. While is drafted to include pluralism in the establishing of Committees, it is not broad enough to be largely compliant.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[993] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism

In relation to General Observation 1.7, the Act legislates for Committees to be established including the Children and Young People Advisory Council and the Children and Young People Consultative Council.[994]

In June 2019, the CCYP established the CCYP Export Advisory Council (as part of its mandate to form a Children and Young People Advisory Council). This council has a focus on supporting the CCYP's role in promoting, monitoring and reviewing the wellbeing of children and young people in Tasmania. Members assist the CCYP in providing high-level strategic, analytical or technical advice to the CCYP as needed.[995]

When appointing members of the Children and Young People Advisory Council, the CCYP must have regards to ensure the committee has persons with a range of experience and backgrounds including people from:[996]

- non-government organisations and community organisations;
- groups which represent the diversity of the Tasmanian population;
- persons employed by government agencies or employed in private practice that is relevant to the health, welfare, care, protection, development or legal rights of children.

The CCYP Ambassador Program (formerly known as the Children and Young People Consultative Council) is made up of children and young people aged 9 to 17 from diverse backgrounds and locations around Tasmania. The program provides a forum for children to share their opinions and ideas about what is important to them, learn about and promote the rights of children and young people and complete special projects.[997]

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[990] *Commissioner for Children and Young People Act 2016* (Tas) s 20(1).

[991] *Commissioner for Children and Young People Act 2016* (Tas) s 20(2).

[992] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[993] GANHRI General Observations, G.O. 1.7.

[994] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 2.

[995] See Commissioner for Children and Young People Tasmania, *About* (Webpage) <https://www.childcomm.tas.gov.au/about/>.

[996] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 2(2).

[997] See Commissioner for Children and Young People Tasmania, *About* (Webpage) <https://www.childcomm.tas.gov.au/about/>.

In appointing members of the Children and Young People Advisory Council, the CCYP must ensure that the members are children and from groups which represent the diversity of the Tasmanian population.[998]

Full time members

In relation to General Observation 2.2, the Act is silent as to whether the appointment is on a full-time basis, however this is implied as one of the terms of appointment is that the CCYP must not hold any other office or engage in any paid employment outside the office of CCYP.[999] There is no minimum term of appointment; rather, there is a maximum terms of 5 years. However, the CCYP may be reappointed after this period for a further term not exceeding 5 years. [1000]

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: The Act is weakly drafted and does not comply with the Paris Principles in relation to the selection and appointment of the decision-making body of NHRIs. The Act is not transparent in this regard. However, in practice, selection criteria for the CCYP has been made publicly available. As such, the selection and appointment of the CCYP is partially compliant with the Paris Principles.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[1001]

The appointment process of the CCYP is unclear in the Act, other than to specify that the Governor on recommendation of the Minister for Human Services, is to appoint the CCYP.[1002]

In the recruitment of the CCPY in August 2017, the Information Package notes the following in relation to the Selection Criteria:

> *In considering a nomination for the office of Commissioner for Children and Young People, the Minister for Human Services will take account of the demonstrated skills, experience and commitment of the nominee to children and young people, including relevant tertiary or professional qualifications.*
>
> *It is therefore suggested that the following criteria provides a guide to any prospective applicant in writing an application for the position.*
>
> *1. An extensive and demonstrated professional involvement with, and an understanding and sensitivity to the health and wellbeing, needs and desires, of children and young people, particularly vulnerable children and young people.*
>
> *2. High level communication and interpersonal skills including the ability to negotiate, consult and resolve conflict over complex personal, interpersonal and organisational issues with children, young people and their families, and with a diverse range of community and government representatives, demonstrating political impartiality, and an understanding of the balance and sensitivity required in engaging with multiple stakeholders, including children and young people, government, and the broader community.*
>
> *3. Demonstrated high level knowledge of, and commitment to, the rights of children, young people and their families, advocacy practice and the principles of empowerment.*
>
> *4. High level discretion and credibility in managing highly confidential and sensitive issues and materials; in establishing priorities, researching and analysing complex*

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[998] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 2(3).

[999] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 1(2)(2).

[1000] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 1(1).

[1001] GAHNRI General Observations, G.O. 1.8

[1002] *Commissioner for Children and Young People Act 2016* (Tas) s 5.

issues; and in speaking publicly and providing leadership to issues on the basis of evidence.

5. Demonstrated high level knowledge of state and federal legislation pertaining to children and young people.

6. An outcomes focus with a demonstrated high level ability to work in partnership with government to manage change, and achieve positive results, with state-wide impact in an environment of competing priorities and fiscal challenges.

7. Sophisticated knowledge of, and experience in, government processes and procedures, particularly regarding policy development, policy analysis and evaluation of service quality.

The above selection criteria appear to be objective, pre-determined and publicly available and promotes the merit-based appointment of candidates. However, the legislative framework around this appointment is minimal and does not provide sufficient certainty or consistency around the selection and appointment process.

1.9 Political representatives on NHRIs

Summary: The Act does not directly address the Paris Principles in respect of political representatives on NHRIs, however is partially compliant in practice.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[1003] Further, the a NHRI should be independent from government.

The Act specifies that the CCYP must act independently, impartially and in the public interest when performing a function or exercising a power under the Act.[1004] The CCYP is not a member of parliament or a government representative. However, there the Act does not specify that that CCYP is not subject to the direction of anyone in relation to the way in which its functions are performed or the order of priority it gives to investigations. While the Minister may request the CCYP undertake an investigation or review, that investigation is independent and does not affect the impartiality of the CCYP to determine the procedure for the investigation or review.[1005] In fact the Act mandates that a request of the Minister under s 9(1) of the Act may not set the terms of the investigation or review, state what is to be considered as part of the investigation or review or otherwise specify how the investigation or review is to be held.[1006]

As outlined above there is however, a lack of transparency around the appointment and selection process for the CCYP in the Act.

Tenure

The tenure provisions of the Act reinforce that the CCYP is also largely not interfered by any political representative. The termination of appointment provisions in the Act are clearly defined and appropriately confined to actions which adversely impact on the capacity of the CCYP to fulfil its mandate.[1007] Dismissal is not allowed solely based on the discretion of the Minister. However, the Act allows for removal of the CCYP if the CCYP is "unable to perform adequately or competently" which could be a subjective standard that may inappropriately interfere and undermine the independence of the role. The Governor must provide written notice to the CCYP if it elects to remove the CCYP from office in accordance with the Act.[1008]

[1003] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[1004] *Commissioner for Children and Young People Act 2016* (Tas) s 8(3).

[1005] *Commissioner for Children and Young People Act 2016* (Tas) s 9(2).

[1006] *Commissioner for Children and Young People Act 2016* (Tas) s 9(2).

[1007] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 1(4).

[1008] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 1(4)(2).

Recruitment

The CCYP has the power to appoint members of the Children and Young People Advisory Council and the Children and Young People Consultative Council.[1009] Additionally the CCYP may make arrangement with the Head of a State Service Agency for State Service officer or employee to be made available to assist the CCYP. Similarly, a person may be employed for the purpose of enabling the CCYP to perform their functions.[1010]

1.10 Adequate funding of NHRIs

Summary: There is a lack of transparency in respect of funding of the CCYP in the Act. In practice (and there is no public criticism to the contrary), the Paris Principles in relation to adequate funding of NHRIs is complied with.

NHRIs must be provided with adequate funding in order to function effectively and independently.[1011]

The statutory provisions do not provide an indication as to the source or amount of funding for the Commissioner and the Commissioner's annual reports do not appear to set out the Commissioner's annual financial statements.

The Tasmanian government State budget includes separate provision for funding for the CCYP office. The Tasmanian Budget for 2019-20 allocates $1,335,000 as a separate line item for the Office of the Commissioner for Children and Young People. Additionally, in the 2019-20 budget, additional funding of $112,000 per annual was provided to the CCYP office to provide for an additional resource to support strategic communication and media services for the CCYP.[1012] Further to this, in the 2017-18 Budget, the Tasmanian Government allocated $250,000per annum for 4 years for the CCYP to provide independent monitoring for out-of-home care.

1.11 Annual reports of NHRIs

Summary: The Act largely complies with the Paris Principles in relation to annual reporting of NHRIs.

The CCYP is required to provide an annual report within 3 months after the end of each financial year. The contents of the report should outline the performance of powers and the exercise of functions of the CCYP during the financial year.[1013] The annual reports are publicly available on the CCYP website which increases the transparency and public accountability of the CCYP.

The report is also required to be directly laid before each House of Parliament, rather than through the Executive.[1014]

2 Any criticisms made publicly about this role?

No public criticisms about this role have been found.

[1010] *Commissioner for Children and Young People Act 2016* (Tas) s 5.

[1010] *Commissioner for Children and Young People Act 2016* (Tas) s 8(3).

[1010] *Commissioner for Children and Young People Act 2016* (Tas) s 9(2).

[1010] *Commissioner for Children and Young People Act 2016* (Tas) s 9(2).

[1010] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 1(4).

[1010] *Commissioner for Children and Young People Act 2016* (Tas) Schedule 1(4)(2).

[1011] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[1012] Treasury Tasmania, *Budget 2019-20* (2019) 17 <https://www.treasury.tas.gov.au/Documents/2019-20-Budget-Paper-No-2-Volume-1.pdf>.

[1013] *Commissioner for Children and Young People Act 2016* (Tas) s 19.

[1014] *Commissioner for Children and Young People Act 2016* (Tas) s 19(2).

3 What are the best features of this role?

Some of the best features include:

- Broad powers to compel and access information which is enshrined in the Act.
- Broad general functions in relation to children and young people.
- Advocacy functions for children generally, but specifically for children and young people detained under the Youth Justice Act 1997.

4 Impacts of the Tasmanian Commissioner for Children and Young People

- In the 2017-18 budget, the Tasmanian Government allocated $250,000 per annum for four years for the CCYP to provide independent monitoring of out-of-home care.[1015] This increase in funding arose from the Tasmanian Government's decision to accept the former Commissioner Morrissey recommendation in his January 2017 report into out-of-home care, *Children and Young People in Out of Home Care in Tasmania*.[1016] Specifically Recommendation Five of this report called for the establishment of independent external oversight and monitoring of the out-of-home care system, and sought the provision of additional resources for the CCYP to perform this role under its existing expanded functions and powers.[1017]

- On 7 May 2019, the CCPY provided an advice to the Tasmanian Government on *Searches of children and young people in custody in custodial facilities in Tasmania*.[1018] In response the Tasmanian Government accepted all recommendations including proposals to amend or draft legislation to address specific issues raised by CCYP.[1019]

- In March 2020, the Tasmanian Government responded to Commissioner McLean's October 2019 report of the CCYP's independent monitoring of Tasmania's Out-of-Home Care system.[1020] Some of these recommendations provided by the CCYP has been actioned and responded to by the Tasmanian Government, while others remain unresolved. Importantly, the CCYP is seeking further information and clarification from the Tasmanian Government on these points.[1021]

[1015] Commissioner for Children and Young People Tasmania , *Annual Report 2018-19* (Report, 2019) 16-17 <https://www.childcomm.tas.gov.au/wp-content/uploads/ANNUAL-REPORT-2018-19.pdf>.

[1016] Commissioner of Children and Young People, *Children and Young People in Out-of-Home Care in Tasmania Report* (Report, January 2017) <https://www.childcomm.tas.gov.au/wp-content/uploads/2017/01/Children-and-Young-People-in-Out-of-Home-Care-in-Tasmania-Report-WEB.pdf>.

[1017] Commissioner of Children and Young People, *Children and Young People in Out-of-Home Care in Tasmania Report* (Report, January 2017) 18 <https://www.childcomm.tas.gov.au/wp-content/uploads/2017/01/Children-and-Young-People-in-Out-of-Home-Care-in-Tasmania-Report-WEB.pdf>.

[1018] Commissioner of Children and Young People, *Advice to Ministers Searches of children and young people in custody in custodial facilities* (Memorandum of Advice, 7 May 2019) <https://www.childcomm.tas.gov.au/wp-content/uploads/2019-05-06-FINAL-Advice-to-Ministers-Searches-of-children-and-young-people-in-custody-in-custodial-facilities.pdf>.

[1019] Commissioner of Children and Young People, *Letter from Government in Response to CCYP Memorandum of Advice Personal on searches of children in custody* (24 June 2020) <https://www.childcomm.tas.gov.au/wp-content/uploads/Letter-from-Government-in-Response-to-CCYP-Memorandum-of-Advice-Personal-Searches.pdf>.

[1020] Commissioner of Children and Young People, *Government response to OOHC Report* (5 March 2020) <https://www.childcomm.tas.gov.au/wp-content/uploads/Government-response-to-OOHC-Report.pdf>.

[1021] Commissioner of Children and Young People, *Commissioner's comments on Tasmanian Government Response to first Out-of-Home Care Report* (Media Release, March 2020) <https://www.childcomm.tas.gov.au/wp-content/uploads/10.3.2020-CCYP-Media-Government-response-to-OOHC-report-WEB.pdf>.

13 The Aboriginal and Torres Strait Islander Social Justice Commissioner

A. The Aboriginal and Torres Strait Islander Social Justice Commissioner: Summary table

Question	Summary response
Country/State/Territory	Australia
Commissioner entity name	Aboriginal and Torres Strait Islander Social Justice Commissioner (the **Commissioner**)
Date established	The *Human Rights and Equal Opportunity Legislation Amendment Act (No. 2) 1992* (Cth[1022]) (the **Amendment Act**) was passed on 16 December 1992 to establish the Aboriginal and Torres Strait Islander Social Justice Commissioner within the Australian Human Rights Commission (**AHRC**). Pursuant to the Amendment Act, the Commissioner's position is now enshrined within Part IIA of the *Australian Human Rights Commission Act 1986* (Cth)[1023] (the **Act**). The inaugural Commissioner, Mr Michael Dodson, was appointed in 1993.[1024] The current Commissioner, Ms June Oscar AO, was appointed on 3 April 2017.[1025]
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The AHRC is accredited by the Global Alliance of national Human Rights Institutions as fully compliant with the Paris Principles.[1026] The Commissioner is largely compliant with the Paris Principles, however there are some gaps: • The Commissioner's role is formally entrenched in law, pursuant to Part IIA of the Act. • The Commissioner's mandate is expressed in broad enough terms to give the public the protection of a wide range of international human right standards. • The Act provides the Commissioner with functional immunity and some guarantee of tenure. • While the Commissioner does not have complaints-handling powers, the AHRC President is able to receive complaints about discrimination, including racial discrimination, and breaches of human rights. • While the Commissioner has its own-motion powers of inquiry, these powers are unduly limited to Commonwealth government agencies. • The Act does not comprehensively set out the terms and conditions of office for the Commissioner.

[1022] Available at <https://www.legislation.gov.au/Details/C2004A04471> (Date of Asset 16 December 1992).

[1023] Available at <https://www.legislation.gov.au/Details/C2019C00030> (Date of Assent 6 December 1986).

[1024] Australian Human Rights Commission, *Commissioners* (Webpage) <https://humanrights.gov.au/about/commissioners>.

[1025] Australian Human Rights Commission, *June Oscar AO – Aboriginal and Torres Strait Islander Social Justice Commissioner* (Webpage) <https://humanrights.gov.au/our-work/commission-general/june-oscar-ao-aboriginal-and-torres-strait-islander-social-justice>.

[1026] Global Alliance of National Human Rights Institutions, *Members* (Webpage) <https://ganhri.org/membership/>.

Question	Summary response
	• There is a lack of transparency around the appointment and selection process for the Commissioner. • The Commissioner maintains consultation with other bodies responsible for the promotion and protection of human rights. • There is some suggestion that the Commissioner does not receive adequate funding. This is particularly difficult to assess given that the Commissioner does not receive funding as a separate line item, but instead the AHRC receives funding for the Commissioner. • The annual reporting requirements of the AHRC (as a whole) are closely aligned with the GANHRI General Observations.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The AHRC is the head body, it is an independent statutory body corporate.[1027] It is a collegiate body made up of a President and seven Commissioners, including the Aboriginal and Torres Strait Islander Social Justice Commissioner.[1028] Each of the seven Commissioner roles has its own functions, which the Commissioner performs on behalf of the AHRC.[1029] The President and all other Commissioners (including the Aboriginal and Torres Strait Islander Social Justice Commissioner) must co-operate with each other to achieve common objectives, where practicable.[1030]

Accountability arrangements
What is the reporting line for the role?
Who sets the budget?
	• The Commissioner has its own functions, which it performs on behalf of the AHRC.[1031]
	• The Commissioner is appointed by the Governor-General, provided that the Minister is satisfied that the person has significant experience in community life of Aboriginal persons or Torres Strait Islanders.[1032]
	• The Commissioner holds office for such period as is specified in the terms of appointment, not exceeding 7 years, and is eligible for re-appointment.[1033]
	• Subject to the *Remuneration Tribunal Act 1973* (Cth),[1034] the Commissioner is entitled to be paid:[1035]
	  ○ Renumeration, which is to be determined by the Remuneration Tribunal,[1036] or as prescribed; and
	  ○ allowances as prescribed.

[1027] Australian Human Rights Commission, *About* (Webpage) <https://humanrights.gov.au/about>; see also *Australian Human Rights Commission Act 1986* (Cth) s 7.

[1028] Australian Human Rights Commission, *Commissioners* (Webpage) <https://humanrights.gov.au/about/commissioners>; see also *Australian Human Rights Commission Act 1986* (Cth) s 8.

[1029] See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 46MB(2).

[1030] *Australian Human Rights Commission Act 1986* (Cth) s 8(2).

[1031] *Australian Human Rights Commission Act 1986* (Cth) s 46MB(2).

[1032] *Australian Human Rights Commission Act 1986* (Cth) s 46B; the relevant minister for the AHRC is the Attorney-General.

[1033] *Australian Human Rights Commission Act 1986* (Cth) s 46D

[1034] Available at <https://www.legislation.gov.au/Details/C2019C00081>.

[1035] *Australian Human Rights Commission Act 1986* (Cth) s 46E.

[1036] The Remuneration Tribunal is the independent statutory body that handles the remuneration of key Commonwealth offices.

Question	Summary response
	• The Commissioner holds office on the terms and conditions determined by the Governor-General,[1037] and may be dismissed by the Governor-General on specific grounds.[1038] • The Commissioner must give the AHRC such information as is from time to time required.[1039] • The Commissioner may submit reports to the Minister that deal with matters relating to the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders.[1040] Such report may include recommendations as to the actions that should be taken.[1041] • The Minister must cause a copy of each report received from the Commissioner to be laid before each House of Parliament within 15 sitting days.[1042]
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	• The Commissioner is appointed by the Governor-General, provided that the Minister is satisfied that the person has significant experience in community life of Aboriginal persons or Torres Strait Islanders.[1043] • The Commissioner holds office on the terms and conditions determined by the Governor-General.[1044]
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	• Section 46C of the Act sets out the broad functions of the Commissioner, which are: ○ to promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders; ○ to undertake research and educational programs, and other programs, for the purpose of promoting respect for the human rights of Aboriginal persons and Torres Strait Islanders and promoting the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders; ○ to examine enactments, and proposed enactments, for the purpose of ascertaining whether they recognise and protect the human rights of Aboriginal persons and Torres Strait Islanders, and to report to the Minister the results of any such examination.

[1037] *Australian Human Rights Commission Act 1986* (Cth) s 46D.

[1038] *Australian Human Rights Commission Act 1986* (Cth) s 46I; the grounds for termination include 'misbehaviour' or if unable to perform the inherent requirements of the office by reason of disability; various financial difficulties, such as bankruptcy; or if the Commissioner is absent without leave beyond specified periods.

[1039] *Australian Human Rights Commission Act 1986* (Cth) s 46L.

[1040] *Australian Human Rights Commission Act 1986* (Cth) ss 46C(2A), (2B).

[1041] *Australian Human Rights Commission Act 1986* (Cth) s 46C(2C).

[1042] *Australian Human Rights Commission Act 1986* (Cth) s 46M.

[1043] *Australian Human Rights Commission Act 1986* (Cth) s 46B.

[1044] *Australian Human Rights Commission Act 1986* (Cth) s 46D.

Question	Summary response
	• In performing its functions, or exercising its powers, the Commissioner must, as appropriate, have regard to a number of specified human rights instruments.[1045] • The Commissioner performs its functions on behalf of the AHRC.[1046]
Purpose What is the purpose and objective of the role?	• The AHRC works to ensure governments, the private sector and civil society acknowledge and implement the rights of Aboriginal and Torres Strait Islander people to self-determination, participation in decision-making, respect for and protection of culture, and equality and non-discrimination.[1047] • The Commissioner's purpose is to promote respect for the human rights of Aboriginal persons and Torres Strait Islanders.[1048]
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries?	• ***Reporting:*** ○ One of the main functions of the Commissioner is to report to the Minister the results of any examination of existing and proposed Commonwealth enactments.[1049] ○ The Commissioner may submit reports to the Minister that deal with matters relating to the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders.[1050] Such report may include recommendations as to the actions that should be taken.[1051] ○ The Minister must cause a copy of each report received from the Commissioner to be laid before each House of Parliament within 15 sitting days.[1052] • ***Promotion of human rights:*** the main functions of the Commissioner include: ○ promoting discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders; ○ undertaking research and educational programs, and other programs, for the purpose of promoting respect for the human rights of Aboriginal persons and Torres Strait Islanders and promoting the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders.[1053] • ***Review of laws:*** One of the main functions of the Commissioner is to examine existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of Aboriginal persons and Torres Strait Islanders.[1054]

[1045] *Australian Human Rights Commission Act 1986* (Cth) s 46C(4).

[1046] *Australian Human Rights Commission Act 1986* (Cth) s 46C(2).

[1047] Australian Human Rights Commission, *About Aboriginal and Torres Strait Islander Social Justice* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/about-aboriginal-and-torres-strait>.

[1048] House of Representatives, *Explanatory Memorandum: Human Rights and Equal Opportunity Legislation Amendment Bill (No. 2) 1992,* available at <http://classic.austlii.edu.au/au/legis/cth/bill_em/hraeolab21992622/memo_0.html>.

[1049] *Australian Human Rights Commission Act 1986* (Cth) s 46C(1)(d).

[1050] *Australian Human Rights Commission Act 1986* (Cth) ss 46C(2A), (2B).

[1051] *Australian Human Rights Commission Act 1986* (Cth) s 46C(2C).

[1052] *Australian Human Rights Commission Act 1986* (Cth) s 46M.

[1053] *Australian Human Rights Commission Act 1986* (Cth) ss 46C(1)(b)-(c).

[1054] *Australian Human Rights Commission Act 1986* (Cth) s 46C(1)(d).

Question	Summary response

Regard to UN human rights instruments required when performing their functions or exercising their powers?	• ***Complaints handling:*** the Commissioner itself does not have a complaint-handling role. However, the AHRC President is able to receive complaints relation to discrimination and breaches of human rights.[1055]
	• ***Inquiry and reporting:*** if the Commissioner has reason to believe that a Commonwealth government agency has information / documents relevant to the performance of the Commissioner's functions, it may give written notice requiring the agency to:
	  ○ to give information to the Commissioner; or
	  ○ to produce the documents to the Commissioner.[1056]
	• ***Regard to human rights instruments:*** in performing its functions or exercising its powers, the Commissioner must, as appropriate, have regard to:[1057]
	  ○ the *Universal Declaration of Human Rights*;
	  ○ the *International Covenant on Civil and Political Rights*;
	  ○ the *International Covenant on Economic, Social and Cultural Rights*;
	  ○ the *International Convention on the Elimination of all Forms of Racial Discrimination*;
	  ○ the *Convention on the Rights of the Child*; and
	  ○ such other instruments relating to human rights as the Commissioner considers relevant.
	• In performance of function, the Commissioner may consult:[1058]
	  ○ organisations established by Aboriginal or Torres Strait Islander Communities;
	  ○ organisations of Indigenous peoples in other countries
	  ○ international organisations and agencies;
	  ○ such other organisations, agencies or persons the Commissioner considers appropriate.

Budget
 	
What is the annual budget for the role?
	• The AHRC receives funding from the Australian Government for the Commissioner.
	• In relation to the AHRC *as a whole*, the 2019-20 Federal budget:
	  ○ allocated $22,059,000 in agency resourcing for 2019-2020; and
	  ○ estimated an actual allocation of $20,324,000 for 2018-2019.[1059]
	• In relation to the AHRC as a whole, the Attorney-General's Department's Portfolio Budged Statements 2019-20 estimated $27,405,000 in net resourcing for the 2019-20 financial year, broken down as follows:

[1055] *Australian Human Rights Commission Act 1986* (Cth) Part IIB.

[1056] *Australian Human Rights Commission Act 1986* (Cth) s 46K(1).

[1057] *Australian Human Rights Commission Act 1986* (Cth) s 46C(4).

[1058] *Australian Human Rights Commission Act 1986* (Cth) s 46C(3).

[1059] See *Agency Resourcing Budget Paper No. 4 2019-20, Part 1: Agency Financial Resourcing, Overview of the Agency resourcing table* (page 40), available at <https://budget.gov.au/2019-20/content/bp4/download/bp4_05_art.pdf>.

Question	Summary response
	○ $16,538,000 in annual appropriations from Government; ○ $3,750,000 from related entities; ○ $250,000 from interest; ○ $900,000 from the sale of goods and services; and ○ $985,000 from "other".[1060] • The AHRC's statement of comprehensive income for the period ended 30 June 2019 refers to:[1061] ○ revenue of $16,709,000 received from the Australian Government in 2019; ○ a deficit of $1,185,000 attributable to the Australian Government in 2019; and ○ $10,100,000 in "total own-source income" in 2019. • In the 2018-19 financial year, the Commissioner received a base salary of $356,756.33 (and a total remuneration of $425,383.38).[1062]
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	The relevant Act is *Australian Human Rights Commission Act 1986* (Cth) and the role of the Commissioner is enshrined within Part IIA.
Most recent annual report or equivalent document (link)	Annual Report 2018-19 (AHRC)

[1060] Attorney-General's Department, *Portfolio Budged Statements 2019-20*, 96 <https://www.ag.gov.au/sites/default/files/2020-03/PBS-australian-human-rights-commission-2019-20.PDF>.

[1061] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 58 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[1062] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 96 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

B. The Aboriginal and Torres Strait Islander Social Justice Commissioner: Further analysis

1 Essential requirements of the Paris Principles

Note: The AHRC is accredited 'A' by the Global Alliance of National Human Rights Institutions,[1063] which indicates that it is fully compliant with the Paris Principles.[1064] An analysis of the Aboriginal and Torres Strait Islander Social Justice Commissioner's compliance with the Paris Principles is set out below.

1.1 The establishment of NHRIs[1065]

Summary: the Act partially complies with the Paris Principles on the establishment of NHRIs. There is a lack of transparency around the appointment mechanisms for the Commissioner.

Entrenched in law[1066]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[1067] The Commissioner's role is formally entrenched in law, pursuant to Part IIA of the Act. The Act sets out the Commissioner's mandate and powers,[1068] including the Commissioner's lines of accountability.[1069] However, the Act does not comprehensively set out the terms and conditions of office, and states that the Commissioner holds office on the terms and conditions determined by the Governor-General.[1070]

Mandate and powers[1071]

The Act broadly sets out the Commissioner's powers,[1072] including:

- to promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders;
- to undertake research and educational programs and other programs for the purpose of promoting respect of the human rights of Aboriginal persons and Torres Strait Islanders and promoting their enjoyment and exercise of human rights;
- to examine existing and proposed enactments for the purpose of ascertaining whether they recognise and protect human rights of Aboriginal persons and Torres Strait Islanders and report findings to the Minister.

The Act empowers the Commissioner to submit reports to the Minister regarding the enjoyment and exercise of human rights by Aboriginal and Torres Strait islanders as well as make recommendations to ensure the continued and enjoyment and exercise of said right.[1073]

[1063] Global Alliance of National Human Rights Institutions, *Members* (Webpage) <https://ganhri.org/membership/>.

[1064] Global Alliance of National Human Rights Institutions, *Accreditation* (Webpage) <https://ganhri.org/accreditation/>.

[1065] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[1066] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[1067] GANHRI General Observations, G.O. 1.1.

[1068] *Australian Human Rights Commission Act 1986* (Cth) s 46C(1).

[1069] *Australian Human Rights Commission Act 1986* (Cth) s 46C(2) .

[1070] *Australian Human Rights Commission Act 1986* (Cth) s 46D.

[1071] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[1072] *Australian Human Rights Commission Act 1986* (Cth) s 46C.

[1073] *Australian Human Rights Commission Act 1986* (Cth) ss 46C(2A), 46C(2C).

The Commissioner may also consult stakeholders in the community including organisations established by Aboriginal and Torres Strait islander communities, international organisations and agencies and any other organisations the Commissioner considers relevant.[1074]

This mandate appears to be expressed in broad enough terms to give the public the protection of a wide range of international human right standards and, in fact, the Commissioner is required to have regard to a number of international human rights standards when exercising its powers and functions.[1075]

Appointment mechanisms[1076]

While the appointment mechanisms for the Commissioner are set out in the Act,[1077] it is arguable that they are not sufficiently transparent. The only clear requirement is that the person has "*significant experience in community life of Aboriginal persons or Torres Strait Islanders.*"[1078]

Quasi-judicial competency (complaints-handling)[1079]

The Act does not set out an ability for the Commissioner to receive or investigate complaints. However, the AHRC President is able to receive complaints in relation to discrimination, including racial discrimination, and breaches of human rights.[1080]

1.2 Human rights mandate

Summary: the Act is largely compliant with the Paris Principles with respect to human rights mandate. However, we would note that the Commissioner's investigatory powers are unduly limited.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[1081] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[1082]

Competence and responsibilities[1083]

As is set out above, s 46C of the Act outlines the broad human rights mandate of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The broad mandate allows the Commissioner to consider and involve itself on a wide range of human rights issues within the context of Aboriginal and Torres Strait Islander peoples' experiences in Australia.

The Commissioner is also mandated to report to the Minister on the operation of human rights for Aboriginal and Torres Strait Islander peoples.[1084] Within these reports, the Commissioner may make recommendations as to improve the enjoyment and exercise of these rights.

Powers of inquiry and investigation

The Commissioner's investigatory powers are able to be exercised without a Ministerial recommendation. The Commissioner also has the power to compel access to documents or information, however this power is (unduly) limited to Commonwealth government agencies and

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[1074] *Australian Human Rights Commission Act 1986* (Cth) s 46C(3).

[1075] *Australian Human Rights Commission Act 1986* (Cth) s 46C(4).

[1076] See GANHRI General Observations, G.O. 1.1.

[1077] *Australian Human Rights Commission Act 1986* (Cth) s 46B, Division 2 of Part IIA.

[1078] *Australian Human Rights Commission Act 1986* (Cth) s 46B.

[1079] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[1080] *Australian Human Rights Commission Act 1986* (Cth) Part IIB; see also, Australian Human Rights Commission, *About the National Children's Commissioner* (Webpage) <https://humanrights.gov.au/our-work/about-national-childrens-commissioner>.

[1081] See Paris Principles, *Competence and responsibilities*; GANHRI General Observations, G.O. 2.6.

[1082] GAHNRI General Observations, G.O. 1.2.

[1083] See Paris Principles, *Competence and responsibilities,* principle 2; GANHRI General Observations, G.O. 2.6.

[1084] *Australian Human Rights Commission Act 1986* (Cth) s 46C(2B), (2C).

requires reasonable written notice to be given.[1085] That is, if the Commissioner has reason to believe that a Commonwealth government agency has information or documents relevant to the performance of the Commissioner's functions, it may give written notice requiring the agency to give information to the Commissioner or to produce the document to the Commissioner.[1086] While a Commonwealth government agency does not have to comply with the Commissioner's request if it would reveal the identity of a particular individual without that individual's consent, the agency *must* comply with the request if it is possible to do so by producing a copy with any identifying information deleted.[1087]

While the Commissioner does not have express powers of inquiry under Part IIA of the Act, the AHRC's powers of inquiry may be delegated to the Commissioner upon written notice.[1088] This would allow the Commissioner to make an examination or hold an inquiry in such manner as the Commissioner sees fit and, in informing itself in the course of the inquiry, the Commissioner would not be bound by the rules of evidence.[1089]

Examples of the Commissioner exercising their investigation powers include the Bringing them Home Report,[1090] Closing the Gap Review[1091] and Indigenous Deaths in Custody.[1092]

AHRC – broader mandate

The Commissioner also sits within the AHRC, which is empowered to perform its duties with regard for:[1093]

- the indivisibility and universality of human rights;
- the principle that every person is free and equal in dignity and rights.

Duties of the AHRC include:[1094]

- functions conferred on the Commission by the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*;
- examining enactments and proposed enactments to ascertain if they are inconsistent with human rights;
- inquiring into any act or practice that may be inconsistent with human rights and if appropriate, endeavour to effect a settlement of the matters;
- promoting an understanding and acceptance of human rights in Australia;
- undertaking research and education programs for the purpose of promoting human rights;
- reporting to the Minister as to the laws that should be made by Parliament on matters relating to human rights;

[1085] *Australian Human Rights Commission Act 1986* (Cth) s 46K.

[1086] *Australian Human Rights Commission Act 1986* (Cth) s 46K(1).

[1087] *Australian Human Rights Commission Act 1986* (Cth) s 46K(3), (4).

[1088] *Australian Human Rights Commission Act 1986* (Cth) s 19.

[1089] *Australian Human Rights Commission Act 1986* (Cth) s 14(1).

[1090] Australian Human Rights Commission, *Bringing them home Report* (Report, 1997) <https://humanrights.gov.au/our-work/bringing-them-home-report-1997>.

[1091] Australian Human Rights Commission, *Close The Gap - 10 Year Review* (Report, 2018) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-10-year-review>.

[1092] Australian Human Rights Commission, *Indigenous Deaths in Custody* (Report, October 1996) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/indigenous-deaths>.

[1093] *Australian Human Rights Commission Act 1986* (Cth) s 10A(a).

[1094] *Australian Human Rights Commission Act 1986* (Cth) s 11.

- reporting to the Minister about any actions that needs to be taken by Australia in order of comply with provisions of the Covenant, of the Declarations or any other relevant international instrument; and

- preparing and publishing guidelines for the avoidance of acts or practices which are inconsistent with human rights.

As such, the Aboriginal and Torres Strait Islander Social Justice Commissioner has a specific human rights mandate within an organisation which has an even broader human rights mandate.

Functional immunity[1095]

The Act provides the AHRC (and, accordingly, the Commissioner)[1096] with express protection from civil actions or other proceedings for damages for or in relation to an act done, or omitted to be done, in good faith in performance, or purported performance, of any function, or in the exercise of any power conferred on the AHRC.[1097]

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Act is largely compliant with the Paris Principles in regard to encouraging ratification or accession to international human rights instruments.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[1098] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[1099]

The Act empowers the Commissioner to:

- to undertake research and educational programs and other programs for the purpose of promoting respect of the human rights of Aboriginal persons and Torres Strait Islanders and promoting their enjoyment and exercise of human rights;[1100]

- to examine existing and proposed enactments for the purpose of ascertaining whether they recognise and protect human rights of Aboriginal persons and Torres Strait Islanders and report findings to the Minister.[1101]

The Commissioner may also submit reports to the Minister regarding the operation of human rights for Aboriginal and Torres Strait Islander peoples, having regard to these international instruments.[1102] Within these reports, the Commissioner may make recommendations as to improve domestic compliance with international standards. In practice, these reports could be used to encourage the ratification or accession to international human rights instruments.

The Commissioner appears to be upholding this aspect of the Paris Principles well. It is a goal of the Commissioner to see international human rights commitments made by the Australian Government in accordance with international standards. In particular, the Commissioner encourages compliance with the *UN Declaration on the Rights of Indigenous People*, which Australian pledged is support in in April 2009.[1103]

[1095] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.3.

[1096] *Australian Human Rights Commission Act 1986* (Cth) s 8(1)(g).

[1097] *Australian Human Rights Commission Act 1986* (Cth) s 48.

[1098] GANHRI General Observations, G. O. 1.3.

[1099] GANHRI General Observations, G. O. 1.3.

[1100] *Australian Human Rights Commission Act 1986* (Cth) s 46C(1)(c).

[1101] *Australian Human Rights Commission Act 1986* (Cth) s 46C(1)(d).

[1102] *Australian Human Rights Commission Act 1986* (Cth) s 46C(2B)-(2C).

[1103] Australian Human Rights Commission, *Indigenous International Rights* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/indigenous-international-rights>.

1.4 Interaction with the international human rights system

Summary: the Act is largely compliant with the Paris Principles with respect to interaction with the international human rights system.

In performing its functions of exercising its powers, the Commissioner must, as appropriate, have regard to:[1104]

- the *Universal Declaration of Human Rights,*
- the *International Covenant on Civil and Political Rights*;
- the *International Covenant on Economic, Social and Cultural Rights*;
- the *Convention on Elimination of All Forms of Racial Discrimination*;
- the *Convention of the Rights of the Child*; and
- such other instruments relating to human rights the Commissioner considers relevant.

In the performance of its functions, the Aboriginal and Torres Strait Islander Social Justice Commission may engage with international bodies, alongside other domestic organisations, to share information, promote good practice and advocate for the rights of Aboriginal and Torres Strait Islander peoples.[1105] This allows for communication and cooperation between the Commission and key international bodies in improving domestic compliance with international materials in respect of Aboriginal and Torres Strait Islander human rights.

In general, the Commissioner's powers with respect to promoting, recognising, protecting and reporting on human rights are broad (see Item 1.3 above). As such, the NCC is empowered to provide information and consult on reports to human rights mechanisms.

Examples of the Commissioner's engagement with international bodies include:[1106]

- in March and August 1999, the Commissioner made submissions to the United Nations Committee on the Elimination of Racial Discrimination, responding to the Committee's requests for information;
- in September 2003, the Commissioner made three submissions to the United Nations Committee on the Rights of the Child, relating to three of the themes to be considered during the Day of General Discussion on the Rights of Indigenous Children;
- in 2018, the Commissioner spoke at the 38th regular session of the United Nations Human Rights Council in Geneva to discuss the *Wiyi Yani U Thangani* (Women's Voices) project for Aboriginal and Torres Strait Islander women;[1107] and
- in 2019, the Commissioner launched the *Hear Us, See Us* exhibition at the United Nations Human Rights Council in Geneva.[1108]

[1104] *Australian Human Rights Commission Act 1986* (Cth) s 46C(4).

[1105] *Australian Human Rights Commission Act 1986* (Cth) s 46C(3)(c).

[1106] Australian Human Rights Commission, *Submissions made by the Aboriginal and Torres Strait Islander Social Justice Commissioner* (Webpage) <https://humanrights.gov.au/our-work/legal/submissions-made-aboriginal-and-torres-strait-islander-social-justice-commissioner#un>.

[1107] Australian Human Rights Commission, *Commissioner June Oscar puts the voices of Indigenous women on international stage* (Webpage) <https://humanrights.gov.au/about/news/commissioner-june-oscar-puts-voices-indigenous-women-international-stage>.

[1108] Australian Human Rights Commission, *Hear Us, See Us* exhibition (Webpage) <https://humanrights.gov.au/about/news/hear-us-see-us-exhibition>.

Regular engagement with international bodies is an 'important dimension' of NHRIs.[1109] Compliance with this Paris Principle ensures that domestic mechanisms are strengthened through communication and cooperation with international organisations.

1.5 Cooperation with other human rights bodies

Summary: the Commissioner largely complies with the Paris Principles on cooperation with other human rights bodies.

The Commissioner is also empowered to consult with other bodies responsible for the promotion and protection of human rights, including:

- organisations established by Aboriginal or Torres Strait Islander communities;
- organisations of Indigenous people in other countries;
- International organisations and agencies; and
- such other organisations, agencies and persons as the Commissioner considers appropriate.[1110]

In practice the Commissioner consults with other bodies and has formalised a number of clear and workable relationships.[1111] For example:

- the Commissioner is the co-chair of the Closing the Gap Steering Committee and, in producing the Closing the Gap reports, has consulted with a range of stakeholders including the Aboriginal Health Council of South Australia, Australian Medical Association, Indigenous Dentists' Association of Australia, and the NSW Aboriginal Land Council;[1112]
- in May 2015, the Commissioner co-convened an Indigenous Leaders Roundtable on economic development and property rights on Yawuru country in Broome, Western Australia;[1113]
- on 24 July 2017, the Commissioner convened a meeting of a number of Aboriginal and Torres Strait Islander advocates and supporters, including the Uluru Statement Co-Chairs, Reconciliation Australia and the Lowitja Institute, and prepared a joint statement urging all Australians and First Nations peoples to focus their collective attention on the recommendations of the Referendum Council;[1114] and
- in 2018, the Commissioner appeared at the Legal and Constitutional Affairs Legislation Committee in Canberra to give an update to the Committee on progress of the *Wiyi Yani U Thangani* (Women's Voices) project, which has involved nationwide stakeholder engagement.[1115]

Cooperation with other Aboriginal or Torres Strait Islander communities and organisations are a clear indication that the Commission is developing relations domestically to actively promote and protect human rights.[1116]

[1109] GANHRI General Observations, G.O. 1.4.

[1110] *Australian Human Rights Commission Act 1986* (Cth) s 46C(3).

[1111] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[1112] Australian Human Rights Commission, *Close the Gap: Indigenous Health Campaign* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/close-gap-indigenous-health>.

[1113] Australian Human Rights Commission, *Indigenous Property Rights* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/indigenous-property-rights>.

[1114] Australian Human Rights Commission, *Joint statement in support of First Nations' voice to Parliament* (Webpage) <https://humanrights.gov.au/about/news/joint-statement-support-first-nations-voice-parliament>.

[1115] Australian Human Rights Commission, *Commissioner June Oscar shares personal experiences of racism with Senate Committee* (Webpage) <https://humanrights.gov.au/about/news/commissioner-june-oscar-shares-personal-experiences-racism-senate-committee>.

[1116] GANHRI General Observations, G.O. 1.5.

1.6 Recommendations by NHRIs

Summary: the Act partially complies with the Paris Principles on recommendations by NHRIs. However, while the AHRC is mandated to submit annual reports, the Commissioner's power to submit reports is not mandated.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[1117] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[1118]

One of the main functions of the Commissioner is to report to the Minister the results of any examinations of existing and proposed Commonwealth enactments.[1119]

The Commissioner may submit reports that deal with matters relating to the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders to the Minister.[1120] The Commissioner may also submit reports to the Minister dealing with the operation of the *Native Title Act 1993* (Cth) and the effect of that Act on the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders.[1121] These reports may include recommendations that the Commissioner considers appropriate to ensure the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders.[1122] The Minister must cause a copy of each report received from the NCC to be laid before each House of Parliament within 15 sitting days.[1123]

However, the language of the legislation indicates that the Commissioner's reports and recommendations are not mandatory or annual. This is likely because the Aboriginal and Torres Strait Islander Social Justice Commissioner sits within AHRC, which makes its own annual report to Parliament under s 46 of the *Public Governance, Performance and Accountability Act 2013* (Cth).[1124]

Publication in practice[1125]

Until 2017, the Commissioner had an obligation to submit an annual Social Justice and Native Title Report to federal Parliament each year,[1126] outlining the human rights perspective on native title issues in Australia.[1127] While the Commissioner no longer produces these annual reports, the Commissioner continues to produce reports at the culmination of key project.[1128]

For example, the next report, the Wiyi Yani U Thangani (Women's Voices) Report, will outline the Commissioner's national consultation with Aboriginal and Torres Strait Islander women and girls in 2018, and will elevate their voices on a wide range of human rights issues, including Native Title.[1129]

[1117] GANHRI General Observations, G.O. 1.6.

[1118] GANHRI General Observations, G.O. 1.6.

[1119] *Australian Human Rights Commission Act 1986* (Cth) s 46C(1)(d).

[1120] *Australian Human Rights Commission Act 1986* (Cth) s 46C(2A).

[1121] *Australian Human Rights Commission Act 1986* (Cth) s 46C(2B).

[1122] *Australian Human Rights Commission Act 1986* (Cth) s 46C(2C).

[1123] *Australian Human Rights Commission Act 1986* (Cth) s 46M.

[1124] *Australian Human Rights Commission Act 1986* (Cth) s 45.

[1125] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.6.

[1126] Australian Human Rights Commission, *Social Justice and Native Title Reports* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/social-justice-and-native>.

[1127] Australian Human Rights Commission, *Social Justice and Native Title Reports* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/social-justice-and-native>.

[1128] Australian Human Rights Commission, *Social Justice and Native Title Reports* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/social-justice-and-native>.

[1129] Australian Human Rights Commission, *Social Justice and Native Title Reports* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/social-justice-and-native>.

1.7 Ensuring pluralism of the NHRI[1130]

Summary: the Commissioner and the AHRC are partially compliant with this Paris Principles in respect of ensuring the pluralism of the NHRI.

A key aspect of the Paris Principles is the requirement for an NHRI to be a diverse decision-making body, composed of a broad representation of national society.[1131] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[1132]

The Commissioner

Where the NHRI is a single-member, such as the Commissioner, it is important that the NHRI is representative of the diverse segments of society.[1133] The only clear requirement for the Commissioner under the Act is that the person has "*significant experience in community life of Aboriginal persons or Torres Strait Islanders.*"[1134]

Staff of the AHRC

The AHRC's staff are employed pursuant to the *Public Service Act 1999* (Cth).[1135] One of the Australian Public Service (**APS**) Employment Principles which agency heads must uphold and promote[1136] is to recognise the diversity of the Australian community and foster diversity in the workplace.[1137]

The AHRC's website states that the AHRC "*currently exceeds APS targets for the employment of people from a non-English speaking background, people with a disability and for Aboriginal and Torres Strait Islander peoples*."[1138] The AHRC also reports that it supports diversity through its:

- Diversity Strategy (incorporating their Disability Action Plan, Reconciliation Action Plan, Indigenous Employment Strategy, and Agency Multicultural Plan);
- Active membership of the Australian Employers Network on Disability;
- Workplace Reasonable Adjustment Policy;
- Internship priority; and
- Mentoring activities.

Full-time members[1139]

The Act does not provide that the Commissioner must hold office on a full-time basis. The Act sets out a specific duration for the Commissioner's mandate, which is the period specified in the instrument of appointment (not exceeding 7 years).[1140]

[1130] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[1131] GANHRI General Observations, G.O. 1.7.

[1132] GANHRI General Observations, G.O. 1.7.

[1133] GANHRI General Observations, G.O. 1.7.

[1134] *Australian Human Rights Commission Act 1986* (Cth) s 46B.

[1135] *Australian Human Rights Commission Act 1986* (Cth) s 43.

[1136] *Public Service Act 1999* (Cth) s 12, available at <https://www.legislation.gov.au/Details/C2019C00057>.

[1137] *Public Service Act 1999* (Cth) s 10A(g).

[1138] See Australian Human Rights Commission, *Culture & diversity* (Webpage) <https://humanrights.gov.au/about/jobs/culture-diversity>.

[1139] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

[1140] *Australian Human Rights Commission Act 1986* (Cth) s 46D(1).

The Commissioner is also eligible for re-appointment.[1141] Although the Paris Principles allow re-appointment, there should be mechanisms in place to ensure pluralism.[1142] The Act does not appear to limit reappointment in any way, which may not constitute appropriate mechanisms of pluralism, particularly given the Commissioner is a single-body NHRI.

The Act states that the Commissioner is entitled to be paid remuneration, as determined by the Remuneration Tribunal or, in the absence of a determination, as prescribed.[1143] The Remuneration Tribunal is the independent statutory body that handles the remuneration of key Commonwealth offices.

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: The Act is sparsely drafted and only partially complies with the Paris Principles with respect to the selection and appointment of the decision-making body of NHRIs

The GANHRI Observations emphasise the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that position is filled by an applicant who has undergone a fair and merit-based selection process.[1144]

The Commissioner is appointed by the Governor-General.[1145] While the appointment mechanisms for the Commissioner are set out in the Act,[1146] the only requirement is that the Minister be satisfied the person has significant experience in community life of Aboriginal persons or Torres Strait Islanders.[1147] The Act does not provide further information on the procedures behind the appointment and there is limited statutory or administrative material available as to how the Minister assesses this criteria, which raises concerns about whether the appointment process is sufficiently clear, transparent and participatory.[1148]

With respect to the AHRC more broadly, we note that the AHRC has a "*Jobs*" page on its website on which it publicly advertises job vacancies at the AHRC as a whole.[1149]

1.9 Political representatives on NHRIs

Summary: the Act should be better drafted in order to better expressly comply with the Paris Principles with respect to political involvement and influence.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[1150] An NHRI should also be independent from government.

As outlined above, there is a lack of transparency around the appointment and selection process for the Commissioner. The Act does not explicitly restrict the participation of government representatives or members of parliament in the decision-making of the Commission.[1151]

[1141] *Australian Human Rights Commission Act 1986* (Cth) s 46D(1).

[1142] GANHRI General Observations, G.O. 1.7.

[1143] *Australian Human Rights Commission Act 1986* (Cth) s 46E.

[1144] GANHRI General Observations, G.O. 1.8.

[1145] *Australian Human Rights Commission Act 1986* (Cth) s 46B.

[1146] *Australian Human Rights Commission Act 1986* (Cth) Division 2 of Part IIA.

[1147] *Australian Human Rights Commission Act 1986* (Cth) s 46B(2).

[1148] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.8.

[1149] See Australian Human Rights Commission, *Jobs* (Webpage) <https://humanrights.gov.au/about/jobs>

[1150] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[1151] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 1.9.

However, the Act does provide that the Commissioner must not engage in paid employment outside the duties of his or her office without the approval of the Minister,[1152] which might operate to prevent a member of parliament from holding the role of Commissioner at the same time.

There is nothing express in Part IIA of the Act to suggest that the Commissioner is not subject to any direction or oversight by the Minister or Governor-General, and in fact, the Governor-General sets the terms and conditions of the Commissioner's office.[1153] This may undermine the perceived (and real) independence of the Commissioner's office.

Tenure[1154]

The Act sets out a specific duration for the Commissioner's mandate, which is the period specified in the instrument of appointment (not exceeding 7 years), and the Commissioner is eligible for re-appointment[1155]

Furthermore, the Commissioner may only be dismissed by the Governor-General on the following specified grounds:[1156]

- for misbehaviour;
- if the Commissioner is unable to perform the inherent requirements of office due to a disability;
- if the Commissioner becomes bankrupt, or applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, or compounds with his or her creditors, or makes an assignment of remuneration for the benefit of his or her creditors;
- if the Commissioner is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
- if the Commissioner engages in paid employment outside the duties of his or her office without the approval of the Minister.

While this complies with the Paris Principles, the Act itself does not expressly require the Governor-General to provide specific reasons for the dismissal, nor does the Act expressly provide the Commissioner with an ability to contest any dismissal.

Recruitment[1157]

The Paris Principles also require NHRIs to be legislatively empowered to determine its own staffing structure, in a way which allows it to best fulfil its mandate. Staff should be recruited in a transparent and fair selection manner to ensure pluralism and diverse composition.[1158]

There is no evidence that the Commissioner hires any staff directly. However, the AHRC is entitled to employ "*the staff necessary to assist the Commission".*[1159] The recruitment of staff for the AHRC is made under the *Public Service Act 1999* (Cth), thereby making it equivalent to the recruitment of staff of other APS bodies.[1160]

[1152] *Australian Human Rights Commission Act 1986* (Cth) s 46G.

[1153] *Australian Human Rights Commission Act 1986* (Cth) s 46D(2).

[1154] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1.

[1155] *Australian Human Rights Commission Act 1986* (Cth) s 46D.

[1156] *Australian Human Rights Commission Act 1986* (Cth) s 46I.

[1157] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

[1158] GAHNRI General Observations, G.O. 2.4.

[1159] *Australian Human Rights Commission Act 1986* (Cth) s 43.

[1160] *Australian Human Rights Commission Act 1986* (Cth) s 21(a).

1.10 Adequate funding of NHRIs

Summary: there is a lack of transparency within the Act around the funding available to the Commissioner specifically (as opposed to the AHRC as a whole). However, in practice, the Commissioner partially complies with the Paris Principles on adequate funding of NHRIs.

NHRIs must be provided with adequate funding in order to function effectively and independently.[1161]

Allocation for activities and accountability[1162]

The Aboriginal and Torres Strait Islander Social Justice Commissioner is not allocated funding as a separate budget line item,[1163] and the Act provides no specific funding for the Commissioner.

Instead, the Finance Minister[1164] may give directions about the amounts in which, and the times at which, money payable to the AHRC is to be paid to the AHRC.[1165]

The Act provides that such funding may only be applied:[1166]

- in payment or discharge of the costs, expenses and other obligations incurred by the AHRC in the performance of its functions and the exercise of its powers; and
- in payment of any remuneration or allowances payable under the Act.

Money that is not immediately required for the purposes of the AHRC may be invested pursuant to the *Public Governance, Performance and Accountability Act 2013* (Cth).*[1167]*

The AHRC is obliged to comply with the financial accountability requirements applicable to public sector bodies under the *Public Governance, Performance and Accountability Act 2013* (Cth). The AHRC's statement of comprehensive income in its Annual Report for 2018-19 states that in the 2019 year, the AHRC received $16,709,000 in revenue from the Australian Government.[1168] The statement also refers to a deficit of $1,185,000 attributable to the Australian Government, [1169] which might suggest that the AHRC as whole does not receive adequate public funding to perform its mandated activities.

In addition to the funding received from the Australian Government, the AHRC reports that it received $10,100,000 in "own-source income" in 2019.[1170]

NHRI staff and members[1171]

[1161] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[1162] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[1163] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[1164] The Minister administering the *Public Governance, Performance and Accountability Act 2013* (Cth); see *Australian Human Rights Commission Act 1986* (Cth) s 44A(4).

[1165] *Australian Human Rights Commission Act 1986* (Cth) s 44A(2).

[1166] *Australian Human Rights Commission Act 1986* (Cth) s 44B.

[1167] *Australian Human Rights Commission Act 1986* (Cth) s 44B(2) of the Act; see also, *Public Governance, Performance and Accountability Act 2013* (Cth) s 59.

[1168] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 58 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[1169] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 58 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[1170] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 58 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[1171] Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

The Act states that the Commissioner is entitled to remuneration as is determined by the Remuneration Tribunal or as prescribed.[1172] The AHRC publishes workforce data, such as executive remuneration, in its annual reports. In the 2018-19 financial year, the Commissioner received a base salary of $356,756.33 (and a total remuneration of $425,383.38).[1173] This is the second-highest remuneration package of all AHRC executive members, with the exception of the President.

Accessibility and communications infrastructure[1174]

The AHRC actively seeks submissions from a broad cross section of the community.[1175] However, the AHRC does not appear to have a permanent physical regional presence.

The AHRC also maintains a communications system for general enquiries.[1176] This system includes a telephone line, email address, mailing address and social media accounts. A National Relay Service is also available for people who are deaf or have a hearing or speech impairment.[1177]

While the Commissioner does not have a complaints-handling role, the AHRC President is able to receive complaints in relation to discrimination, including racial discrimination, and breaches of human rights. These complaints can be submitted online through the AHRC website.[1178]

To assist with its complaints-handling function, the AHRC also runs the National Information Service (**NIS**), which is free and confidential service that provides information and referrals for individuals, organisations and employers about a range of human rights and discrimination issues.[1179] The NIS can:

- provide information on rights and responsibilities under federal human rights and anti-discrimination law;
- discuss whether individuals are able to make a complaint to the AHRC or how the law might apply to their situation;
- provide information about how to make a complaint, respond to a complaint or deal with specific discrimination issues; and
- refer individuals on to other organisations that might be able to assist (to the extent that the NIS is unable to).

The NIS can be contacted by phone, email, online or by fax. A National Relay Service is available for people who are deaf or have a hearing or speech impairment,[1180] and a translating and interpreting service is available for non-English speakers.[1181]

1.11 Annual reports of NHRIs

Summary: the Act is partially compliant with the Paris Principles. The Commissioner itself is not mandated to produce their own report, but the AHRC produces an annual report which captures the activities of the Commissioner.

[1172] *Australian Human Rights Commission Act 1986* (Cth) s 46E.

[1173] Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 96 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[1174] GANHRI General Observations G.O. 1.10(a), (d).

[1175] See Australian Human Rights Commission, *Have your say* (Webpage) <https://humanrights.gov.au/have-your-say>.

[1176] See Australian Human Rights Commission, *Contact* (Webpage) <https://humanrights.gov.au/about/contact>.

[1177] See National Relay Service, available at <https://nrschat.nrscall.gov.au/nrs/internetrelay>.

[1178] See Australian Human Rights Commission, *Make a complaint* (Webpage) <https://humanrights.gov.au/complaints/make-complaint>.

[1179] See Australian Human Rights Commission, *National Information Service* (Webpage) <https://humanrights.gov.au/our-work/complaint-information-service/enquiries-national-information-service>.

[1180] See National Relay Service, available at <https://nrschat.nrscall.gov.au/nrs/internetrelay>.

[1181] See Department of Home Affairs, *TIS National Service* (Webpage) <https://www.tisnational.gov.au/>.

The President of the AHRC is required to produce annual reports for the Minister, for presentation to the Parliament, under section 46 of the *Public Governance, Performance and Accountability Act 2013* (Cth).[1182] The report must set out the AHRC's activities, annual performance statements and annual financial statements with respect to the reporting period.[1183] The AHRC's annual reports are made available on its website.[1184]

In practice, the Aboriginal and Torres Strait Islander Social Justice Commissioner contributes to the AHRC's annual report but does not release their own specific annual report.

2 Any criticisms made publicly about this role?

While not a criticism of the Commissioner directly, in 2017, Oxfam recommended that a legislative requirement or other mechanism be established to require the federal Government to provide a formal response to the Commissioner's reports. [1185] The Oxfam report noted that:[1186]

> *"...the lack of political will among governments and lack of engagement by parliament on issues raised by the Commissioner have been significant limitations in ensuring the protection and realisation of rights for Aboriginal and Torres Strait Islander peoples. Ultimately, the vast majority of recommendations made by successive Social Justice Commissioners remain largely unimplemented."*

The broader AHRC, of which the Commissioner is a part, has come under criticism for being political[1187] and questions of its effectiveness are raised when Australia is criticised for its human rights record.[1188]

3 What are the best features of this role?

- The Aboriginal and Torres Strait Islander Social Justice Commissioner has a relatively broad human rights mandate to promote and protect human rights, which is an essential requirement of the Paris Principles. Furthermore, it sits within a broader structure, the Australian Human Rights Commission, which also has a broad human rights mandate.

- The Minister must consider a person's lived experience within Aboriginal and Torres Strait Islander communities before appointing them as the Commissioner.[1189] This ensures a culturally competent and appropriate appointment.

- The Commissioner appears to maintain consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships. This obligation is also enshrined well within the legislation.[1190]

[1182] *Australian Human Rights Commission Act 1986* (Cth) s 45.

[1183] *Public Governance, Performance and Accountability Act 2013* (Cth) s 46, available at <https://www.legislation.gov.au/Details/C2017C00269>.

[1184] See Australian Human Rights Commission, *Annual Reports Index,* available at <https://humanrights.gov.au/our-work/commission-general/publications/annual-reports-index>.

[1185] Oxfam, *Moving Beyond Recognition: Respecting the Rights of Aboriginal and Torres Strait Islander Peoples* (Report, April 2017) 17 <https://www.oxfam.org.au/wp-content/uploads/2017/04/OXF011-Indigenous-Rights-Report-Email.pdf>.

[1186] Oxfam, *Moving Beyond Recognition: Respecting the Rights of Aboriginal and Torres Strait Islander Peoples* (Report, April 2017) 17 <https://www.oxfam.org.au/wp-content/uploads/2017/04/OXF011-Indigenous-Rights-Report-Email.pdf>.

[1187] Michael Gordon, 'Lauded and vilified: Gillian Triggs, Australian Human Rights Commission president', *Sydney Morning Herald* (17 June 2017) available at <https://www.smh.com.au/politics/federal/lauded-and-vilified-gillian-triggs-australian-human-rights-commission-president-20170616-gwsk3b.html>.

[1188] Ben Doherty, 'Unacceptable: UN Committee damns Australia's record on human rights', *The Guardian* (19 October 2017) available at: <https://www.theguardian.com/australia-news/2017/oct/19/unacceptable-un-committee-damns-australias-record-on-human-rights>; Anna Cody and Maria Nawaz, 'UN slams Australia's human rights record', *The Conversation* (10 November 2017) available at: <https://theconversation.com/un-slams-australias-human-rights-record-87169>.

[1189] *Australian Human Rights Commission Act 1986* (Cth) s 46B(2).

[1190] *Australian Human Rights Commission Act 1986* (Cth) s 46C(3).

- It is mandated that the Commissioner *must* have regard to international instruments when exercising its functions domestically.[1191] This ensures compliance with and promotion of international standards of human rights.

[1191] See s 46C(4) of the Act.

C. The Aboriginal and Torres Strait Islander Social Justice Commissioner: Impacts

4 Recent or Continuing Projects

4.1 Close the Gap Indigenous Health Campaign

The Close the Gap Steering Committee (the **Committee**), which is co-chaired by the Commissioner, has been working with peak Indigenous and non-Indigenous health bodies, NGOs and human rights organisations to work to achieve quality in health and life expectancy for Aboriginal and Torres Strait Islander peoples. [1192]

The Close the Gap Indigenous Health Campaign aims to close the health and life expectancy gap between Aboriginal and Torres Strait Islander people and non-Indigenous Australia within a generation. In February 2018, the Committee released a 10-year review, examining the reasons why Australian governments have not succeeded in closing the health gap and why they will not succeed by 2030 if the current course continues.[1193]

4.2 Wiyi Yani U Thangani (Women's Voices) Project

The *Wiyi Yani U Thangani* (Women's Voices) Project is a major project let by the Commissioner and funded by the Department of Prime Minister and Cabinet.[1194] The project aims to explore:

- the needs, challenges and aspirations of Aboriginal and Torres Strait Islander women and girls today;
- the key achievements in relation to the rights of Aboriginal and Torres Strait Islander women and girls over the past 30 years;
- ways to enhance the lives of Aboriginal and Torres Strait Islander women and girls so that they can lead happy, healthy and fulfilling lives; and
- ways to promote and protect culture.[1195]

As part of the project, during 2018, the Commissioner led a national conversation with Aboriginal and Torres Strait Islander women and girls to hear their priorities, challenges and aspirations for themselves, their families and their future. A report of these engagements is currently being prepared. [1196] In 2019 and 2020, the project will also engage with Aboriginal and Torres Strait Islander senior women through a limited number of additional gatherings.

4.3 Constitutional reform to recognise Aboriginal and Torres Strait Islander people in the Constitution

In 2018, the current Commissioner and all of the former Aboriginal and Torres Strait Islander Social Justice Commissioners called for a referendum on constitutional recognition within five years. [1197] In addition to advocating for this five-year commitment, the joint submission:

- set out a four step process, which included a new Aboriginal and Torres Strait Islander Peoples Recognition Act, to set out the framework for participation of Aboriginal and Torres Strait Islander peoples;

[1192] Australian Human Rights Commission, *Close the Gap: Indigenous Health Campaign* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/close-gap-indigenous-health>.

[1193] Australian Human Rights Commission, *Close The Gap - 10 Year Review* (2018) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-10-year-review>.

[1194] Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices)* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/wiyi-yani-u-thangani-womens>.

[1195] Wiyi Yani U Thangani, *The Project* (Webpage) <https://wiyiyaniuthangani.humanrights.gov.au/wiyi-yani-u-thangani-womens-voices/project>.

[1196] Wiyi Yani U Thangani, *The Project* (Webpage) <https://wiyiyaniuthangani.humanrights.gov.au/wiyi-yani-u-thangani-womens-voices/project>.

[1197] Australian Human Rights Commission, *Constitution reform to recognise Aboriginal and Torres Strait Islander people in the nationals Constitutions* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/constitution-reform>.

- recommended a regular parliamentary motion to hold parliamentarians to account on whether they support removing racism from the Constitution; and
- sought a negotiation process between parliamentarians, the government and Aboriginal and Torres Strait Islander peoples to finalise the wording of constitutional recognition.

The Commissioner also spoke at the final day of hearings of the Joint-Select Committee on constitutional recognition.

4.4 Bringing Them Home – interactive educational resource

In 2017, the Commissioner created an interactive education website to mark the 20th anniversary of the release of the Bringing them Home Report, the final report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander from Their Families (see Item 2.5 below).[1198] The website features a map, lesson plans and all of the stories from the report.[1199]

5 Notable Past Projects

5.1 Social Justice and Native Title Reports

Until 2017, the Commissioner had an obligation to submit an annual Social Justice and Native Title Report to federal Parliament each year,[1200] outlining the human rights perspective on native title issues in Australia.[1201] While the Commissioner no longer produces these annual reports, the Commissioner continues to produce reports at the culmination of key project.[1202]

5.2 The Declaration dialogues

In 2012, a series of dialogues was conducted in order to ensure that the principles and rights outlined in the Declaration on the Rights of Indigenous Peoples was fully integrated into the Australian policy landscape. [1203] The dialogue series provided a mechanism to develop a comprehensive National Strategy as to those principles and rights.

5.3 National Congress of Australia's First Peoples

In 2008, the Commissioner assisted with the early creation of a new national representative body, the National Congress of Australia's First Peoples, to provide a new national representative voice for Aboriginal and Torres Strait Islander peoples in Australia. [1204]

5.4 Northern Territory 'Emergency Response' intervention

From 2007 to 2012, the Commissioner contributed to ensuring that the Australian Government's "*national emergency response to protect Aboriginal children in Northern Territory*" from sexual abuse and family violence, was consistent with Australia's international human rights obligations and particularly with the *Racial Discrimination Act 1975* (Cth).[1205] The publications, speeches and

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[1198] Australian Human Rights Commission, *Bringing Them Home – interactive educational resource*, available at <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/bringing-them-home-0>.

[1199] The *Bringing them Home* website is available at <https://bth.humanrights.gov.au/?_ga=2.197522731.589246182.1598254727-688638973.1596176623>.

[1200] Australian Human Rights Commission, *Social Justice and Native Title Reports* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/social-justice-and-native>.

[1201] Australian Human Rights Commission, *Social Justice and Native Title Reports* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/social-justice-and-native>.

[1202] Australian Human Rights Commission, *Social Justice and Native Title Reports* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/social-justice-and-native>.

[1203] Australian Human Rights Commission, *The Declaration dialogues* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/declaration-dialogues>.

[1204] Australian Human Rights Commission, *National Congress of Australia's First Peoples* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/national-congress-australias>.

[1205] Australian Human Rights Commission, *Northern Territory 'Emergency Response' intervention* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/northern-territory-emergency>.

media releases made by the AHRC with respect to the 'Emergency Response' intervention have been made publicly available on the AHRC's website.[1206]

5.5 The Bringing them Home Report and the Moving Forward Conference

In April 1997, the Commissioner released the Bringing them Home Report.[1207] The report resulted from the Commission's national inquiry into the laws, policies and practices which separated Aboriginal and Torres Strait Islander children from their families. The Inquiry's recommendations were directed to healing and reconciliation for the benefit of all Australians.

Four years later, in August 2001, the AHRC, the Aboriginal and Torres Strait Islander Commission and the Public Interest Advocacy Centre hosted a national conference to facilitate public debate about the reparations for the stolen generations.[1208] The reports, issues paper, recommendations and speeches from the Moving Forward Conference have all been made publicly available on the AHRC's website.[1209]

5.6 Indigenous Deaths in Custody

In October 1996, the Commissioner prepared a report into Indigenous Deaths in Custody from 1989 - 1996.[1210] The report analysed findings of coronial inquests in order to examine the circumstances of each death and determine whether the 179 recommendations made by the 1989 Royal Commission into Indigenous deaths in custody were implemented in the years between 1989 to 1996. The Report found a failure by State and Territory Governments to properly implement the findings of the Royal Commission and noted that this failure raised serious questions as to whether international human rights instruments were being complied with by Australia.[1211]

[1206] Australian Human Rights Commission, *Northern Territory 'Emergency Response' intervention* (Webpage) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/northern-territory-emergency>.

[1207] Australian Human Rights Commission, *Bringing them home Report* (Report, 1997) <https://humanrights.gov.au/our-work/bringing-them-home-report-1997>.

[1208] Australian Human Rights Commission, *Moving Forward – achieving reparations for the stolen generations* (Webpage, 15 August 2001) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/moving-forward-achieving>.

[1209] Australian Human Rights Commission, *Moving Forward – achieving reparations for the stolen generations* (Webpage, 15 August 2001) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/moving-forward-achieving>.

[1210] Australian Human Rights Commission, *Indigenous Deaths in Custody* (Report, 1 January 1996) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/indigenous-deaths>.

[1211] Australian Human Rights Commission, *Indigenous Deaths in Custody* (Report, 1 January 1996) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/indigenous-deaths>.

14 The Advocate for Children and Young People in New South Wales

A. The Advocate for Children and Young People in New South Wales: Summary table

Question	Summary response
Country/State/Territory	New South Wales, Australia
Commissioner entity name	The Advocate for Children and Young People (the **Advocate**)
Date established	The *Advocate for Children and Young People Bill 2014* (NSW)[1212] (the **Bill**) was assented on 24 June 2014,[1213] to establish the office of the Advocate and to provide for the functions of that office. The *Advocate for Children and Young People Act 2014* (NSW)[1214] (**the Act**) was commended by Regulation 713 of 2014 on 9 January 2015.[1215]
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The Advocate is largely compliant with the Paris Principles, however there are some gaps: • The role of the Advocate is formally entrenched in law, pursuant to the Act. • The Act does not contain any express human rights references. However, the Advocate's functions are expressed on broad terms and may arguably be extended for the promotion of these rights. • The Act provides the Advocate, and its advisory council, with functional immunity with respect to any actions, liability, claim or demand. • The Advocate does not have a complaints-handling power. • While the Advocate has powers of inquiry and reporting, it may only launch an inquiry by request to the Minister or on the Minister's own initiative. • The Act does not comprehensively set out the terms and conditions of office for the Advocate. • There is a significant lack of transparency around the appointment and selection process for the Advocate. However, the Act contains detailed provisions as the selection and appointment of part-time members of the Advocate's Youth Advisory Council. • The Advocate maintains consultation with stakeholders and other bodies responsible for the promotion and protection of human rights. • The Act contains no limit on political representatives and in fact it appears that the Minister has some influence over the Advocate.

[1212] Available at <https://beta.legislation.nsw.gov.au/view/pdf/bill/cfe9b309-cb9b-447f-bfdc-8be77309e3fb>.

[1213] NSW Government, *Advocate for Children and Young People Bill 2014,* available at <https://beta.legislation.nsw.gov.au/view/html/inforce/current/act-2014-029/lh>.

[1214] Available at <https://legislation.nsw.gov.au/~/pdf/view/act/2014/29/whole>.

[1215] TimeBase, *Advocate for Children and Young People Act 2014 Commences in NSW,* available at <https://www.timebase.com.au/news/2015/AT006-article.html#:~:text=Last%20Thursday%20(9%20January%202015,a%20new%20Youth%20Advisory%20Council.>.

Question	Summary response
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The Advocate is an independent statutory office reporting to the NSW Parliament through the Parliamentary Joint Committee on Children and Young People (the **Joint Committee**).[1216] The Joint Committee is a joint statutory committee which monitors and reviews the Advocate's work.[1217] It consists of three members from the Legislative Council of NSW Parliament and four from the Legislative Assembly of NSW Parliament.[1218] The Advocate is supported by a small team of staff in the Department of Communities and Justice,[1219] and provides secretariat support to the NSW Youth Advisory Council.[1220] Notably, the Advocate's website has a New South Wales Government domain (www.acyp.nsw.gov.au) and both the Advocates' website and annual reports contain the New South Wales Government logo. This signalling may go towards undermining the perceived independence of the Advocate from Government.
Accountability arrangements What is the reporting line for the role? Who sets the budget?	• The Advocate's budget is part of the operating budget of the Department of Family and Community Services (**FACS**).[1221] • The Advocate is appointed by the Governor,[1222] and the Advocate's employment is governed by a contract of employment between the Advocate and the Minister.[1223] • The Advocate's remuneration, employment benefits and allowances are governed by the *Government Sector Employment Act 2013* (NSW).[1224] • The Advocate must be appointed on a full-time basis, and holds office for a specified period, which must not exceed 5 years (unless re-appointed).[1225] • The Advocate may be re-appointed but is not eligible to be appointed for more than 2 terms of office.[1226] • The Governor may remove the Advocate from office, but only for incompetence, incapacity or misbehaviour.[1227] • The Advocate must prepare annual reports to Parliament.[1228]

[1216] Office of the Advocate for Children and Young People, *About ACYP* (Webpage) <https://www.acyp.nsw.gov.au/about>.

[1217] *Advocate for Children and Young People Act 2014* (NSW) Part 7.

[1218] *Advocate for Children and Young People Act 2014* (NSW) s 36.

[1219] Office of the Advocate for Children and Young People, *About ACYP* (Webpage) <https://www.acyp.nsw.gov.au/about>.

[1220] *Advocate for Children and Young People Act 2014* (NSW) Part 4; Office of the Advocate for Children and Young People, *Our legislation* (Webpage) <https://www.acyp.nsw.gov.au/about/our-legislation>.

[1221] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 53 < https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1222] *Advocate for Children and Young People Act 2014* (NSW) s 4.

[1223] *Advocate for Children and Young People Act 2014* (NSW) s 7(1).

[1224] *Advocate for Children and Young People Act 2014* (NSW) s 7(2)(c); the *Government Sector Employment Act 2013* (NSW) is available at <https://legislation.nsw.gov.au/~/pdf/view/act/2013/40/whole?download=false>.

[1225] *Advocate for Children and Young People Act 2014* (NSW) s 5.

[1226] *Advocate for Children and Young People Act 2014* (NSW) s 5.

[1227] *Advocate for Children and Young People Act 2014* (NSW) s 9.

[1228] *Advocate for Children and Young People Act 2014* (NSW) s 32.

Question	Summary response
	• The Advocate *must* prepare special reports on any particular issue or general matter requested by the Minister and may furnish these reports to Parliament.[1229] • The Advocate *may* make a report on any particular issue or general matter relating to the Advocate's functions and may furnish that report to Parliament.[1230] • The Minister *must* review a draft of any report to be furnished to Parliament and *may* provide comments.[1231] The Advocate is not bound to amend the report based on this review but must consider any comments before furnishing the report to Parliament.[1232]

Qualification and Experience
What qualifications and experiences are required for the role?
Does the person need to be an Aboriginal or Torres Strait Islander person?
What is the selection and appointment process?
	• The Advocate is appointed by the Governor,[1233] and the Advocate's employment is governed by a contract of employment between the Advocate and the Minister.[1234]
	• The Act does not set out any information about the qualifications and experiences required for the Advocate role.
	• Conversely, the Act provides that persons appointed to the Youth Advisory Council:
	  ○ must have such experience, skills and qualifications as the Minister considers necessary;[1235]
	  ○ must reflect the diversity of young people in NSW;[1236] and
	  ○ at least 6 of the 12 part-time members appointed must be persons under the age of 25 years at the time of appointment.[1237]

Scope
What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?
	• Section 15 of the Act sets out the broad functions of the Advocate, which are:
	  ○ to advocate for and promote the safety, welfare and well-being of children and young people;
	  ○ to promote the participation of children and young people in the making of decisions that affect their lives and to encourage government and non-government agencies to seek the participation of children and young people appropriate to their age and maturity;
	  ○ to conduct special inquiries into issues affecting children and young people;
	  ○ to make recommendations to government and non-government agencies on legislation, reports, policies, practices, procedures and services affecting children and young people;

[1229] *Advocate for Children and Young People Act 2014* (NSW) s 33(1).
[1230] *Advocate for Children and Young People Act 2014* (NSW) s 33(2).
[1231] *Advocate for Children and Young People Act 2014* (NSW) s 34.
[1232] *Advocate for Children and Young People Act 2014* (NSW) s 34(5).
[1233] *Advocate for Children and Young People Act 2014* (NSW) s 4.
[1234] *Advocate for Children and Young People Act 2014* (NSW) s 7(1).
[1235] *Advocate for Children and Young People Act 2014* (NSW) s 21(2).
[1236] *Advocate for Children and Young People Act 2014* (NSW) s 21(4).
[1237] *Advocate for Children and Young People Act 2014* (NSW) s 21(3).

Question	Summary response
	○ to conduct, promote and monitor research into issues affecting children and young people; ○ to promote the provision of information and advice to assist children and young people; ○ to prepare, in consultation with the Minister, a 3-year strategic plan for children and young people in the State; and ○ such other functions as are conferred or imposed on the Advocate by or under the Act or any other Act. • In performing its functions, the Advocate must:[1238] ○ focus on systemic issues affecting children and young people; ○ give priority to the interests and needs of vulnerable and disadvantaged children and young people; ○ consult with children and young people from a broad range of backgrounds and age groups throughout the State; ○ work co-operatively with other organisations that provide services to or represent the interests of children and young people; and ○ work co-operatively with the Youth Advisory Council.
Purpose What is the purpose and objective of the role?	• The Advocate was designed to stand up for the rights and interests of children and young people, and to ensure that the voices of children and young people are heard by the Government and by the whole community.[1239] • The following principles govern the Advocate's work:[1240] ○ the safety, welfare and well-being of children and young people are the paramount considerations, ○ the views of children and young people are to be given serious consideration and taken into account, ○ a co-operative relationship between children and young people and their families and communities is important for the safety, welfare and well-being of children and young people.
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament?	• ***Reporting:*** ○ The Advocate *must* prepare annual reports to Parliament: [1241] ▪ setting out the Advocate's activities during that year; ▪ evaluating responses to its recommendations; ▪ setting out recommendations for changes in laws or administrative action; and

[1238] *Advocate for Children and Young People Act 2014* (NSW) s 15(2).

[1239] NSW Legislative Assembly, *Second Reading: Advocate for Children and Young People Bill 2014,* available at <https://www.parliament.nsw.gov.au/bill/files/3179/2R%20Advocate.pdf>; NSW Legislative Council, *Second Reading: Advocate for Children and Young People Bill 2014,* available at <https://www.parliament.nsw.gov.au/bill/files/3179/2R%20Advocate_1.pdf>.

[1240] *Advocate for Children and Young People Act 2014* (NSW) s 14.

[1241] *Advocate for Children and Young People Act 2014* (NSW) s 32.

Question	Summary response
Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	▪ describing any requests made for special inquiries which were not approved by the Minister. ○ The Advocate must prepare special reports on any particular issue or general matter requested by the Minister and may furnish these reports to Parliament.[1242] ○ The Advocate may make a report on any particular issue or general matter relating to the Advocate's functions and may furnish that report to Parliament.[1243] ○ The Minister must review a draft of any report to be furnished to Parliament and may provide comments.[1244] The Advocate is not bound to amend the report based on this review but must consider any comments before furnishing the report to Parliament.[1245] • ***Promotion of human rights:*** while the Act does not refer specifically to human rights, the Advocate is empowered to: ○ act as an advocate for and promotes the safety, welfare and well-being of children and young people;[1246] ○ conduct special inquiries into issues affecting children and young people;[1247] and ○ promote the provision of information and advice to assist children and young people.[1248] • ***Review of laws*****:** one of the main functions of the Advocate is to make recommendations to government and non-government agencies on legislation, reports, policies, practices, procedures and services affecting children and young people.[1249] • ***Complaints handling:*** the Act expressly provides that the Advocate does not have the function of dealing directly with the complaints or concerns of particular children or young people.[1250] • ***Inquiry and reporting:*** the Minister may require the Advocate to conduct a special inquiry into a specified issue affecting children or young people, either at the request of the Advocate or on the Minister's own initiative.[1251] In conducting the inquiry, the Advocate: ○ may hold hearings or public seminars, conduct workshops or establish working groups and task forces for the purposes of a special inquiry.[1252] ○ may give written notice requiring a person to give information or documents or attend a hearing, and any such person is under a duty to comply with the notice and to answer any question at the hearing.[1253]

[1242] *Advocate for Children and Young People Act 2014* (NSW) s 33(1).
[1243] *Advocate for Children and Young People Act 2014* (NSW) s 33(2).
[1244] *Advocate for Children and Young People Act 2014* (NSW) s 34.
[1245] *Advocate for Children and Young People Act 2014* (NSW) s 34(5).
[1246] *Advocate for Children and Young People Act 2014* (NSW) s 15(1)(a).
[1247] *Advocate for Children and Young People Act 2014* (NSW) s 15(1)(c).
[1248] *Advocate for Children and Young People Act 2014* (NSW) s 15(1)(e).
[1249] *Advocate for Children and Young People Act 2014* (NSW) s 15(1)(d).
[1250] *Advocate for Children and Young People Act 2014* (NSW) s 19(1).
[1251] *Advocate for Children and Young People Act 2014* (NSW) s 21(1).
[1252] *Advocate for Children and Young People Act 2014* (NSW) s 27(1) & (2).
[1253] *Advocate for Children and Young People Act 2014* (NSW) s 30.

Question	Summary response
	• ***Regard to human rights instruments:*** the Act does not contain any express references to human rights instruments.
Budget What is the annual budget for the role?	• The Advocate's budget is part of the FACS operating budget.[1254] • The NSW Budget Estimates for 2018-19 allocated $6.8 billion ($6.7 billion recurrent expenses and $119.4 million capital expenditure) to the FACS cluster (as a whole).[1255] ○ One of the "key initiatives" listed in the Estimates (with respect to protecting vulnerable people from harm) is the allocation of $4.1 million for the Advocate to improve safety, welfare and wellbeing of all children and young people in New South Wales.[1256] • In general, there is a lack of transparency around the Advocate's budget and funding – for example, the Advocate's annual report for 2018-19 states that its operating budget is being reported as part of FAC's annual report, [1257] however the FACS annual report for 2018-19 states that the Advocate produced its own annual report containing financial statements.[1258] • In 2018-19, the FACS annual report indicated a $50.5 million surplus, suggesting that the office of the Advocate is well funded and not lacking in budget.[1259]
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	*Advocate for Children and Young People Act 2014* (NSW)
Most recent annual report or equivalent document (link)	Annual Report 2018-2019

[1254] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 53 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1255] NSW Government, *Budget Estimates 2018-19: Budget Paper No. 3* (2018) 2 <https://www.budget.nsw.gov.au/sites/default/files/budget-2018-06/Budget_Paper_3-Budget%20Estimates-Budget_201819.pdf>.

[1256] NSW Government, *Budget Estimates 2018-19: Budget Paper No. 3* (2018) 2-8 <https://www.budget.nsw.gov.au/sites/default/files/budget-2018-06/Budget_Paper_3-Budget%20Estimates-Budget_201819.pdf>.

[1257] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 53 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1258] Family and Community Services, *2018-19 Annual Report* (Report, 2019) 11.

[1259] Family and Community Services, *2018-19 Annual Report* (Report, 2019) 63.

B. The Advocate for Children and Young People in New South Wales: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs[1260]

Summary: the Act partially complies with the Paris Principles with respect to the establishment of NHRIs. However, there is some suggestion that the Advocate is not sufficiently distinguished as an independent state agency.

Entrenched in law[1261]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[1262] The Advocate is formally entrenched in law, pursuant to the Act. The Act broadly sets out Advocate's functions and powers (see below). However, the Act also establishes a Parliamentary Joint Committee (the **Committee**) which monitors and reviews the actions of the Advocate,[1263] and the Advocate receives funding as part of the Department of Family and Community Services (**FACS**).[1264]

Furthermore, the Act does not comprehensively set out the terms and conditions of office, and the Advocate's employment is governed by a separate contract of employment between the Advocate and the Minister.[1265] The Act also provides that some of the provisions which govern the employment of public service senior executives under the *Government Sector Employment Act 2013* (NSW)[1266] also apply to the Advocate.[1267]

When considered as whole, these provisions might suggest that the Advocate is not sufficiently distinguished as an independent state agency.[1268]

Mandate and powers[1269]

The Act establishes clear general principles which guide the Advocate's role and functions, including:[1270]

- the safety, welfare, and wellbeing of children are the paramount consideration;
- the views of children and young people are to be given serious consideration and taken into account; and
- a co-operative relationship between children and young people and their families and communities.

[1260] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[1261] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[1262] GANHRI General Observations, G.O. 1.1.

[1263] *Advocate for Children and Young People Act 2014* (NSW) s 37(1)(a).

[1264] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 53 < https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1265] *Advocate for Children and Young People Act 2014* (NSW) s 7(1).

[1266] The *Government Sector Employment Act 2013* (NSW) is available at <https://legislation.nsw.gov.au/~/pdf/view/act/2013/40/whole?download=false>.

[1267] *Advocate for Children and Young People Act 2014* (NSW) s 7(2).

[1268] GAHNRI General Observations, G.O. 2.7.

[1269] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[1270] *Advocate for Children and Young People Act 2014* (NSW) s 14.

The Act also sets out the specific functions of the Advocate, including:[1271]

- to advocate for and promote the safety, welfare and well-being of children and young people;
- to promote the participation of children and young people in the making of decisions that affect their lives and to encourage government and non-government agencies to seek the participation of children and young people appropriate to their age and maturity;
- to conduct special inquiries into issues affecting children and young people;
- to make recommendations to government and non-government agencies on legislation, reports, policies, practices, procedures and services affecting children and young people;
- to conduct, promote and monitor research into issues affecting children and young people;
- to promote the provision of information and advice to assist children and young people;
- to prepare, in consultation with the Minister, a 3-year strategic plan for children and young people in the State; and
- such other functions as are conferred or imposed on the Advocate by the Act or under this or any other Act.

In performing its functions, the Advocate must:[1272]

- focus on systemic issues affecting children and young people;
- give priority to the interests and needs of vulnerable and disadvantaged children and young people,
- consult with children and young people from a broad range of backgrounds and age groups throughout the State;
- work co-operatively with other organisations that provide services to or represent the interests of children and young people; and
- work co-operatively with the Youth Advisory Council.

This mandate appears to be expressed in broad enough terms to give the public the protection of various human right standards, particularly those which relate to the "*safety, welfare and well-being of children and young people".*

Appointment mechanisms[1273]

The appointment mechanisms for the Advocate are not sufficiently transparent under the Act.[1274] This can be contrasted with the appointment mechanisms for the members of the Youth Advisory Council.[1275] With respect to the membership of the Council, the Act provides that members:

- must have such experience, skills and qualifications as the Minister considers necessary;[1276]

[1271] *Advocate for Children and Young People Act 2014* (NSW) s 15(1).
[1272] *Advocate for Children and Young People Act 2014* (NSW) s 15(2).
[1273] See GANHRI General Observations, G.O. 1.1.
[1274] *Advocate for Children and Young People Act 2014* (NSW) Part 2.
[1275] *Advocate for Children and Young People Act 2014* (NSW) s 21.
[1276] *Advocate for Children and Young People Act 2014* (NSW) s 21(2).

- must reflect the diversity of young people in NSW;[1277] and
- at least 6 of the 12 part-time members appointed must be persons under the age of 25 years at the time of appointment.[1278]

Quasi-judicial competency (complaints-handling)[1279]

The Act expressly provides that the Advocate does not have the function of dealing directly with the complaints or concerns of particular children or young people.[1280] As part of the second reading speech for the Bill, it was explained that the Ombudsman would monitor complaints, while the Advocate would provide a systemic approach to ensure that children and young people are able to bring issues of concern to them.[1281] As part of this role, the Advocate and the Ombudsman were set to work together on child friendly complaints standards.[1282]

Furthermore, as part of the Advocate's power to conduct special inquiries,[1283] the Advocate may hold hearings and public seminars,[1284] request information and documents,[1285] and refer any findings or information to other investigative agencies such as the Commissioner of Police, the Ombudsman and FACS.[1286] These powers suggest at least partial compliance with the quasi-judicial competency of NHRIs.[1287]

1.2 Human rights mandate

Summary: the Act is largely compliant with the Paris Principles with respect to human rights mandate.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[1288] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[1289]

Competence and responsibilities[1290]

As is described above, the Act sets out the broad mandate of the Advocate. This mandate allows the Advocate to advocate for the rights of children and young people,[1291] conduct inquiries into issues affecting children and young people,[1292] make recommendations to government and non-

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[1277] *Advocate for Children and Young People Act 2014* (NSW) s 21(4).

[1278] *Advocate for Children and Young People Act 2014* (NSW) s 21(3).

[1279] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[1280] *Advocate for Children and Young People Act 2014* (NSW) s 19(1).

[1281] NSW Legislative Assembly, *Second Reading: Advocate for Children and Young People Bill 2014,* available at <https://www.parliament.nsw.gov.au/bill/files/3179/2R%20Advocate.pdf>; NSW Legislative Council, *Second Reading: Advocate for Children and Young People Bill 2014,* available at <https://www.parliament.nsw.gov.au/bill/files/3179/2R%20Advocate_1.pdf>.

[1282] NSW Legislative Assembly, *Second Reading: Advocate for Children and Young People Bill 2014,* available at <https://www.parliament.nsw.gov.au/bill/files/3179/2R%20Advocate.pdf>; NSW Legislative Council, *Second Reading: Advocate for Children and Young People Bill 2014,* available at <https://www.parliament.nsw.gov.au/bill/files/3179/2R%20Advocate_1.pdf>.

[1283] *Advocate for Children and Young People Act 2014* (NSW) s 15(1)(c), Part 5.

[1284] *Advocate for Children and Young People Act 2014* (NSW) ss 27(1), (2).

[1285] *Advocate for Children and Young People Act 2014* (NSW) s 30.

[1286] *Advocate for Children and Young People Act 2014* (NSW) s 17.

[1287] GAHNRI General Observations, G.O. 2.9.

[1288] GAHNRI General Observations, G.O. 1.2.

[1289] GAHNRI General Observations, G.O. 1.2.

[1290] See Paris Principles, *Competence and responsibilities,* principle 2; GANHRI General Observations, G.O. 2.6.

[1291] *Advocate for Children and Young People Act 2014* (NSW) ss 14-15.

[1292] *Advocate for Children and Young People Act 2014* (NSW) s 15(1)(c).

government agencies,[1293] and promote the interests and needs of vulnerable or disadvantage children.[1294]

Functional immunity[1295]

The Act provides that any matter or thing done or omitted to be done by the Advocate does not, if done in good faith for the purposes of executing the Act (or any other legislation), subject the Advocate to any action, liability, claim or demand.[1296] This protection also applies to Advocate's staff, the Youth Advisory Council and any advisory committees.[1297]

Powers of investigations and inquiry[1298]

The Advocate is vested with the competence to launch inquiries into any issue affecting children or young people.[1299] However, the Advocate may only do so by request to the Minister or on the Minister's own initiative.[1300] As part of an inquiry, the Advocate:

- may hold hearings or public seminars, conduct workshops or establish working groups and task forces for the purposes of a special inquiry.[1301]
- may give written notice requiring a person to give information or documents or attend a hearing, and any such person is under a duty to comply with the notice and to answer any question at the hearing.[1302]

There Act also creates penalties (50 penalty units or imprisonment for 6 months, or both) to be imposed on persons providing the Advocate with false or misleading material.[1303]

Part 5 of the *Advocate for Children and Young People Act 2014* governs the Advocate's power of special inquiry.

In theory one of the main functions of the Advocate is to conduct special inquiries into issues affecting children and young people, and in addition to its annual report may also make a report to Parliament on any particular issue or general matter relating to the Advocate's functions, on his own initiative or as requested by the related Minister.

For the purpose of a special inquiry, the Advocate may hold hearings, consult with such persons as the Advocate thinks fit and require employees of government agencies to attend hearings or to provide specified information.

The Advocate conducts regular consultations in Juvenile Justice Centres and is trialling an exit interview program for young people leaving detention.

In reality, the powers of investigation and inquiry are largely only exercised jointly with other parties and are utilised through the Parliamentary Joint Committee on Children and Young

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[1293] *Advocate for Children and Young People Act 2014* (NSW) s 15(d).

[1294] *Advocate for Children and Young People Act 2014* (NSW) s 15(2)(b).

[1295] General Observation 2.3.

[1296] *Advocate for Children and Young People Act 2014* (NSW) s 40.

[1297] *Advocate for Children and Young People Act 2014* (NSW) s 40.

[1298] Australian and New Zealand Children's Commissioners and Guardians, *Table of Functions* (Report, 2018) <https://accg.org.au/wp-content/uploads/2018/12/Table-of-Functions-20181212.pdf>.

[1299] *Advocate for Children and Young People Act 2014* (NSW) s 24.

[1300] *Advocate for Children and Young People Act 2014* (NSW) s 24(1).

[1301] *Advocate for Children and Young People Act 2014* (NSW) ss 27(1)-(2).

[1302] *Advocate for Children and Young People Act 2014* (NSW) s 30.

[1303] *Advocate for Children and Young People Act 2014* (NSW) s 30(3).

People. For example, submissions to the Prevention of Youth Suicide in NSW;[1304] inquiry into students with a disability or special needs in NSW schools;[1305] inquiry into child protection.[1306]

No systemic monitoring program is legislatively required. Only 6 results come up on the Parliament website for the Committee on Children and Young People, all regarding their annual report (rather than an investigation or inquiry).[1307] Since December 2018 the only inquiry being considered by Parliament is the Support for Children of Imprisoned Parents in New South Wales by the Committee on Children and Young People.[1308] Since March 2014 the only inquiries made are:[1309]

- Support for Children of Imprisoned Parents in New South Wales (14/11/2019);
- 2020 Review of the annual reports and other matters of the Office of the Advocate for Children and Young People and the Office of the Children's Guardian (14/11/2019);
- 2018 Review of the Annual Report of the Advocate for Children and Young People and functions of the Children's Guardian (05/03/2018);
- Prevention of youth suicide in New South Wales (22/06/2017);
- 2017 Review of the Annual Reports of the Advocate for Children and Young People and the Children's Guardian (03/04/2017);
- Review of the 2015 Annual Report of the Advocate for Children and Young People (20/10/2015); and
- Sexualisation of children and young people (20/10/2015).

No special inquiries have been conducted since 2017, according to the annual reports since that time.[1310] In the 2018 – 2019 reporting period, the Advocate made one submission to Government Inquiries - Review of Consent in Relation to Sexual Assault Offences.[1311]

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Act is partially compliant with the Paris Principles in regard to encouraging ratification or accession to international human rights instruments.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human

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[1304] Available at <https://www.parliament.nsw.gov.au/ladocs/submissions/58742/Submission%2047%20-%20Advocate%20for%20Children%20and%20Young%20People.pdf>

[1305] Available at <https://www.parliament.nsw.gov.au/lcdocs/submissions/57327/0191%20Office%20of%20the%20Advocate%20for%20Children%20and%20Young%20People.pdf>.

[1306] Available at <https://www.parliament.nsw.gov.au/lcdocs/submissions/56291/0128%20Office%20of%20the%20Advocate%20for%20Children%20and%20Young%20People.pdf>.

[1307] See search results, available at <https://www.parliament.nsw.gov.au/search/Pages/committee-results.aspx?k=Advocate%20for%20Children%20and%20Young%20People#Default=%7B%22k%22%3A%22Advocate%20for%20Children%20and%20Young%20People%22%2C%22o%22%3A%5B%7B%22d%22%3A1%2C%22p%22%3A%22SortByDate%22%7D%5D%2C%22r%22%3A%5B%7B%22n%22%3A%22Committees%22%2C%22t%22%3A%5B%22%5C%22%C7%82%C7%82436f6d6d6974746565206f6e204368696c6472656e20616e6420596f756e672050656f706c65%5C%22%22%5D%2C%22o%22%3A%22and%22%2C%22k%22%3Afalse%2C%22m%22%3Anull%7D%5D%7D>.

[1308] Parliament of New South Wales, *Inquiries* (Webpage) <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiries.aspx#tab-search>.

[1309] Parliament of New South Wales, *Committee on Children and Young People* (Webpage) <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=170#tab-inquiries>.

[1310] Office of the Advocate for Children and Young People, *ACYP Annual Report 2017/18* (Report, 2018) < https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2018-web.pdf>.

[1311] Office of the Advocate for Children and Young People, *ACYP Annual Report 2017/18* (Report, 2018) 50 < https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2018-web.pdf>.

rights obligations.[1312] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[1313]

The Act contains no express references to international instruments and there is no legislative responsibility for the Advocate to encourage accession to any international human rights instruments. However, the Act empowers the Advocate to make recommendations to government and non-government agencies on legislation, reports, policies, practices, procedures and services affecting children and young people.[1314] This power could arguably be used to encourage ratification or accession to international human rights instruments, provided that such instruments affect children and young people.

1.4 Interaction with the international human rights system

Summary: the Act is partially compliant with the Paris Principles with respect to interaction with the international human rights system.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[1315] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[1316]

In general, the Advocate's powers with respect to promoting the safety, welfare and well-being of children and young people are broad (see Item 1.3 above). The Advocate for Children and Young People is not required to report to any organisation or body beyond the NSW Parliament (annual report),[1317] the Minister (special reports),[1318] and the Secretary of FACS (for inquiry-related matters).[1319] However, the language of the Act does not preclude other forms of interaction with the international human rights system. For example, s 15(2)(d) of the Act mandates that the Advocate must '*work co-operatively with other organisations that provide services to or represent the interests of children and young people'*.

In practice, the Advocate shows some limited interaction with the international human rights system. For example:

- in November 2018, the Advocate launched an educational video resource that covers the meaning, history and significance of child rights and the *United Nations Convention on the Rights of the Child*;[1320] and
- the Advocate holds registered training courses for teachers, helping the teachers to gain an understanding of the history of the child rights movement and the major rights embedded in the *United Nations Convention on the Rights of the Child*.[1321]

The work of the Advocate has been reviewed in 2020, and, in summary, the Advocate:[1322]

[1312] GANHRI General Observations, G. O. 1.3.

[1313] GANHRI General Observations, G. O. 1.3.

[1314] *Advocate for Children and Young People Act 2014* (NSW) s 15(1)(d).

[1315] GAHNRI General Observations, G.O. 1.4.

[1316] GAHNRI General Observations, G.O. 1.4.

[1317] *Advocate for Children and Young People Act 2014* (NSW) s 32.

[1318] *Advocate for Children and Young People Act 2014* (NSW) s 33.

[1319] *Advocate for Children and Young People Act 2014* (NSW) s 18.

[1320] Office of the Advocate for Children and Young People, *Child Rights Educational Resource* (Webpage) < https://www.acyp.nsw.gov.au/child-rights-educational-resource>.

[1321] See, eg, AIS NSW, *Child Rights Training for NSW Teachers* (Webpage) < https://www.aisnsw.edu.au/Course%20and%20Conference%20Materials/Free%20Child%20Rights%20Training%20Course.pdf >.

[1322] Committee on Children and Young People, *2020 Review of the Annual Reports and other matters of the Office of the Advocate for Children and Young People* (Report 1/57, June 2020)

- implemented the NSW Strategic Plan for Children and Young People;
- produced a disaster report, documenting the stories of young people during the bushfires;
- engaged with diverse groups of children and young people in face-to-face consultations and online;
- Visited every juvenile justice centre twice to conduct trial exist interviews, allowing these disadvantaged groups to express their views (in the 2018-2019 period, the Advocate consulted with 86 young people on what is working well and what is not working so well);
- Attending every meeting of and briefing the Youth Advisory Council, who provide advice to the Minister on issues, policies and laws.

1.5 Cooperation with other human rights bodies

Summary: the Advocate largely complies with the Paris Principles on the cooperation with other human rights bodies.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[1323] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[1324]

Under the Act, the Advocate must cooperate with other government and non-government agencies regarding issues or services affecting children and young people.[1325] Under this provision, the Minister must make arrangements for co-operation, including for access to information and documents, with the Minister to whom the government agency is responsible.[1326]

In practice, the Advocate regularly consults with other organisations and bodies and has a number of formalised and workable relationships.[1327] Some recent examples include:

- the Advocate attends biannual members meetings of the Australia and New Zealand Children's Commissioners and Guardians (**ANZCCG**), which aims to promote and protect the safety, wellbeing and rights of children and young people in Australia and New Zealand;[1328]
- in 2017, the Advocate partnership with Multicultural NSW to create IDEATION – Creation your Campaign – a youth-led campaign to increase inclusion and a sense of belonging for all children and young people in NSW;[1329]
- between November 2018 and January 2019, the Advocate partnered with the Coordinator-General for Refugee Resettlement in NSW, the Joint Party Working Group Refugee Youth Sub Group and Multicultural NSW to conduct a series of focus group style consultations with young refugees and asylum seekers;[1330] and

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<https://www.parliament.nsw.gov.au/ladocs/inquiries/2573/2020%20Review%20of%20the%20Annual%20Reports%20and%20other%20matters%20of%20the%20Office%20of%20the%20Advocate%20for%20CYP.pdf>.

[1323] GAHNRI General Observations, G.O. 1.5.

[1324] GAHNRI General Observations, G.O. 1.5.

[1325] *Advocate for Children and Young People Act 2014* (NSW) s 16.

[1326] *Advocate for Children and Young People Act 2014* (NSW) s 16(2).

[1327] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[1328] Office of the Advocate for Children and Young People, *ACCG submissions* (Webpage) <https://www.acyp.nsw.gov.au/info/publications/accg-submissions>.

[1329] Office of the Advocate for Children and Young People, *Annual Report 2017* (Report, 2017) 14 <https://www.acyp.nsw.gov.au/acyp-annual-report-2017>.

[1330] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 14 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

- in both 2017 and 2018, the Advocate delivered the NSW Children's Week Parliament program in partnership with the YMCA.[1331]

Furthermore, the Advocate (or its delegates) hold membership in or provide council to a number of government and non-government entities. These include the Youth Justice Coalition, NCOSS Children Young People and Families Alliance, NSW Family Matters Collective, NESA's Board Endorsed Alternative Education Panel and the Social Innovation Council.[1332]

1.6 Recommendations by NHRIs

Summary: the Act largely complies with the Paris Principles on recommendations by NHRIs.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[1333] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[1334] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[1335]

One of the key functions of the Advocate to make recommendations to government and non-government agencies on legislation, reports, policies, practices, procedures, and services affecting children and young people.[1336]

The Advocate must also prepare annual reports to Parliament each year.[1337] Under the Act, these reports should:[1338]

- outline the Advocate's activities during that year;
- evaluate responses to its recommendations;
- set out recommendations for changes in laws or administrative action; and
- describe any requests made for special inquiries which were not approved by the Minister.

In addition to its annual reports, the Advocate:

- *must* prepare special reports on any particular issue or general matter requested by the Minister and may furnish these reports to Parliament;[1339] and
- *may* make a report on any particular issue or general matter relating to the Advocate's functions and may furnish that report to Parliament.[1340]

The Minister must review a draft of any annual, special or general report to be furnished to Parliament and may provide comments.[1341] The Advocate is not bound to amend the report

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[1331] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 14 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1332] Office of the Advocate for Children and Young People, *Annual Report 2017* (Report, 2017) 14 <https://www.acyp.nsw.gov.au/acyp-annual-report-2017>.

[1333] GAHNRI General Observations, G.O. 1.6.

[1334] GAHNRI General Observations, G.O. 1.6.

[1335] GAHNRI General Observations, G.O. 1.6.

[1336] *Advocate for Children and Young People Act 2014* (NSW) s 15(1)(d).

[1337] *Advocate for Children and Young People Act 2014* (NSW) s 32.

[1338] *Advocate for Children and Young People Act 2014* (NSW) s 32(2).

[1339] *Advocate for Children and Young People Act 2014* (NSW) s 33(1).

[1340] *Advocate for Children and Young People Act 2014* (NSW) s 33(2).

[1341] *Advocate for Children and Young People Act 2014* (NSW) s 34.

based on this review but must consider any comments before furnishing the report to Parliament.[1342]

The Advocate publishes its Annual Reports on its website.[1343]

1.7 Ensuring pluralism of the NHRI[1344]

Summary: the Act is partially compliant with the Paris Principles in respect of ensuring the pluralism of the NHRI.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[1345] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[1346]

Where the NHRI is a single-member, such as the Advocate, it is important that the NHRI is representative of diverse segments of society.[1347] However, there are no clear requirements for the Advocate under the Act.

Staff of the Advocate

The FACS website states that the department is "*committed to building a workplace culture that values diversity and inclusion*" and that it actively promotes the employment of people with disability, Aboriginal and Torres Strait Islander peoples, members of the LGBTI community and other diversity groups.[1348]

The Youth Advisory Council

Although the Advocate itself is a singular role, Part 4 of the Act establishes a Youth Advisory Council, which comprises of 12 part-time members appointed by the Minister and an ex-officio person appointed by the Advocate.[1349] While the Minister is responsible for appointing members, the Minister must consider any recommendations made by the Advocate in relation to the appointment of members.[1350]

The Youth Advisory Council must consist of at least 6 people under the age of 25, and the appointments should reflect the diversity of young people in the State.[1351] Each member may only hold office for a period of 2 years but is eligible for re-appointment.[1352] Schedule 1 of the Act sets out extensive provisions relating to the membership and procedure of the Youth Advisory Council.

Under Part 4, the Advocate can also appoint any other advisory committees he or she considers appropriate to assist in the Advocate's functions.[1353] The Advocate has wide discretion and power when appointing members of any additional committees.

[1342] *Advocate for Children and Young People Act 2014* (NSW) s 34(5).

[1343] See Office of the Advocate for Children and Young People, *Annual Reports* (Webpage) < https://www.acyp.nsw.gov.au/info/publications/annual-reports>.

[1344] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[1345] GANHRI General Observations, G.O. 1.7.

[1346] GANHRI General Observations, G.O. 1.7.

[1347] GANHRI General Observations, G.O. 1.7.

[1348] Communities & Justice, *Why work at DCJ* (Webpage) <https://www.facs.nsw.gov.au/about/careers/working-at-dcj/about>.

[1349] *Advocate for Children and Young People Act 2014* (NSW) ss 20, 21.

[1350] *Advocate for Children and Young People Act 2014* (NSW) s 21(5).

[1351] *Advocate for Children and Young People Act 2014* (NSW) s 21(3), (4).

[1352] *Advocate for Children and Young People Act 2014* (NSW) Schedule 1, s 4.

[1353] *Advocate for Children and Young People Act 2014* (NSW) s 23.

Full-time members[1354]

The Advocate is required to hold office on a full-time basis, unless otherwise permitted by the Minister.[1355] This can be contrasted with the members of the Youth Advisory Council, who are part-time members.[1356]

The Act sets out a specific duration for the Advocate's mandate, which is the period specified in the instrument of appointment (not exceeding 5 years), with capacity for reappointment.[1357] Although the Paris Principles allow re-appointment, there should be mechanisms in place to ensure pluralism.[1358] The Act provides such mechanism by mandating that a person cannot be reappointed for more than 2 tenures as an Advocate (whether they are consecutive terms is irrelevant).[1359]

The Act does not comprehensively set out the terms and conditions of office, and states that the Advocate holds office on the terms set out in a contract of employment between the Advocate and the Minister.[1360]

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: the Act is partially compliant with the Paris Principles with respect to the selection and appointment of the decision-making body of the NHRI.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[1361]

The Advocate is appointed by the Governor.[1362] The Act does not mandate a clear selection and appointment process, which raises issues as to whether the appointment process is sufficiently '*clear, transparent, and participatory'*.[1363] The appointment of staff of the Advocate is also up to the discretion of the Advocate, subject to the *Government Sector Employment Act 2013* (NSW),[1364] and therefore lacks a transparent and prescribed process within the legislation.[1365]

However, while the selection and appointment of the Advocate position lacks transparency under the Act, the selection process of the Youth Advisory Council mostly complies well with the Paris Principles requiring transparency.[1366] The twelve part-time members of the Youth Advisory Council are appointed by the Minister.[1367] The criteria for selection is well-contained within the legislation.[1368] The Minister must only appoint members who they consider have the skills, experience, and qualifications necessary for them to make a contribution to the work of the

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[1354] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

[1355] *Advocate for Children and Young People Act 2014* (NSW) s 6.

[1356] *Advocate for Children and Young People Act 2014* (NSW) s 21.

[1357] *Advocate for Children and Young People Act 2014* (NSW) s 5.

[1358] GAHNRI General Observations, G.O. 1.7.

[1359] *Advocate for Children and Young People Act 2014* (NSW) s 5.

[1360] *Advocate for Children and Young People Act 2014* (NSW) s 7(1).

[1361] GANHRI, General Observations, G.O. 1.8.

[1362] *Advocate for Children and Young People Act 2014* (NSW) s 4.

[1363] GAHNRI General Observations, G.O. 1.8.

[1364] The *Government Sector Employment Act 2013* (NSW) is available at <https://legislation.nsw.gov.au/~/pdf/view/act/2013/40/whole?download=false>.

[1365] *Advocate for Children and Young People Act 2014* (NSW) s 12.

[1366] GAHNRI General Observations, G.O. 1.8.

[1367] *Advocate for Children and Young People Act 2014* (NSW) s 21.

[1368] *Advocate for Children and Young People Act 2014* (NSW) Schedule 1.

council.[1369] Six of those twelve members should be under 25 years old and the Council should reflect the diversity of young people within the State.[1370]

1.9 Political representatives on NHRIs

Summary: the Act should be better drafted in order to expressly comply with the Paris Principles with respect to political representatives on NHRIs.

In order to maintain a NRHI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[1371]

There is no legislative provision preventing a political representative from being appointed as the Advocate. As mentioned above, there is therefore a lack of transparency surrounding the Advocate selection and appointment process.

Notably, the Advocate's website has a New South Wales Government domain (www.acyp.nsw.gov.au) and both the Advocates' website and annual reports contain the New South Wales Government logo. This signalling may go towards undermining the perceived independence of the Advocate from Government.

Tenure[1372]

The Act sets out a specific duration of the Advocate's mandate, which is the period specified in the instrument of appointment (not exceeding 5 years).[1373] The Advocate is eligible for re-appointment but is not eligible to be appointed for more than 2 terms.[1374]

The Governor has the power to remove the Advocate from office, but only for incompetence, incapacity or misbehaviour.[1375] While this technically complies with the Paris Principles, the Act itself does not expressly require the Governor to provide specific reasons for the dismissal, nor does the Act expressly provide the Advocate with an ability to contest any dismissal.

Recruitment[1376]

The Paris Principles also require NHRIs to be legislatively empowered to determine its own staffing structure, in a way which allows it to best fulfil its mandate. Staff should be recruited in a transparent and fair selection manner to ensure pluralism and diverse composition.[1377]

The Advocate may employ staff in the public service under the *Government Sector Employment Act 2013* (NSW)[1378] to enable the Advocate to exercise his or her functions.[1379]

1.10 Adequate funding of NHRIs

Summary: the Act is partially compliant with the Paris Principles on adequate funding of NHRIs.

NHRIs must be provided with adequate funding in order to function effectively and independently.[1380]

[1369] *Advocate for Children and Young People Act 2014* (NSW) s 21(2).

[1370] *Advocate for Children and Young People Act 2014* (NSW) s 21(3)-(4).

[1371] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[1372] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1.

[1373] *Advocate for Children and Young People Act 2014* (NSW) s 5.

[1374] *Advocate for Children and Young People Act 2014* (NSW) s 5.

[1375] *Advocate for Children and Young People Act 2014* (NSW) s 9.

[1376] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

[1377] GAHNRI General Observations, G.O. 2.4.

[1378] The *Government Sector Employment Act 2013* (NSW) is available at https://legislation.nsw.gov.au/~/pdf/view/act/2013/40/whole?download=false

[1379] *Advocate for Children and Young People Act 2014* (NSW) s 12.

[1380] GANHRI, General Observations, G.O. 1.10, Paris Principles, *Composition and guarantees of independence and pluralism*.

The statutory provisions do not provide an indication as to the source or amount of funding for the Advocate for Children and Young People,[1381] however the Advocate's annual reports state that the Advocate's budget is part of the FACS operating budget.[1382]

In general, there is some lack of transparency around the Advocate's budget and funding – for example, the Advocate's annual report for 2018-19 states that its operating budget is being reported as part of FAC's annual report, [1383] however the FACS annual report for 2018-19 states that the Advocate produced its own annual report containing financial statements.[1384] Despite this confusion, in 2018-19, the FACS annual report indicated a $50.5 million surplus, suggesting that the office of the Advocate is well funded and not lacking in budget.[1385]

Furthermore, the NSW Budget Estimates for 2018-19 allocated $6.8 billion ($6.7 billion recurrent expenses and $119.4 million capital expenditure) to the FACS cluster (as a whole).[1386] One of the "key initiatives" listed in the Estimates (with respect to protecting vulnerable people from harm) is the allocation of $4.1 million for the Advocate to improve safety, welfare and wellbeing of all children and young people in New South Wales.[1387]

NHRI staff and members[1388]

The Advocate's remuneration, employment benefits and allowances are governed by the *Government Sector Employment Act 2013* (NSW).[1389] FACS publishes workforce data, such as executive grades and remuneration, in its annual reports.

Accessibility and communications infrastructure[1390]

In the course of its functions, the Advocate is required to maintain engagement with a broad cross section of the community, including children from a broad range of backgrounds and age groups.[1391] The office of the Advocate can also provide children, young people and their families, friends and advocates with information about and referral to government and non-government programs and services.[1392]

As part of these roles, the Advocate maintains a communications system for general enquiries. This system includes a telephone line, email address and mailing address. However, we note that there is a wait time of up to 2 weeks for enquiries sent by emails.[1393]

The Advocate's website is also made more accessible by providing a quick button function to translate it into over 100 different languages.

[1381] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[1382] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 53 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1383] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 2019) 53 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1384] Family and Community Services, *2018-19 Annual Report* (Report, 2019) 11.

[1385] Family and Community Services, *2018-19 Annual Report* (Report, 2019) 63.

[1386] NSW Government, *Budget Estimates 2018-19: Budget Paper No. 3* (2018) 2 < https://www.budget.nsw.gov.au/sites/default/files/budget-2018-06/Budget_Paper_3-Budget%20Estimates-Budget_201819.pdf>.

[1387] NSW Government, *Budget Estimates 2018-19: Budget Paper No. 3* (2018) 2 < https://www.budget.nsw.gov.au/sites/default/files/budget-2018-06/Budget_Paper_3-Budget%20Estimates-Budget_201819.pdf>.

[1388] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[1389] *Advocate for Children and Young People Act 2014* (NSW) s 7(2)(c); the *Government Sector Employment Act 2013* (NSW) is available at <https://legislation.nsw.gov.au/~/pdf/view/act/2013/40/whole?download=false>.

[1390] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[1391] *Advocate for Children and Young People Act 2014* (NSW) ss 15(1)(b), (2)(c); Office of the Advocate for Children and Young People, *What the Office of the Advocate does to promote participation,* available at <https://www.acyp.nsw.gov.au/promoting-childrens-participation/what-the-office-of-the-advocate-does-to-promote-participation>.

[1392] Office of the Advocate for Children and Young People, *Contact Us* (Webpage) <https://www.acyp.nsw.gov.au/contact-us>.

[1393] Office of the Advocate for Children and Young People, *Contact Us* (Webpage) <https://www.acyp.nsw.gov.au/contact-us>.

1.11 Annual reports of NHRIs

Summary: the Act largely complies with the Paris Principles on annual reports of NHRIs.

The Paris Principles require NHRIs to prepare, publicise, and submit an annual report on its activities and recommendations, to assess how well it has furthered its mandate that year.[1394] The report can include recommendations, opinions, proposals, or to address human rights concerns. Reporting is an essential aspect of ensuring the accountability of an independent agency.[1395]

The Advocate must prepare annual reports to Parliament each year.[1396] Under the Act, these reports should:[1397]

- outline the Advocate's activities during that year;
- evaluate responses to its recommendations;
- set out recommendations for changes in laws or administrative action; and
- describe any requests made for special inquiries which were not approved by the Minister.

The Minister must review a draft of any annual report to be furnished to Parliament and may provide comments.[1398] The Advocate is not bound to amend the report based on this review but must consider any comments before furnishing the report to Parliament.[1399]

The Advocate makes its annual reports available on its website.[1400] The 2018-19 Annual Report can be accessed here.

2 Any criticisms made publicly about this role?

We have been unable to locate any specific criticisms about this role.

The Royal Commission into the Protection and Detention of Children in the Northern Territory noted that the Advocate does not have an individual complaints resolution and investigatory function (unlike the equivalent bodies in the Australian Capital Territory and the Northern Territory).[1401]

3 What are the best features of this role?

- The Advocate's functions are set out in broad terms,[1402] which gives the Advocate a wide scope to promote human rights with respect to children.
- The Act sets out transparent criteria for the appointment of Youth Advisory Council members,[1403] and upholds the Paris Principles with respect to pluralism by:[1404]

[1394] GAHNRI General Observations, G.O. 1.11.

[1395] GAHNRI General Observations, G.O. 1.11.

[1396] *Advocate for Children and Young People Act 2014* (NSW) s 32.

[1397] *Advocate for Children and Young People Act 2014* (NSW) s 32(2).

[1398] *Advocate for Children and Young People Act 2014* (NSW) s 34.

[1399] *Advocate for Children and Young People Act 2014* (NSW) s 34(5).

[1400] Office of the Advocate for Children and Young People, *Annual Reports* (Webpage) <https://www.acyp.nsw.gov.au/info/publications/annual-reports>.

[1401] *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Report, 2019) 11 <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-4.pdf>.

[1402] *Advocate for Children and Young People Act 2014* (NSW) s 15.

[1403] *Advocate for Children and Young People Act 2014* (NSW) Schedule 1.

[1404] *Advocate for Children and Young People Act 2014* (NSW) s 21.

- mandating that at least 6 of the 12 part-time members are under the age of 25 at the time of appointment; and

- that any appointments reflect the diversity of young people in the State.

- The Advocate has the power to appoint an advisory committee at their discretion.[1405]

- With respect to its annual reports, the Advocate is mandated to provide an evaluation of the response of relevant authorities to its recommendations as part of its annual report to Parliament.[1406]

- One of the main functions of the Advocate is to prepare, in consultation with the Minister, a three-year strategic plan for children and young people in NSW.[1407] This legislated plan sets out a common set of agreed objectives and indicators against which NSW Government policies and services for children and young people can be aligned.

- One of the Advocate's key functions is to promote the participation of children and young people in the making of decisions that affect their lives,[1408] and the Advocate appears to place significant emphasis on this function (see below on 'Consultations').[1409]

[1405] *Advocate for Children and Young People Act 2014* (NSW) s 23.

[1406] *Advocate for Children and Young People Act 2014* (NSW) s 32(1)(b).

[1407] *Advocate for Children and Young People Act 2014* (NSW) s 15(1)(g).

[1408] *Advocate for Children and Young People Act 2014* (NSW) ss 15(1)(b), (2)(c).

[1409] See also Office of the Advocate for Children and Young People, *Participation Resources* (Webpage) <https://www.acyp.nsw.gov.au/participation-resources>.

C. The Advocate for Children and Young People in New South Wales: Impacts

In its 2018/2019 Annual Report, which was received by Parliament on 1 October 2019, the Advocate sets out the following statistics for the reporting year:

- the Advocate released three reports;[1410]
- the Advocate made one submission to a Government Inquiry;[1411]
- the Advocate attended or held 393 meetings, forums, seminars and related events;[1412]
- the Advocate made no independent recommendations (outside of its usual government consultation process); [1413] and
- the Advocate received no responses to recommendations, other than the tabling of its annual report.[1414]

4 Strategic Plan for Children and Young People

Pursuant to s 15(1)(g) of the Act, one of the main functions of the Advocate is to prepare, in consultation with the Minister, a three-year strategic plan for children and young people in NSW.

On 26 July 2016, the NSW Government officially launched the first legislated Strategic Plan for Children and Young People, which applies to the whole of government.[1415] The plan captures the government's priorities and initiatives with respect to children and young people and provides a common set of agreed objectives and indicators against which NSW Government policies and services for children and young people can be aligned.

The goal of the plan was for children and young people in NSW to be safe, connected, respected, healthy and well, with opportunities to thrive and have their voice heard in their communities.[1416]

As part of developing the plan, the Advocate consulted with more than 4,000 children and young people to inform the themes and directions of the plan. These themes relate to ensuring that children and young people are safe, connected, respected, have opportunities, are healthy and well and have a voice in decisions that affect them. [1417] In addition to publishing the strategic

[1410] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 53 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1411] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 50 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1412] O Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 50 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1413] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 51 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1414] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 51 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1415] Office of the Advocate for Children and Young People, *Media Release: The first whole-of-government Strategic Plan for Children and Young People is something to celebrate* (Media Release, 26 July) <https://cdn2.hubspot.net/hubfs/522228/documents/acyp/Launch-Strategic-Plan-for-Children-and-Young-People.pdf>.

[1416] Committee on Children and Young People, *2020 Review of the Annual Reports and other matters of the Office of the Advocate for Children and Young People* (Report 1/57, June 2020) 2 <https://www.parliament.nsw.gov.au/ladocs/inquiries/2573/2020%20Review%20of%20the%20Annual%20Reports%20and%20other%20matters%20of%20the%20Office%20of%20the%20Advocate%20for%20CYP.pdf>.

[1417] Office of the Advocate for Children and Young People, *NSW Strategic Plan for Children and Young People* (Webpage) <https://www.acyp.nsw.gov.au/plan>.

plan on its website, the Advocate has also published a copy of the Consultation Report and a polling infographic summarising the outcomes of the consultation process.[1418]

5 Consultations

Throughout the 2018/2019 reporting period, the Advocate held a number of targeted consultations with children and young people across NSW.[1419] We have summarised some of these consultations below.

5.1 Regional consultations[1420]

In late July and early August 2018, the Advocate worked with the Department of Premier and Cabinet to conduct 26 workshops with 640 children across regional NSW in order to prepare a Regional Youth Strategy for NSW.

5.2 Refugee consultations[1421]

Between November 2018 and January 2019, the Advocate partnered with the Coordinator-General for Refugee Resettlement in NSW, the Joint Party Working Group Refugee Youth Sub Group and Multicultural NSW to conduct a series of 36 focus group consultations with 176 young refugees and asylum seekers. These consultations were held to gain insights which could be used to inform the NSW Government's Refugee Youth Policy Initiative.

5.3 Juvenile Justice consultations[1422]

During the reporting period, the Advocate conducted consultations with 86 young people in the Acmena, Riverina, Cobham, and Orana Juvenile Justice Centres. These consultations formed part of a wider series of consultations being held across Juvenile Justice Centres, in which the Advocate has consulted with over 242 young people. The consultations focus on what services, programs, and supports the young people thought would be helpful to young people prior to coming into custody, whilst they are in custody, and when they return to the community.

5.4 Aboriginal children and young people – Nations of Origin[1423]

From 16 to 18 July 2018, the Advocate attended the PCYC Nations of Origin event, an annual sport, cultural, education and leadership program with a focus on cultural identity. The Advocate undertook consultations about community and culture with 354 young people from regional and urban areas across a number of netball, football and rugby league tournaments.

6 Key Reports

6.1 Children and Young People's Experience of Disaster Report (2020)[1424]

The Advocate recently visited bushfire and flood affected areas of NSW and spoke to more than 400 children and young people about their experiences. In addition to these face-to-face consultations, the Advocate conducted quantitative polling of a further 1,000 children and young people. The feedback from this process formed the basis of the Children and Young People's

[1418] Office of the Advocate for Children and Young People, *ACYP NSW Consultations with children and young people* (Webpage) < https://www.acyp.nsw.gov.au/consultation-results>.

[1419] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 14-19 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1420] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 14 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1421] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 14 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1422] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 15 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1423] Office of the Advocate for Children and Young People, *Annual Report 2018/2019* (Report, 1 October 2019) 17 <https://www.acyp.nsw.gov.au/hubfs/documents/annual-reports/ACYP-Annual-Report-2019-web.pdf>.

[1424] Office of the Advocate for Children and Young People, *Children and Young People's Experience of Disaster Report 2020 by ACYP* (Webpage) <https://www.acyp.nsw.gov.au/disaster-report-2020>.

Experience of Disaster Report, which was designed to act as a platform for children and young people to inform decision makers and service providers about:

- how best to support their needs before, during and after disaster; and
- the ways in which children and young people want to be included in the planning and implementation of solutions as to preparing for and recovering from disaster.

The report makes a number of recommendations across ten key areas, including community recovery and raising awareness.

6.2 Mental health and wellbeing needs of children and young people Report (2019)[1425]

In 2019, the Advocate held face-to-face consultations with more than 10,000 children and young people and conducted online polling of a further 2,000 children and young people in order to report on the mental health and wellbeing needs of children and young people. Through this process, children and young people gave detailed feedback and provided recommendations about how best to support and improve the mental health and wellbeing of children and young people. The report makes a number of recommendations, which are broken down into the following key areas:

- access to information;
- schools;
- health and community services; and
- the broader community.

6.3 What Aboriginal children and young people have to say Report (2019)[1426]

In 2019, the Advocate held face-to-face consultations with 2,800 Aboriginal children and young people. These consultations formed the basis of a report, which set out 38 recommendations across the following key areas:

- connection to culture;
- racism and discrimination;
- education;
- accessible activities and programs;
- supportive workers and services; and
- justice.

[1425] Office of the Advocate for Children and Young People, *Report: Mental health and wellbeing needs of children and young people* (Report, 2019) <https://www.acyp.nsw.gov.au/mental-health-consultations-report-2019>.

[1426] Office of the Advocate for Children and Young People, Report: *What Aboriginal children and young people have to say* (Report, 2019) <https://www.acyp.nsw.gov.au/aboriginal-consultations-report-2019>.

15 The Commissioner for Children and Young People (Western Australia)

A. The Commissioner for Children and Young People (Western Australia): Summary table

Question	Summary response
Country/State/Territory	Western Australia
Commissioner entity name	The Commissioner for Children and Young People
Date established	2007 by virtue of the *Commissioner for Children and Young People Act 2006* (WA) (**Act**)
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	Partial compliance.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	**Where does the role sit** Established by WA Parliament, oversight by the Joint Standing Committee on the Commissioner for Children and Young People. **Relationship between other Commissioners** Every state and territory in Australia has a Commissioner and/or Guardian who represents children and young people. The role of each Commissioner and Guardian is slightly different and based on the legislation of each jurisdiction. The Commissioners meet twice a year at the meeting of Australia and New Zealand's Children's Commissioner and Guardians Group (ANZCCG).
Accountability arrangements What is the reporting line for the role? Who sets the budget?	Oversight by Joint Standing Committee on the Commissioner for Children and Young People, established by the WA Parliament. Budget set by the Treasurer of WA, who is required to consider recommendations by the Joint Standing Committee.
Qualification and Experience What qualifications and experiences are required for the role?	**Qualifications and experience** Not specified in the Act, beyond "experience in matters affecting children".[1427] **Does the person need to be an Aboriginal or Torres Strait Islander person** Not required. The role arose from recommendations made in the 2003 Gordon Inquiry into child sex abuse and violence in Aboriginal communities in Western Australia. An additional recommendation was the establishment of a Deputy Children's Commissioner

[1427] *Commissioner for Children and Young People Act 2006* (WA) s 7(1)(a).

Question	Summary response
Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	with responsibility for issues in relation to Aboriginal children, in light of the particular vulnerability of Aboriginal children.[1428] This was not followed. **Selection and appointment** A person is to be appointed to the office of Commissioner for Children and Young People by the Governor on the recommendation of the Premier.[1429] Before making a recommendation, the Premier shall: a) advertise throughout Australia for expressions of interest from people with professional qualifications and substantive experience in matters affecting children; b) consult with the leader of any political party with at least 2 members in either House.[1430] Children and young people must be involved in the selection process, unfortunately no further detail is provided about how this is achieved.[1431]
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	The Commissioner undertakes projects, commissions research, publishes reports, and hosts events to highlight specific aspects of children and young people's wellbeing. Using research and the other evidence available, the Commissioner seeks to positively influence legislation, policy, services and attitudes.[1432]
Purpose What is the purpose and objective of the role?	The health and wellbeing of all WA children and young people.
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament? Promotion of human rights: promote	**Functions** As specified in section 19 of the Act: • to advocate for children and young people; • to promote the participation of children and young people in the making of decisions that affect their lives and to encourage government and non-government agencies to seek the participation of children and young people appropriate to their age and maturity; • to promote and monitor the wellbeing of children and young people generally; • to monitor the way in which a government agency investigates or otherwise deals with a complaint made by a child or young person and the outcome of the complaint; • to monitor the trends in complaints made by children and young people to government agencies; • to initiate and conduct inquiries into any matter, including any written law or any practice, procedure or service, affecting the wellbeing of children and young people;

[1428] *Commissioner for Children and Young People Act 2006 (WA)* (2007) 11(2) AILR <http://138.25.65.17/au/journals/AUIndigLawRw/2007/48.pdf>.

[1429] *Commissioner for Children and Young People Act 2006* (WA) s 7(1).

[1430] *Commissioner for Children and Young People Act 2006* (WA) s 7(2).

[1431] *Commissioner for Children and Young People Act 2006* (WA) s 7(3).

[1432] Commissioner for Children and Young People, *What we do* (Webpage) <https://www.ccyp.wa.gov.au/about-us/what-we-do/>.

Question	Summary response
discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	• to monitor and review written laws, draft laws, policies, practices and services affecting the wellbeing of children and young people; • to promote public awareness and understanding of matters relating to the wellbeing of children and young people; • to conduct, coordinate, sponsor, participate in and promote research into matters relating to the wellbeing of children and young people; • to conduct special inquiries under Part 5 of the Act; • on the Commissioner's own initiative or at the request of the Minister or the Standing Committee, to advise the Minister on any matter relating to the wellbeing of children and young people; • to consider, and make recommendations in relation to, any written laws, draft laws, reports, policies, practices, procedures or other matters relating to the wellbeing of children and young people that are referred to the Commissioner by the Minister or the Standing Committee; • to consult with children and young people from a broad range of socio-economic backgrounds and age groups throughout Western Australia each year; • to do anything which the Commissioner considers is necessary or convenient to further the principle in section 3 or any of the guiding principles in section 4 of the Act; and • to perform any other function conferred on the Commissioner by or under the Act or any other written law. **Reporting** The Commissioner must, within 3 months after 30 June in each year, prepare a report as to the Commissioner's general activities during the financial year ending on that day.[1433] Report to be laid before WA Parliament.[1434] Minister has right to comment on draft report.[1435] **Promotion of human rights** Not specifically referenced, however some functions overlap into areas traditionally considered as human rights. **Review of laws** Yes, specified as a function: to initiate and conduct inquiries into any matter, including any written law or any practice, procedure or service, affecting the wellbeing of children and young people.[1436] **Complaints** Yes, specified as a function: to monitor the way in which a government agency investigates or otherwise deals with a complaint made by a child or young person and the outcome of the complaint.[1437]
Budget What is the annual budget for the role?	Based on financial statements in annual report, the office of the Commissioner appears to have been approx. $3m from the WA state government in the 28/19 financial year.

[1433] *Commissioner for Children and Young People Act 2006* (WA) s 42.
[1434] *Commissioner for Children and Young People Act 2006* (WA) s 49.
[1435] *Commissioner for Children and Young People Act 2006* (WA) s 48(2).
[1436] *Commissioner for Children and Young People Act 2006* (WA) s 19(d).
[1437] *Commissioner for Children and Young People Act 2006* (WA) s 19(f).

Question	Summary response
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	Established under the *Commissioner for Children and Young People Act 2006* (WA) https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_164_homepage.html
Most recent annual report or equivalent document (link)	2018/19 Annual Report

B. Western Australia: The Commissioner for Children and Young People: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs

Summary: The Act partially complies with this requirement, as whilst enacting legislation exists it lacks sufficient detail

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[1438]

Entrenched in law[1439]

The Commissioner for Children and Young People is established pursuant to section 6(1) of the Act.

Mandate and powers[1440]

Functions of the office are specifically set out in section 19 of the Act and matters relevant to the performance of the functions are set out in section 20. The office of the Commissioner is given broad power by the Act to do all things necessary or convenient to be done for or in connection with the performance of the Commissioner's functions.[1441] No specific mandate is set out in the Act.

The office of the Commissioner makes a series of high-level statements about the role, which don't provide much detail[1442]. However, usefully the office of the Commissioner releases 5-year plans, which outlines the "approach and priorities" for the period.

Appointment mechanisms[1443]

A person is to be appointed to the position of Commissioner for Children and Young People by the Governor by commission under the Public Seal of the State on the recommendation of the

[1438] GANHRI General Observations, G.O. 1.1.

[1439] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[1440] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[1441] *Commissioner for Children and Young People Act 2006* (WA) s 21(1).

[1442] The Commissioner is the independent person who works closely with children and young people, their families, community and government to make WA a better place for 0 to 18 year-olds (https://www.ccyp.wa.gov.au/about-us/what-we-do/); The position was created because the Western Australian Parliament made a commitment to the children and young people of WA that they would live in a state where they were heard, valued, healthy and safe (https://www.ccyp.wa.gov.au/about-us/what-we-do/).

[1443] See GANHRI General Observations, G.O. 1.1.

Premier.[1444] The Act also sets out circumstances where the Commissioner may be either suspended or removed from office,[1445] and the term of office for the Commissioner.[1446]

Quasi-judicial competency (complaints-handling) [1447]

Some complaints oversight functions have been included in the Act as follows:

- to monitor the way in which a government agency investigates or otherwise deals with a complaint made by a child or young person and the outcome of the complaint; and
- to monitor the trends in complaints made by children and young people to government agencies.[1448]

The Act otherwise specifically excludes the Commissioner from investigating or otherwise dealing with a complaint made by or relating to a particular child or young person.[1449]

1.2 Human rights mandate[1450]

Summary: the Act is substantially compliant in this respect, with a special investigative power and broad mandate

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[1451] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[1452]

Competence and responsibilities [1453]

Functions of the Commissioner include:

- to initiate and conduct inquiries into any matter, including any written law or any practice, procedure or service, affecting the wellbeing of children and young people;
- to monitor and review written laws, draft laws, policies, practices and services affecting the wellbeing of children and young people;
- to promote public awareness and understanding of matters relating to the wellbeing of children and young people;
- to consider, and make recommendations in relation to, any written laws, draft laws, reports, policies, practices, procedures or other matters relating to the wellbeing of children and young people that are referred to the Commissioner by the Minister or the Standing Committee; and

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[1444] *Commissioner for Children and Young People Act 2006* (WA) s 7(1).

[1445] *Commissioner for Children and Young People Act 2006* (WA) s 8.

[1446] *Commissioner for Children and Young People Act 2006* (WA) s 9.

[1447] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[1448] *Commissioner for Children and Young People Act 2006* (WA) ss 19 (d), (e).

[1449] *Commissioner for Children and Young People Act 2006* (WA) s 23.

[1450] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

[1451] GAHNRI General Observations, G.O. 1.2.

[1452] GAHNRI General Observations, G.O. 1.2.

[1453] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 2.6.

- to conduct, coordinate, sponsor, participate in and promote research into matters relating to the wellbeing of children and young people.[1454]

The Commissioner holds a broad power to "do all things necessary or convenient to be done for or in connection with the performance of the Commissioner's functions."[1455]

Functional immunity

Under section 59 of the Act an action in tort does not lie against a person for anything that the person has done (or omitted to do), in good faith, in the performance or purported performance of a function under the Act. Similar relief from liability is also afforded to the State.[1456]

In addition, the general protection from civil liability for public servants may be available under the *Civil Liability Act 2002* (WA).[1457]

Powers of investigation and inquiry

As discussed above, the Act specifically excludes the Commissioner from investigating or otherwise dealing with a complaint made by or relating to a particular child or young person.[1458]

The Commissioner holds a power of special inquiry, allowing the Commissioner to investigate any matter affecting the wellbeing of children and young people on the Commissioner's own motion.[1459] The Commissioner holds broad powers in conducting these special inquiries, and may enter premises,[1460] conduct hearings, compel the attendance of persons and require the production of documents.[1461] These powers are augmented by significant enforcement measures. A person may face a fine of $12,000 or 12-months imprisonment for failing to attend or produce a document, and a person may not refuse to answer questions on the basis of self-incrimination.[1462]

The Commissioner is also empowered to contribute to inquiries conducted by other entities. In its 2019 Annual Report the office of the Commissioner reported that it had made 31 submissions to other inquiries, including to:

- Review of the Carers Recognition Act 2004;
- UN CRC Alternate Report – Child Rights Taskforce; and
- Productivity Commission Inquiry – Social and economic benefits of improving mental health.

While the Commissioner must seek approval of the Minister prior to conducting a special enquiry under the Act, there does not appear to be a legislative right for the Minister to stop the Commissioner from conducting such an enquiry.[1463]

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Act is partially compliant, as requiring only observance of international rights instruments

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[1454] *Commissioner for Children and Young People Act 2006* (WA) s 19.
[1455] *Commissioner for Children and Young People Act 2006* (WA) s 21(1).
[1456] *Commissioner for Children and Young People Act 2006* (WA) s 59(2).
[1457] Either under subsection (e) or (g) of the definition of "public body or officer" in section 5U of the *Civil Liability Act 2002* (WA).
[1458] *Commissioner for Children and Young People Act 2006* (WA) s 23.
[1459] *Commissioner for Children and Young People Act 2006* (WA) s 29.
[1460] *Commissioner for Children and Young People Act 2006* (WA) s 37.
[1461] *Commissioner for Children and Young People Act 2006* (WA) s 33.
[1462] *Commissioner for Children and Young People Act 2006* (WA) ss 34, 35.
[1463] Th *Commissioner for Children and Young People Act 2006* (WA) ss 29, 30.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[1464] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[1465]

The Act specifically requires the Commissioner, in performing its functions, to, among other things, have regard to the United Nations Convention on the Rights of the Child.[1466]

The Commissioner has a history of advocating for human rights, including in:

- 2012 to the Legal and Constitutional Affairs Legislation Committee on the Inquiry into the Australian Human Rights Commission Amendment Bill 2012;[1467]
- 2014 to the Australian Human Rights Commission on the National Inquiry into Children in Immigration Detention 2014;[1468] and
- 2018 to the Human Rights Commission on the Protecting the Human Rights of People Born with Variations in Sex Characteristics Project.[1469]

1.4 Interaction with the international human rights system

Summary: the Act is not compliant in this respect, as it lacks any formal requirement for engagement with the international human rights system beyond compliance with certain instruments.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[1470] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[1471]

The Commissioner does not hold any specific legislative function or power to engage with the international human rights system. Whilst the Commissioner must promote children's rights and conduct research into matters affecting children, which may involve engaging with international actors, the lack of any formal requirement fails to satisfy the relevant criteria.

1.5 Cooperation with other human rights bodies

Summary: *the Act appears substantially complaint, in actively engaging with relevant human rights bodies.*

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[1472] This can involve engagement within a national

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[1464] GANHRI General Observations, G.O. 1.3.

[1465] GANHRI General Observations, G.O. 1.3.

[1466] *Commissioner for Children and Young People Act 2006* (WA) s 20.

[1467] Commissioner for Children and Young People, Submission to the Inquiry into the Australian Human Rights Commission Amendment (National Children's Commisioner) Bill 2012 (31 May 2012) <https://www.ccyp.wa.gov.au/media/1981/submission-to-the-legal-and-constitutional-committee-re-national-children-s-commissioner-bill.pdf>.

[1468] Commissioner for Children and Young People, Submission to the National Inquiry into Children in Immigration Detention 2014 (26 May 2014) <https://www.ccyp.wa.gov.au/media/1858/2014-submission-to-the-australian-human-rights-commission-national-inquiry-into-children-in-immigration-detention-2014.pdf>.

[1469] Commissioner for Children and Young People, Submission to protecting the human rights of people born with variations in sex characteristics project (28 September 2018) <https://www.ccyp.wa.gov.au/media/3290/submission-to-australian-human-rights-co-the-human-rights-of-people-bor.pdf>.

[1470] GAHNRI General Observations, G.O. 1.4.

[1471] GAHNRI General Observations, G.O. 1.4.

[1472] GAHNRI General Observations, G.O. 1.5.

human rights framework or other domestic institutions and actors mandated to promote human rights.[1473]

The Commissioner has an active history of advocating for human rights. In particular, the office of the Commissioner has:

- Established two Advisory Committees with representatives from Bunbury and the Perth metropolitan area who advised the Commissioner on the wellbeing needs and experiences of lesbian, gay, bisexual, trans or intersex (LGBTI) children and young people;[1474]
- meets twice per year with the Australian and New Zealand Children's Commissioners and Guardians Group, consisting of each Australian state and territory Child Guardian and/or Commissioner office and the New Zealand National Commissioner;[1475]
- chaired the "Responses to Child Sexual Abuse in Western Australia Executive Steering Group", a consortium of non-government service providers, government agencies and the Australian Centre for Child Protection in relation to improving responses to child sexual abuse;[1476] and
- engages with and provides submissions to organisations that promote human rights, including the Child Rights Taskforce of the United Nations, Office of Advocacy and Accountability in Aboriginal Affairs in WA (Department of Premier and Cabinet), the Australian Human Rights Commission, Law Reform Commission and the Mental Health Commission.[1477]

1.6 Recommendations by NHRIs

Summary: the Act appears partially compliant with this requirement, in holding a general recommendation power without follow up provisions.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[1478] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[1479] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[1480]

In its 5 year plan, called "Our approach and priorities 2016 – 2020", one of the three key platforms for the office of the Commissioner is its role in monitoring and advocacy.[1481] In particular, the office of the Commissioner has undertaken generally to promote and monitor recommendations of published reports by the Commissioner for Children and Young People.[1482]

Examples of this monitoring work include:

- In late 2018 the Commissioner invited children and young people with experience of family separation to share their views as part of the national review of the family law

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[1473] GAHNRI General Observations, G.O. 1.5.

[1474] Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 26 September 2019) 20 <https://www.ccyp.wa.gov.au/media/3945/annual-report-2018-19.pdf>.

[1475] Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 26 September 2019) 20 <https://www.ccyp.wa.gov.au/media/3945/annual-report-2018-19.pdf>.

[1476] Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 26 September 2019) 28 <https://www.ccyp.wa.gov.au/media/3945/annual-report-2018-19.pdf>.

[1477] Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 26 September 2019) 32-33 <https://www.ccyp.wa.gov.au/media/3945/annual-report-2018-19.pdf>.

[1478] GAHNRI General Observations, G.O. 1.6.

[1479] GAHNRI General Observations, G.O. 1.6.

[1480] GAHNRI General Observations, G.O. 1.6.

[1481] Commissioner for Children and Young People, *Our approach and priorities 2016 – 2020* (Report, 2016) 3 <https://www.ccyp.wa.gov.au/media/2220/our-approach-and-priorities-final-lr2.pdf>.

[1482] Commissioner for Children and Young People, *Our approach and priorities 2016 – 2020* (Report, 2016) 3 <https://www.ccyp.wa.gov.au/media/2220/our-approach-and-priorities-final-lr2.pdf>.

system. The Commissioner published his recommendations and the views of young people in the Speaking Out About Family Separation report. The report was submitted to the Australian Law Reform Commission and the Family Court of Western Australia. The Commissioner has undertaken to monitor the Australian Law Reform Commission's findings and the implementation of their recommendations within WA;[1483]

- In February 2019, the State Coroner released the Inquest into the deaths of thirteen children and young people in the Kimberley Region. The Commissioner provided feedback and input to the State Government's response to the Coroner's Inquest. The Commissioner has undertaken to continue to monitor and strongly advocate for the implementation of effective strategies in this area;[1484]

- In 2019 the Commissioner published findings and recommendations in the report "Improving the odds for WA's vulnerable children and young people". The Commissioner has undertaken to monitor progress on his recommendations and to continue to work with relevant agencies.[1485]

1.7 Ensuring pluralism of the NHRI[1486]

Summary: the Act is partially compliant, with insufficient requirement to consult in appointing the Commissioner

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[1487] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism

In appointing the Commissioner, the WA Premier must:[1488]

(a) advertise throughout Australia for expressions of interest from people with professional qualifications and substantive experience in matters affecting children; and

(b) consult with the leader of any political party with at least 2 members in either House.

Whilst difficult, it is still possible to achieve pluralism in the context of a single-person role. However, the requirement to consult only with members of political parties is not sufficient to promote pluralism. The Act also provides a requirement for children and young people to be involved in the selection of the Commissioner.[1489] The method by which this occurs is unclear.

The Commissioner may also appoint Ambassadors, who represent diverse backgrounds and presently include several people who identify as African and Aboriginal or Torres Strait Islander.[1490] Of the 15 Ambassadors, 50% are women.

Further, given staff are engaged via the WA government jobs website, it is subject to their stated policies on diversity.[1491]

[1483] Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 26 September 2019) 20 <https://www.ccyp.wa.gov.au/media/3945/annual-report-2018-19.pdf>.

[1484] Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 26 September 2019) 29 <https://www.ccyp.wa.gov.au/media/3945/annual-report-2018-19.pdf>.

[1485] Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 26 September 2019) 31 <https://www.ccyp.wa.gov.au/media/3945/annual-report-2018-19.pdf>.

[1486] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[1487] GANHRI General Observations, G.O. 1.7.

[1488] *Commissioner for Children and Young People Act 2006* (WA s 7.

[1489] *Commissioner for Children and Young People Act 2006* (WA s 7(3).

[1490] Commissioner for Children and Young People, *The Ambassadors* (Webpage) <https://www.ccyp.wa.gov.au/about-us/the-ambassadors/>.

[1491] WA Government, *Diversity and inclusion in the public sector* (Webpage) <https://www.wa.gov.au/organisation/public-sector-commission/diversity-and-inclusion-the-public-sector>.

Full time members

Section 10 of the Act provides that the Commissioner is to be appointed on a full-time basis.

Recruitment and retention

There Act provides that staff are to be appointed or made available under the *Public Sector Management Act 1994* (WA) to enable the Commissioner to perform his or her functions.[1492]

While broadly this appears to grant the Commissioner the right to the staff needed to fulfil the role of the office, in the case that public service staff are to be made available, the Commissioner must do so by arrangement with the relevant employer.[1493]

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: the Act is substantially compliant as requiring the creation of a range of decision-making entities, and requiring representation in the makeup of these entities.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[1494]

The Premier of WA appoints the Commissioner.[1495] The Act only prescribes that the Premier, before making a recommendation, advertises "throughout Australia for expressions of interest from people with professional qualifications and substantive experience in matters affecting children" and "consult with the leader of any political party with at least 2 members in either House".[1496]

The Act requires the creation of a standing Parliamentary standing committee comprising an equal number of members appointed from each House.[1497] The Standing Committee may request advice from the Commissioner on issues relating to children and young people and refer legislation, reports, policies and procedures to the Commissioner for consideration.

The Commissioner may also establish advisory committees and reference groups to assist with the performance of the Commissioner's functions.[1498] These advisory committees should include representatives of non-government agencies concerned with the rights, interests and wellbeing of children and young people. The Commissioner must also establish advisory committees consisting of children and young people, who the Commissioner considers are from a broad range of socio-economic and cultural backgrounds and age groups, to assist in the performance of the Commissioner's functions.[1499] These committees should be established in regional areas as well as the metropolitan area.

1.9 Political representatives on NHRIs

Summary: the Act is partially compliant with this requirement.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[1500] An NHRI should also be independent from government.

[1492] *Commissioner for Children and Young People Act 2006* (WA) s 16.

[1493] *Commissioner for Children and Young People Act 2006* (WA) s 17.

[1494] GAHNRI General Observations, G.O. 1.8

[1495] *Commissioner for Children and Young People Act 2006* (WA) s 7(1).

[1496] *Commissioner for Children and Young People Act 2006* (WA) s 7(1).

[1497] *Commissioner for Children and Young People Act 2006* (WA) s 51.

[1498] *Commissioner for Children and Young People Act 2006* (WA) s 52.

[1499] T *Commissioner for Children and Young People Act 2006* (WA) s 52(2).

[1500] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

The Act states that the Commissioner is not subject to direction by the Minister or any other person in the performance of their duty,[1501] except as specified in the Act. The Minister may give directions on matters of general policy relevant to the exercise of the Commissioner's functions.[1502] Further, with the authorisation of the Governor, the Commissioner may hold another "office of profit or trust".[1503]

Further, If a person was engaged by the public service prior to appointment as Commissioner, and the office held by that person expires by effluxion of time and he or she is not reappointed as Commissioner, then that person is entitled to be appointed to an office under the Public Sector Management Act 1994 of at least the equivalent level of classification as the office that person occupied immediately prior to appointment as Commissioner.[1504] Under the Act, prior service as a public servant will be treated as continuous service as Commissioner.[1505]

In practice, the current Commissioner has been a senior public servant for some time, including:

- as a teacher and then principal in a number of regional schools in Western Australia;
- Executive Director Regional and Remote Education at the Western Australian Department of Education (for three years); and
- Secretary of Education for the Tasmanian Department of Education.[1506]

Tenure

The Commissioner is appointed for a term of no longer than 5 years and is eligible for reappointment once.[1507] The Commissioner may be suspended or removed from office by both houses of WA parliament[1508] or suspended where the Governor is satisfied that the Commissioner is incapable of properly performing its duties of office, has shown themselves to be incompetent to properly to perform, or has neglected, their duties or is guilty of misconduct.[1509] Whether any of these events occurs is at the discretion of the Governor and is accordingly highly subjective, however, such a decision is temporary until a motion confirming the decision is moved in both houses of parliament.[1510]

Recruitment

As discussed above, the Act only prescribes that the Premier, before making a recommendation, advertises "throughout Australia for expressions of interest from people with professional qualifications and substantive experience in matters affecting children" and "consult with the leader of any political party with at least 2 members in either House".[1511]

The Act does not further prescribe how the Premier should exercise its appointment discretion and no information has otherwise been provided detailing how the recruitment of the Commissioner occurs in practice.

1.10 Adequate funding of NHRIs

Summary: the Act is partially compliant, with a declining budget and limited protections in place to ensure adequate funding.

[1501] *Commissioner for Children and Young People Act 2006* (WA) s 25.
[1502] *Commissioner for Children and Young People Act 2006* (WA) s 26.
[1503] *Commissioner for Children and Young People Act 2006* (WA) s 10(2).
[1504] *Commissioner for Children and Young People Act 2006* (WA) s 13(3).
[1505] *Commissioner for Children and Young People Act 2006* (WA) s 13(1).
[1506] Commission for Children and Young People, *About us* (Webpage) <https://www.ccyp.wa.gov.au/about-us/the-commissioner/>.
[1507] *Commissioner for Children and Young People Act 2006* (WA) s 9.
[1508] *Commissioner for Children and Young People Act 2006* (WA) s 8(1).
[1509] *Commissioner for Children and Young People Act 2006* (WA) s 8(2).
[1510] *Commissioner for Children and Young People Act 2006* (WA) s 8(2).
[1511] *Commissioner for Children and Young People Act 2006* (WA) s 8(2).

NHRIs must be provided with adequate funding in order to function effectively and independently.[1512]

Remuneration

The Act is limited in relation to remuneration, only going as far as to state that the remuneration and allowances of the Commissioner are to be determined by the Governor.[1513]

The Act does provide that the remuneration, allowances and conditions must not be changed while the Commissioner is in office so as to become less favourable to the Commissioner.[1514]

Funding

The Joint Standing Committee on the Commissioner for Children and Young People has oversight over the office of the Commissioner. The Treasurer of the WA Government sets the budget, having regard to any recommendation by the Standing Committee.[1515]

The Act does not otherwise prescribe how the Treasurer should set the budget of the office of the Commissioner, or how the budget should be utilised by the Commissioner.

Based on financial statements in the office of the Commissioner's 2019 annual report, the budget appears to have been approx. $3m from the WA state government in the FY19 financial year.[1516] This budget is approximately $200k lower than for the FY18 financial year.

1.11 Annual reports of NHRIs

Summary: the Act is complaint in this respect, holding an annual reporting power.

The Commissioner is required to prepare an annual report as to the Commissioner's general activities during the financial year.[1517] Reports are public on the Commissioners website.[1518]

2 Any criticisms made publicly about this role?

None about the role of Commissioner.

A criticism was made of the Act in 2007. The role of Commissioner arose from recommendations made in the 2003 Gordon Inquiry into child sex abuse and violence in Aboriginal communities in Western Australia. An additional recommendation was for the establishment of a of a Deputy Children's Commissioner with responsibility for issues in relation to Aboriginal children, in light of the particular vulnerability of Aboriginal children.[1519] This was not followed.

Groups such as the Perth Aboriginal Women's Network have criticised the Act, and argued that there was insufficient pre-legislative consultation, especially with Aboriginal women's groups.

A review of the Act was undertaken in 2013. The Review made 16 recommendations, mostly clarifying administrative aspects of the Act.[1520]

[1512] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[1513] *Commissioner for Children and Young People Act 2006* (WA) s 11(1).

[1514] *Commissioner for Children and Young People Act 2006* (WA) s 11(4).

[1515] *Commissioner for Children and Young People Act 2006* (WA) s 57.

[1516] Commissioner for Children and Young People, *Annual Report 2018-19* (Report, 26 September 2019) 56 <https://www.ccyp.wa.gov.au/media/3945/annual-report-2018-19.pdf>.

[1517] *Commissioner for Children and Young People Act 2006* (WA) s 42(1).

[1518] Commissioner for Children and Young People, *Corporate information* (Webpage) <https://www.ccyp.wa.gov.au/about-us/corporate-information/>.

[1519] *Commissioner for Children and Young People Act 2006* (WA) (2007) 11(2) AILR <http://138.25.65.17/au/journals/AUIndigLawRw/2007/48.pdf>.

[1520] Commissioner for Children and Young People, *Review of the Act* (Webpage) <https://www.ccyp.wa.gov.au/about-us/review-of-the-act/>.

The recommendations also include that the Commissioner should not have a role in investigating individual child abuse complaints, as it would duplicate the role of existing investigative bodies..

3 What are the best features of this role?

- The Commissioner has a very strong advocacy role and, in addition to preparing submissions on various inquiries and professional bodies, the Commissioner consults widely with children and young people in the community, travelling extensively throughout WA to listen directly to the opinions of young people. This kind of direct involvement is effective in informing the Commissioner on issues which may be specific to a particular generation (for example, the emergence of cyber bullying) and appears to have worked effectively in WA.[1521]

- Annual reporting by the Commissioner is to a high standard. It is comprehensive and professional.

- Broad power to conduct special enquiries and require attendance or production of documents.[1522]

[1521] See, eg, the Commissioners 2010 submission to the Joint Select Committee on Cyber-Safety, available at < https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jscc/subs/sub_54.pdf>.

[1522] *Commissioner for Children and Young People Act 2006* (WA) ss 33, 34.

16 The Commissioner for Aboriginal Children and Young People and The Principal Commissioner for Children and Young People in Victoria

A. The Commissioner for Aboriginal Children and Young People and The Principal Commissioner for Children and Young People in Victoria: Summary table

Question	Summary response
Country/State/Territory	Victoria, Australia
Commissioner entity name	Commissioner for Aboriginal Children and Young People (**CACYP)** Principal Commissioner for Children and Young People (**CCYP**) (together, the **Commissioners**)
Date established	*Commission for Children and Young People Act 2012* (Vic) (the **Act**):[1523] • CCYP – the Commission for Children and Young People (the **Commission**) began operating on 1 March 2013, replacing the Office of the Child Safety Commissioner.[1524] • CACYP – the role was first announced in July 2013.[1525]

Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The roles are partially compliant with the Paris Principles, however there are significant gaps:
	• The role of the CACYP not expressly enshrined in legislation (while the role of the CCYP is).
	• The role of the CACYP is currently filled by an identified Aboriginal or Torres Strait Islander person with appropriate qualifications, knowledge and experience, however:
	  ○ this is not a mandated requirement for the position; and
	  ○ the appointment process is not transparent (for either the CACYP or the CCYP).[1526]
	• The role of the Commission and of the CCYP is relatively clear under the Act, however the functions and powers of the CACYP are not clearly defined.
	• The interaction of the two Commissioner roles is also unclear, with some resources suggesting they are side-by-side roles and others suggesting that the CACYP reports to the CCYP.
	• While the Commission has own-motion powers of inquiry, the inquiries are limited to specific issues, and the power to compel access to information during an inquiry is limited to specific Departments and services.
	• The Act provides some functional immunity for the Commissioners, by including a specified term and limited

[1523] Date of assent, 18 December 2012; date of commencement 1 March 2013. We note that the *Child Wellbeing and Safety Act 2005* (Vic) also contains some of the objectives, functions and powers of the Commission.

[1524] Commission for Children and Young People, *Who we are* (Webpage) <https://ccyp.vic.gov.au/about-the-commission/who-we-are/#TOC-5>.

[1525] Commission for Children and Young People, *Annual Report 2012–2013* (Report, October 2013) < https://www.parliament.vic.gov.au/file_uploads/Commission_for_Children_and_Young_People_AR_2013_Final_Bookmarked_opti_N2RMhMvg.pdf>.

[1526] See, however, the job listing for the CACYP, available at <https://fisherleadership.com/opportunities/commissioner-for-aboriginal-children-and-young-people/>.

Question	Summary response
	powers of removal. However, the removal powers provide the Governor in Council with some discretion – which may undermine the independence of the Commissioners. • The Commission does not have complaints-handling powers. • There are no express human rights or convention references in the Act. However, some of the Commission's functions may arguably be extended for the promotion of these rights and the Commission regularly uses its powers for this purpose in practice. • The Commission maintains consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships. • In practice, the Commission publishes a wide range of information on its website, making it publicly accessible. • The Commission is good at publicly tracking and reviewing the implementation of its recommendations. • The annual reporting requirements of Commission are closely aligned with the GANHRI General Observations.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The Commission is the head body, it is an independent statutory body.[1527] The Commission is led by both the CCYP (as Principal Commissioner) and the CACYP (as additional Commissioner).[1528] However we note that the CACYP is sometimes referred to as "reporting to" the CCYP.[1529] Notably, the Commission's website has a Victorian Government domain (www.ccyp.vic.gov.au) and contains the Victorian Government logo. This signalling may go towards undermining the perceived independence of the Commission from Government.
Accountability arrangements What is the reporting line for the role? Who sets the budget?	• The Commissioners are entitled to be paid the remuneration and allowances that are determined from time to time by the Governor in Council.[1530] ○ *NOTE:* The term 'Governor in Council' refers to the Victorian Governor acting on the advice of the Executive Council. The Governor in Council is not a deliberative body, but one that acts on the advice of the relevant Ministers. As such, in practice, remuneration and allowances are determined on a discretionary basis by the ruling party. • The CCYP must be appointed on a full-time basis and the CACYP may be appointed on a full-time or part-time basis.[1531] • The Commissioners hold office:

[1527] Commission for Children and Young People, *Fact Sheet,* available at <https://ccyp.vic.gov.au/assets/resources/General-Information-Sheet/CCYP-Information-Sheet-General-0320.pdf>.

[1528] See also, Commission for Children and Young People, *Organisation structure* (Webpage) <https://ccyp.vic.gov.au/about-the-commission/organisation-structure/>.

[1529] See, eg, the job listing for the CACYP, available at <https://fisherleadership.com/opportunities/commissioner-for-aboriginal-children-and-young-people/>.

[1530] *Commission for Children and Young People Act 2012* (Vic) s 13.

[1531] *Commission for Children and Young People Act 2012* (Vic) ss 11(3), s 12(3).

Question	Summary response
	○ for a specified period (period not to exceed 5 years, Commissioners are eligible for reappointment); and ○ on the terms and conditions determined by the Governor in Council.[1532] • The CCYP has all the functions and powers of the Commission, and all acts and things done by the CCYP are taken to have been done by the Commission.[1533] • On certain events, such as completing an inquiry under the Act, the Commission must give a report to the Minister for Families and Children (the **Minister**) and the Secretary of the Department of Health and Human Services (the **Secretary**).[1534] ○ If 14 days elapse, the Commission may give a copy of the report to the clerk of each House of the Parliament of Victoria (unless it contains identifying information); and ○ may publish a copy of the report given to the Parliament on the internet.[1535]
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	• The Governor in Council may, on the recommendation of the Minister, appoint a person as the CCYP or as an additional Commissioner (including the CACYP).[1536] • In making this recommendation, the Minister must be satisfied that the person is qualified for appointment as a Commissioner because of his or her knowledge and experience.[1537] • The current and previous persons in the role of the CACYP are both of Aboriginal descent but this is not a mandated requirement for the position.
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	• Section 8(1) of the Act sets out the functions of the Commission, which are: ○ to provide advice to Ministers, Government Departments, health services and human services about policies, practices and the provision of services relating to the safety or wellbeing of vulnerable children and young persons; and ○ to promote the interests of vulnerable children and young persons in the Victorian community; and ○ to monitor and report to Ministers on the implementation and effectiveness of strategies relating to the safety or wellbeing of vulnerable children and young persons; and ○ to provide advice and recommendations to the Minister about child safety issues, at the request of the Minister; and ○ to promote child-friendly and child-safe practices in the Victorian community; and

[1532] *Commission for Children and Young People Act 2012* (Vic) s 14; we note that the terms and conditions are not specified in the Act.

[1533] *Commission for Children and Young People Act 2012* (Vic) s 10.

[1534] *Commission for Children and Young People Act 2012* (Vic) s 46.

[1535] *Commission for Children and Young People Act 2012* (Vic) ss 49-52.

[1536] *Commission for Children and Young People Act 2012* (Vic) ss 11(1), 12(1).

[1537] *Commission for Children and Young People Act 2012* (Vic) ss 11(2), 12(2).

Question	Summary response
	○ the functions relating to working with children conferred by Part 3 of the Act; and ○ the functions relating to out of home care conferred by Part 4 of the Act; and ○ the functions relating to inquiries conferred by Part 5 of the Act; and ○ any other functions conferred on the Commission by or under this Act or any other Act. • The Part 3 functions referred to in s 8(1)(e) are: ○ to review and report on the administration of the Working with Children Act 2005; ○ in consultation with the Secretary to the Department of Justice, to educate and inform the community about that Act.[1538] • The Part 4 functions referred to in s 8(1)(g) are: ○ to promote the provision of out of home care services that encourage the active participation of those children in the making of decisions that affect them; ○ to advise the Minister and the Secretary on the performance of out of home care services; ○ at the request of the Minister, to investigate and report on an out of home care service.[1539] • The Commission must: ○ act independently and impartially in performing its functions; and ○ when performing a function in relation to a vulnerable child or young person, perform the function for the purpose of promoting the best interests of the child or person.[1540]
Purpose What is the purpose and objective of the role?	• Section 7 of the Act sets out the objective of the Commission, which is to "*promote continuous improvement and innovation"* in: *(a) policies and practices relating to the safety and wellbeing of—* *(i) vulnerable children and young persons; and* *(ii) children and young persons generally; and* *(b) the provision of out of home care services for children*
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be	• ***CYCP:*** The functions and powers of the CCYP are all functions and powers of the Commission, and any other functions or powers conferred on the CCYP under legislation.[1541] • ***CACYP:*** The functions and powers of the CACYP are not clearly defined. It appears that the functions of the CACYP are those that are deemed appropriate between the CCYP and the CACYP. In 2017 – 2018, these functions included:

[1538] *Commission for Children and Young People Act 2012* (Vic) s 24.
[1539] *Commission for Children and Young People Act 2012* (Vic) s 28.
[1540] *Commission for Children and Young People Act 2012* (Vic) s 8(2), (3).
[1541] *Commission for Children and Young People Act 2012* (Vic) s 10.

Question	Summary response
tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	○ leading the Aboriginal Youth Justice Taskforce; ○ implementing recommendations from reports and inquiries; ○ developing the Aboriginal Children and Families Agreement; ○ undertaking a review of the circumstances of all Aboriginal children and young people in custody and subject to community-based orders; and ○ undertaking the Koori Youth Justice Taskforce in collaboration with the department.[1542] • ***Commission powers:*** Subject to the Act, the Commission has the power to "*do all things necessary or convenient to be done for or in connection with the performance of its functions"* under: ○ the Act; ○ any other legislation; and ○ any regulations made under the Act or that legislation.[1543] • ***Reporting:*** on certain events, such as completing an inquiry under the Act, the Commission must give a report to the Minister and the Secretary:[1544] ○ If 14 days elapse, the Commission may give a copy of the report to the clerk of each House of the Parliament of Victoria (unless it contains identifying information); and ○ may publish a copy of the report given to the Parliament on the internet.[1545] • ***Promotion of human rights:*** there are no human rights or convention references in the Act, however, the Annual Report indicates the Commission's desire to engage with newly ratified conventions like OPCAT, as well as well-founded Conventions like the Convention on the Rights of the Child.[1546] Furthermore, the Commission lists the *Charter of Human Rights and Responsibilities Act 2006* as one of the pieces of legislation that guides the Commission's day to day work.[1547] • ***Review of laws:*** the Commissioner does not have an express power to review legislation, however some of the Commission's functions may arguably be used for this purpose in practice. These functions include: ○ providing advice about the policies, practices and the provision of services relating to the safety or wellbeing of vulnerable children and young persons;[1548] and ○ providing advice and recommendations to the Minister about child safety issues, at the request of the Minister.[1549]

[1542] Commission for Children and Young People *Annual Report 2017-18* (page 10 – 12), available at: https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-AR-2018-P6-FINAL-web.pdf.

[1543] *Commission for Children and Young People Act 2012* (Vic) s 9.

[1544] *Commission for Children and Young People Act 2012* (Vic) s 46.

[1545] *Commission for Children and Young People Act 2012* (Vic) ss 49-52..

[1546] Commission for Children and Young People, *Annual Report 2018-19* (Report, October 2019) 18 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1547] Commission for Children and Young People, *Legislation* (Webpage) <https://ccyp.vic.gov.au/about-the-commission/legislation/>.

[1548] *Commission for Children and Young People Act 2012* (Vic) s 8(1)(a).

[1549] *Commission for Children and Young People Act 2012* (Vic) s 8(1)(d).

Question	Summary response

	• ***Complaints handling:*** complaints are not referenced in the Act, however, the CCYP has an External Complaints Policy for complaints received regarding the Commission.[1550] The Commission's website expressly states that the Commission does not investigate complaints about Child Protection matters and refers complainants on to the Department of Health and Human Services or Victorian Ombudsman (depending on the complaint).[1551]
	• ***Inquiries:***[1552] the Commission:
	  ○ must conduct inquiries in relation to the death of a child protection client;[1553]
	  ○ may conduct inquiries in relation to a matter relating to the safety or wellbeing of a vulnerable child or young person (or a group of them);[1554]
	  ○ may conduct inquiries in relation to provision of services (if there is a persistent or recurring systemic issue in the provision of those services);[1555] and
	  ○ may determine whether or not it will conduct an inquiry recommended by the Minister (in relation to dot points 2 & 3) but must provide reasons.[1556]
	• ***Regard to human rights instruments:*** the Act does not contain any express references to human rights instruments.

Budget What is the annual budget for the role?	• From 2016, the Commission's financial statements have been incorporated into the Department of Health and Human Services' annual reports. However, these reports do not allocate a separate line item for the Commission and, as such, the Commission's budget is not transparent.[1557] • In 2018-9, the Commission expenditure totalled $12,577,852.[1558] • The Victorian Budget for 2019-20 invests an additional $16.2 million for the Commission to administer the Reportable Conduct Scheme and Child Safe Standards.[1559] • The Victorian Budget for 2019-20 also allocates $3.9 million of "output initiative" funding to the Commission.[1560] The term

[1550] Commission for Children and Young People, *External complaints regarding the Commission for Children and Young People – Policy* (Webpage) <https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-External-Complaints-Policy.pdf>.

[1551] Commission for Children and Young People, *General enquiries for the Commission* (Webpage) <https://ccyp.vic.gov.au/contact-us/general-enquiries-for-the-commission/#:~:text=Child%20Protection,-During%20business%20hours&text=You%20can%20submit%20your%20complaint,Box%204057%2C%20Melbourne%20Vic%203000>.

[1552] *Commission for Children and Young People Act 2012* (Vic) Part.

[1553] *Commission for Children and Young People Act 2012* (Vic) s 34 t; a child protection client is a person who is the subject of a report under ss 28, 33(2), 183 or 184 of the *Children, Youth and Families Act 2005* and the Secretary has not recorded that the person's case is closed. In practical terms, these are children that have had reports made about them due to significant concern for their wellbeing or a perceived need for protection.

[1554] *Commission for Children and Young People Act 2012* (Vic) s 37.

[1555] *Commission for Children and Young People Act 2012* (Vic) s 39.

[1556] *Commission for Children and Young People Act 2012* (Vic) ss 38, 40.

[1557] Commission for Children and Young People, *Annual Report 2018-19* (Report, October 2019) 104 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1558] Commission for Children and Young People, *Annual Report 2018-19* (Report, October 2019) 104 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1559] The Hon Luke Donnellan MP, Minister for Child Protection, *Victorian Budget 2019-20* (Paper, 2020) *5* <https://www.parliament.vic.gov.au/images/stories/committees/paec/2019-20_Budget_Estimates/Presentations/2019-20_BE_presentation_Child_Protection.pdf>.

[1560] See Victoria State Government, *Victorian Budget 2019-20 Service Delivery – Budget Paper No. 3* (Paper, 2020) 50, 55 <https://s3-ap-southeast-2.amazonaws.com/budgetfiles201920.budget.vic.gov.au/2019-20+State+Budget+-+Service+Delivery.pdf>.

Question	Summary response
	"output initiatives" relates to new programs or projects that deliver goods and services.[1561]
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	The relevant Act is the *Commission for Children and Young People Act 2012* (Vic):[1562] • the role of the CCYP is legislatively enshrined (s 6 of the Act); and • the role of the CACYP is not legislatively enshrined - the CACYP is appointed as an additional Commissioner under s 12 of the Act.
Most recent annual report or equivalent document (link)	Annual Report 2018-19

[1561] See Parliament of Victoria Public Accounts and Estates Committee, *Report on the 2018-19 Budget Estimates* (Report, 2019) xi <https://www.parliament.vic.gov.au/images/stories/committees/paec/2018-19_Budget_Estimates/PAEC_58-15_Report_on_the_2018-19_Budget_Estimates.pdf>.

[1562] We note that the *Child Wellbeing and Safety Act 2005* (Vic) also contains some of the objectives, functions and powers of the Commission.

B. The Commissioner for Aboriginal Children and Young People and The Principal Commissioner for Children and Young People in Victoria: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs[1563]

Summary: the Act is sparsely drafted and largely does not comply with the Paris Principles with respect to the establishment of NHRIs. This is particularly so for the role of the CACYP, which isn't explicitly recognised by the Act (other than under the broad provisions relating to "additional Commissioners")

Entrenched in law[1564]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[1565] While both the Commission and the CCYP are legislatively enshrined in the Act,[1566] the CACYP was established under the broad powers to appoint an additional Commissioner[1567] and, therefore, the role is not formally entrenched in law.

Mandate and powers[1568]

The Act sets out the specific functions of the Commission and the CCYP, including:[1569]

- to provide advice to Ministers, Government Departments, health services and human services about policies, practices and the provision of services relating to the safety or wellbeing of vulnerable children and young persons;
- to promote the interests of vulnerable children and young persons in the Victorian community;
- to monitor and report to Ministers on the implementation and effectiveness of strategies relating to the safety or wellbeing of vulnerable children and young persons;
- to provide advice and recommendations to the Minister about child safety issues, at the request of the Minister;
- to promote child-friendly and child-safe practices in the Victorian community;
- the functions relating to working with children conferred by Part 3 of the Act;
- the functions relating to out of home care conferred by Part 4 of the Act;
- the functions relating to inquiries conferred by Part 5 of the Act;
- any other functions conferred on the Commission by or under this Act or any other Act.

The Part 3 functions referred to above are:

- to review and report on the administration of the Working with Children Act 2005; and

[1563] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[1564] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[1565] GANHRI General Observations, G.O. 1.1.

[1566] *Commission for Children and Young People Act 2012* (Vic) s 6.

[1567] *Commission for Children and Young People Act 2012* (Vic) s 12.

[1568] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[1569] *Commission for Children and Young People Act 2012* (Vic) s 8(1).

- in consultation with the Secretary to the Department of Justice, to educate and inform the community about that Act.[1570]

The Part 4 functions referred to above are:

- to promote the provision of out of home care services that encourage the active participation of those children in the making of decisions that affect them;
- to advise the Minister and the Secretary on the performance of out of home care services; and
- at the request of the Minister, to investigate and report on an out of home care service.[1571]

In the exercise of these functions, the CCYP and the Commission must:

- act independently and impartially; and
- when performing a function in relation to a vulnerable child or young person, perform the function for the purpose of promoting the best interests of the child or person.[1572]

While the Act broadly sets out the powers of the Commission and CCYP, the CACYP's mandate is not entirely clear. It appears that the functions of the CACYP are those that are deemed appropriate between the CCYP and the CACYP. The best articulations of the CACYP's mandate and powers are found within the Commission's Annual Reports,[1573] and job listings.[1574] In addition, it is unclear whether the role of CACYP sits alongside the CCYP, or whether the CACYP reports directly to the CCYP.[1575]

Appointment mechanisms[1576]

The appointment process is not transparent for either the CACYP or the CCYP.[1577] The Governor in Council may, on the recommendation of the Minister, appoint a person as the CCYP or CACYP.[1578] The only clear requirement is that the person is "*qualified for appointment as a Commissioner because of his or her knowledge and experience*".[1579]

Quasi-judicial competency (complaints-handling)[1580]

The Act does not set out an ability for the Commission, CCYP or CACYP to receive or investigate complaints. In fact, the Commission's website and resources expressly state that the Commission is not a formal complaints handling body and refer complainants on to the

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[1570] *Commission for Children and Young People Act 2012* (Vic) s 24.

[1571] *Commission for Children and Young People Act 2012* (Vic) s 28.

[1572] *Commission for Children and Young People Act 2012* (Vic) ss 8(2), (3).

[1573] See, eg, Commission for Children and Young People, *Annual Report 2012-13* (Report, 2013) 14 <https://www.parliament.vic.gov.au/file_uploads/Commission_for_Children_and_Young_People_AR_2013_Final_Bookmarked_opti_N2RMhMvg.pdf>; Commission for Children and Young People, *Annual Report 2017-18* (Report, 2018) 10 – 12 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-AR-2018-P6-FINAL-web.pdf>.

[1574] See, eg, the job listing for the CACYP, available at <https://fisherleadership.com/opportunities/commissioner-for-aboriginal-children-and-young-people/>.

[1575] See, eg, the job listing for the CACYP, available at <https://fisherleadership.com/opportunities/commissioner-for-aboriginal-children-and-young-people/>.

[1576] See GANHRI General Observations, G.O. 1.1.

[1577] See, however, the job listing for the CACYP, available at <https://fisherleadership.com/opportunities/commissioner-for-aboriginal-children-and-young-people/>.

[1578] *Commission for Children and Young People Act 2012* (Vic) ss 11(1), 12(1).

[1579] *Commission for Children and Young People Act 2012* (Vic) ss 11(2), 12(2).

[1580] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

Department of Health and Human Services or Victorian Ombudsman (depending on the complaint).[1581]

1.2 Human rights mandate

Summary: the Act is partially compliant with the Paris Principles in respect of the Commission's human rights mandate. While the Act provides the Commission with inquiry powers and some functional immunity, these are limited by other provisions and qualifications contained within the Act.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[1582] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[1583]

Competence and responsibilities[1584]

As is set out above, the Act sets out a broad mandate for the CCYP and the Commission. This mandate allows the CCYP to promote the interests of vulnerable children and young persons, monitor and report to Ministers on strategies relating to the safety or wellbeing of vulnerable children and young persons, provide advice and recommendations (upon request by the Minister) and promote child-friendly and child-safe practices in the community.[1585]

Powers of inquiry and investigation

The CCYP and Commission are also vested with the competence to launch inquiries.[1586] The Commission's inquiry powers are able to be exercised without a Ministerial recommendation. However, the Commission's own-motion powers are limited to inquiries concerning:

- the death of child protection clients;[1587]
- children or young persons; and
- the provision of services (where a persistent or recurring systemic issue is identified).[1588]

Furthermore, while the Commission must be given access to information reasonably required in relation to any person or service that is the subject of an inquiry, this access is limited to information, documents or records held by three specified Departments, three specific services, or a school.[1589]

The Commission may also request a health, welfare or education professional to provide any information reasonably required in relation to any person or service that is the subject of an

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[1581] See, eg, Commission for Children and Young People, *General enquiries for the Commission,* available at <https://ccyp.vic.gov.au/contact-us/general-enquiries-for-the-commission/#:~:text=Child%20Protection,-During%20business%20hours&text=You%20can%20submit%20your%20complaint,Box%204057%2C%20Melbourne%20Vic%203000>; see also Commission for Children and Young People, *Aboriginal Inclusion Action Plan 2016-2019* (Report, 2018) 4 < https://ccyp.vic.gov.au/assets/corporate-documents/aboriginal-inclusion-action-plan-2016-19.pdf>.

[1582] GAHNRI General Observations, G.O. 1.2.

[1583] GAHNRI General Observations, G.O. 1.2.

[1584] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 2.6.

[1585] *Commission for Children and Young People Act 2012* (Vic) s 8.

[1586] *Commission for Children and Young People Act 2012* (Vic) Part 5.

[1587] As above, a child protection client is a person who is the subject of a report under ss 28, 33(2), 183 or 184 of the *Children, Youth and Families Act 2005* and the Secretary has not recorded that the person's case is closed. In practical terms, these are children that have had reports made about them due to significant concern for their wellbeing or a perceived need for protection.

[1588] *Commission for Children and Young People Act 2012* (Vic) Part 5.

[1589] *Commission for Children and Young People Act 2012* (Vic) s 42; the relevant Departments are the Department of Education and Training, the Department of Health and Human Services and the Department of Justice and Regulation. The relevant services are registered community services, health services and human services.

inquiry.[1590] However, the Act does not compel disclosure by the relevant professional (they are only compelled to have regard to certain matters in determining whether to disclose).[1591]

Despite this discretion, the Act does attempt to persuade professionals to disclose by providing that a disclosure made to the Commission in good faith by a relevant professional does not constitute unprofessional conduct or a breach of professional ethics and does not make the relevant professional subject to any liability.[1592]

Functional immunity[1593]

Unlike other Australian jurisdictions,[1594] the Act does not expressly provide protection from criminal and civil liability for official actions and decisions undertaken in good faith by the Commission, CCYP or CACYP.

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Act is partially compliant with the Paris Principles in regard to encouraging ratification or accession to international human rights instruments.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[1595] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[1596]

The Act does not explicitly reference international human rights standards and/or instruments. However, the functions of the Commission include:

- providing advice to Ministers, Government Departments, health services and human services about policies and practices;[1597] and
- monitoring and reporting to Minister on the implementation and effectiveness of strategies relating to the safety or wellbeing of vulnerable children and young persons.[1598]

Arguably, these functions could be used to:

- review policies, practices and strategies to determine whether they are compatible with any obligations arising from international human rights standards; and
- propose the amendment or repeal of any policies, practices or strategies that are inconsistent with the requirements of these standards.[1599]

In fact, the Commission has a history of consulting on the implementation of human rights instruments in Australia and of invoking international human rights instruments in its submissions and letters. For instance:

- in January 2016, the Commission wrote to Senator George Brandis about the progress of the Expatriate Adoption Working Group, and referenced compliance with the *Hague*

[1590] *Commission for Children and Young People Act 2012* (Vic) s 43.

[1591] *Commission for Children and Young People Act 2012* (Vic) s 43(3).

[1592] *Commission for Children and Young People Act 2012* (Vic) s 44(a)-(b).

[1593] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1 & 2.3.

[1594] See, eg, *Children's Commissioner Act 2013* (NT) s 48, 49.

[1595] GANHRI General Observations, G. O. 1.3.

[1596] GANHRI General Observations, G. O. 1.3.

[1597] *Commission for Children and Young People Act 2012* (Vic) s 8(1)(a).

[1598] *Commission for Children and Young People Act 2012* (Vic) s 8(1)(c).

[1599] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.3.

Convention on Protection of Children and Co-operation in respect of Intercountry Adoption;[1600]

- in September 2016, the Commission wrote to Philip Cummins AM concerning the review of Victoria's adoption laws, and referenced the general principles of the *Convention on the Rights of the Child*;[1601]
- in July 2017, the Commission contributed to the Australian Human Rights Commission's consultations about the implementation of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**);[1602] and
- in 2019, the Commission wrote to Corrections Victoria during public consultation on the proposed *Corrections Regulations 2019.* In its letter, the Commission referred to a number of human rights instruments, such as:[1603]
    - the Convention on the Rights of the Child*;*
    - the United Nations Rules for the Protection of Juveniles Deprived of their Liberty;
    - the United Nationals Standard Minimum Rules for the Administration of Juvenile Justice;
    - the Victoria Charter of Human Rights and Responsibilities; and
    - the United Nations Standard Minimum Rules for the Treatment of Prisoners.

1.4 Interaction with the international human rights system

Summary: the Act is partially compliant with the Paris Principles with respect to interaction with the international human rights system.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[1604] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[1605]

While there are no human rights or convention references in the Act, the Commission's own Fact Sheet asserts that in delivering its functions, the Commission applies a "*rights-based approach"* to its work, "*drawing on the United Nations Convention on the Rights of the Child and Victoria's Charter of Human Rights and Responsibilities".*[1606] The Commission also expressly lists the

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[1600] See Commission for Children and Young People, *Equivalency of Standards for Expatriate Adoption,* available at <https://ccyp.vic.gov.au/assets/Submissions/Letter-to-Attorney-General-on-Expatriate-Adoption.pdf>.

[1601] See Commission for Children and Young People, *Review of the Adoption Act 1984,* available at <https://ccyp.vic.gov.au/assets/Submissions/Submission-Review-of-the-Adoption-Act-1984.pdf>.

[1602] See Commission for Children and Young People, *Submission to consultation on the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Australia,* available at <https://ccyp.vic.gov.au/assets/Submissions/Submission-to-Australian-Human-Rights-Commission-re-OPCAT-in-Australia-2017-consultation-paper.pdf>.

[1603] See Commission for Children and Young People, *Corrections Regulations 2019,* available at <https://ccyp.vic.gov.au/assets/Submissions/Submission-on-Corrections-Regulations-2019-Public-Consultation.pdf>.

[1604] GAHNRI General Observations, G.O. 1.4.

[1605] GAHNRI General Observations, G.O. 1.4.

[1606] Commission for Children and Young People, *Fact Sheet* <https://ccyp.vic.gov.au/assets/Uploads/GenInfoSheets/CCYPPDFInfoSheet-General.pdf>; See also, Commission for Children and Young People, *Our approach and priorities 2016-17,* available at <https://ccyp.vic.gov.au/assets/Uploads/ccyp-strategic-plan-2016-17.pdf>.

Charter of Human Rights and Responsibilities Act 2006 (Vic) as one of the pieces of legislation that guides the Commission's day to day work.[1607]

Furthermore, the Commission's most recent Annual Report indicates the Commission's desire to engage with newly ratified conventions like OPCAT, as well as well-founded Conventions like the *United Nations Convention on the Rights of the Child*.[1608] The Commission's recent history of consulting on the implementation of human rights instruments in Australia and of invoking international human rights instruments in its submissions and letters is detailed above.

One of the functions of the Commission is to provide advice and recommendations to the Minister about child safety issues, at the request of the Minister.[1609] This function must be exercised independently and impartially.[1610] Therefore, the Commission could arguably express its independent opinion on a report to be submitted to the United Nations bodies and committees,[1611] provided such opinion was:

- requested by the Minister; and
- related to child safety issues.

1.5 Cooperation with other human rights bodies

Summary: in practice, the CCYP and CACYP largely comply with the Paris Principles on the cooperation with other human rights bodies.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[1612] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[1613]

While the Act does not expressly mandate cooperation with other entities, in practice, the Commission maintains consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships.[1614] For example:

- the CCYP attends biannual members meetings of the Australia and New Zealand Children's Commissioners and Guardians (**ANZCCG**), which aims to promote and protect the safety, wellbeing and rights of children and young people in Australia and New Zealand;[1615]
- the Commission commenced a joint taskforce with the Department of Justice and Community Safety to conduct a systemic inquiry into the over-representation of Aboriginal children and young people in Victoria's youth justice system;[1616]
- the Commission partnered with the Victorian Equal Opportunity and Human Rights Commission to undertake a project to promote the importance of cultural connection and

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[1607] Commission for Children and Young People, *Legislation* (Webpage) <https://ccyp.vic.gov.au/about-the-commission/legislation/>.

[1608] Commission for Children and Young People, *Annual Report 2018-19* (Report, 2019) 18 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1609] *Commission for Children and Young People Act 2012* (Vic) 8(1)(d).

[1610] *Commission for Children and Young People Act 2012* (Vic) s 8(2).

[1611] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.4.

[1612] GAHNRI General Observations, G.O. 1.5.

[1613] GAHNRI General Observations, G.O. 1.5.

[1614] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[1615] See Commission for Children and Young People, *Australia and New Zealand Children's Commissioners and Guardians,* available at <https://ccyp.vic.gov.au/about-the-commission/who-we-are/australian-and-new-zealand-childrens-commissioners-and-guardians/>.

[1616] See Commission for Children and Young People, *Our youth, our way: Inquiry into the overrepresentation of Aboriginal children and young people in youth justice,* available at https://ccyp.vic.gov.au/assets/Uploads/FinalInquiryInfoSheet.pdf

the protection of cultural rights for Koori children and young people in Victoria's youth justice centres;[1617] and

- the CACYP commenced a taskforce with the Department of Health and Human Services, Aboriginal community controlled organisations and community service organisations to examine the treatment of almost 1000 Aboriginal children in out-of-home care.[1618]

1.6 Recommendations by NHRIs

Summary: the Act largely complies with the Paris Principles on recommendations by NHRIs.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[1619] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[1620] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[1621]

The Act provides that the Commission may provide advice and recommendations to the Minister about child safety issues, at the request of the Minister.[1622] While it appears that the Commission may only make recommendations with the Minister's permission, the Commission is also vested with inquiry and reporting powers,[1623] and may provide advice to Ministers, Government Departments, health services and human services about policies, practices and the provision of services relating to the safety or wellbeing of vulnerable children and young persons.[1624]

On completing an inquiry under the Act, the Commission *must* give a report of the inquiry to the Minister and the Secretary.[1625] The Commission *must* also give a copy of the report to any responsible Minister.[1626] The Commission *may not* give a report of an inquiry to a Minister or the Secretary if it contains any adverse comment or opinion on any person or specified service[1627] and that person or service has not had an opportunity to comment.[1628]

If at least 14 days have elapsed after an inquiry report is provided to a Minister and the Secretary, the Commission *may* give a copy of the report to the clerk of each House of the Parliament of Victoria (unless it contains identifying information).[1629] Once a copy of the report has been given to the Parliament, the Commission *may* publish a copy of the report given to the Parliament on an "*appropriate Internet site".*[1630] In practice, once the Commission's inquiries reports have been tabled in Victorian Parliament, they are usually accompanied by a media release.[1631]

[1617] See Commission for Children and Young People, *Our approach and priorities 2017-18* (item 5.3), available at <https://ccyp.vic.gov.au/assets/corporate-documents/Our-approach-and-priorities-2017-18.pdf>.

[1618] See Rapid Impact, *Taskforce 1000 Reflection,* available at <https://ccyp.vic.gov.au/assets/Publications-inquiries/taskforce-1000-reflection.pdf>

[1619] GAHNRI General Observations, G.O. 1.6.

[1620] GAHNRI General Observations, G.O. 1.6.

[1621] GAHNRI General Observations, G.O. 1.6.

[1622] *Commission for Children and Young People Act 2012* (Vic) s 8(1)(d).

[1623] *Commission for Children and Young People Act 2012* (Vic) Part 5, Division 6.

[1624] *Commission for Children and Young People Act 2012* (Vic) s 8(1)(a).

[1625] *Commission for Children and Young People Act 2012* (Vic) s 46.

[1626] *Commission for Children and Young People Act 2012* (Vic) s 47.

[1627] These services include: a community service, a health service, a human service, a school or child protection services or youth justice services provided by the Secretary.

[1628] *Commission for Children and Young People Act 2012* (Vic) s 48.

[1629] *Commission for Children and Young People Act 2012* (Vic) ss 50, 51.

[1630] *Commission for Children and Young People Act 2012* (Vic) s 52.

[1631] Commission for Children and Young People, *About our systemic inquiries* (Webpage) <https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/about-our-systemic-inquiries/>.

The Commission *may* also disclose any information that is acquired in performing its inquiry functions to the following entities (provided the information is relevant to the performance of a function conferred on the entity under an Act):[1632]

- the Ombudsman;
- the Independent Broad-based Anti-corruption Commission established under the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic);
- a coroner;
- the Disability Services Commissioner within the meaning of the *Disability Act 2006* (Vic);
- the Commissioner of the NDIS Quality and Safeguards Commission referred to in section 181C of the *National Disability Insurance Scheme Act 2013* (Cth);
- the Health Complaints Commissioner within the meaning of the *Health Complaints Act 2016* (Vic);
- the Information Commissioner appointed under the *Freedom of Information Act 1982* (Vic) in the Information Commissioner's capacity under the *Privacy and Data Protection Act 2014* (Vic); and
- the Mental Health Complaints Commissioner within the meaning of the *Mental Health Act 2014* (Vic).

The Commission may also disclose to the Minister or the Secretary "*any information acquired by the Commission in performing its functions and exercising its powers*" under the Act (or under any other Act).[1633]

In addition to its inquiry reports, the Commission also prepares an annual report under the Act.[1634]

Publication in practice[1635]

The Commission regularly publishes its systemic inquiries reports on its website.[1636] These reports usually contain a number of recommendations for improvement, and the Commission also publishes information on the responses to these recommendations on its website.[1637]

The following inquiries are not public documents and are not published on the Commission's website:

- inquiries about the safety or wellbeing of an individual or group of vulnerable children and young people; [1638]
- Ministerial inquiries; [1639] and

[1632] *Commission for Children and Young People Act 2012* (Vic) s 53.

[1633] *Commission for Children and Young People Act 2012* (Vic) s 60.

[1634] *Commission for Children and Young People Act 2012* (Vic) s 72.

[1635] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.6.

[1636] Commission for Children and Young People, *Systemic inquiries* (Webpage) <https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/>.

[1637] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.6; Commission for Children and Young People, *Monitoring of reports,* available at https://ccyp.vic.gov.au/upholding-childrens-rights/monitoring-of-reports/

[1638] Commission for Children and Young People, *Individual inquiries* (Webpage) <https://ccyp.vic.gov.au/upholding-childrens-rights/individual-inquiries/>.

[1639] Commission for Children and Young People, *Ministerial inquiries* (Webpage) <https://ccyp.vic.gov.au/upholding-childrens-rights/ministerial-inquiries/>.

- child death inquiry reports.[1640]

However, the Commission sometimes publishes de-identified summaries of these child safety and wellbeing inquiries in its annual reports.[1641] Furthermore, the Minister may decide whether to make Ministerial inquiries public in full or in part.[1642]

The Commission is also active in making submissions on policy and law reform relating to issues affecting children and young people (including submissions to government bodies and agencies). The Commission openly publishes its key submissions on its website (with the exception of submissions in relation to draft legislation, which are Cabinet in Confidence and unable to be published).[1643]

1.7 Ensuring pluralism of the NHRI[1644]

Summary: the Act is partially compliant with the Paris Principles in respect of ensuring the pluralism of the NHRI. While the Commission has a number of policies around diversity in the workplace, the Act itself is sparsely drafted and pluralism may be limited by the provisions and qualifications contained within the Act.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[1645] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[1646]

Where the NHRI is a single-member, such as the CCYP or CAYP, it is important that the NHRI is representative of diverse segments of society.[1647] However, there are no clear requirements for these roles under the Act, other than that the Commissioners must be "*qualified*" for the role because of his or her "*knowledge and experience*".[1648]

The role of the CACYP is currently filled by an identified Aboriginal or Torres Strait Islander person with appropriate qualifications, knowledge and experience, however this is not a legislatively mandated requirement for the position.[1649] Nonetheless, we note that the last job listing for the position stated that the Commission was "*seeking to appoint an Aboriginal leader".*[1650]

Commission Staff

The Paris Principles also require NHRIs to be legislatively empowered to determine its own staffing structure, in a way which allows it to best fulfil its mandate. Staff should be recruited in a transparent and fair selection manner to ensure pluralism and diverse composition.[1651]

[1640] Commission for Children and Young People, *Child death inquiries* (Webpage) <https://ccyp.vic.gov.au/upholding-childrens-rights/child-death-inquiries/ >.

[1641] Commission for Children and Young People, *Individual inquiries* (Webpage) <https://ccyp.vic.gov.au/upholding-childrens-rights/individual-inquiries/>.

[1642] Commission for Children and Young People, *Ministerial inquiries* (Webpage) < https://ccyp.vic.gov.au/upholding-childrens-rights/ministerial-inquiries/>.

[1643] Commission for Children and Young People, *Submissions* (Webpage) <https://ccyp.vic.gov.au/upholding-childrens-rights/submissions/>.

[1644] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[1645] GANHRI General Observations, G.O. 1.7.

[1646] GANHRI General Observations, G.O. 1.7.

[1647] GANHRI General Observations, G.O. 1.7.

[1648] *Commission for Children and Young People Act 2012* (Vic) ss 11(2) & 12(2) of the Act.

[1649] GANHRI General Observations, G.O. 1.7.

[1650] Fisher Leadership, job listing for the CACYP, available at <https://fisherleadership.com/opportunities/commissioner-for-aboriginal-children-and-young-people/>.

[1651] GAHNRI General Observations, G.O. 2.4.

The Commission may employ staff under the *Public Administration Act 2004* (Vic)[1652] to enable the Commission to perform its functions.[1653] The CCYP may also enter into agreements or arrangements for the use of the services of any staff of a Department, statutory authority or other public body.[1654]

The Commission's website states that it is "*committed to building an inclusive workplace that embraces diversity*" and encourages job applications from "*people with a disability, people from culturally diverse backgrounds, and people who are lesbian, gay, bisexual, trans, gender diverse and intersex*".[1655] The Commission publishes workforce data, including demographic data on the age and gender of all its employees, in its annual reports.[1656]

Furthermore, in 2016, the Commission introduced an Aboriginal Inclusion Action Plan (**AIAP**)[1657], which sets out the Commission's target for Aboriginal employment. The AIAP was intended to be implemented over a three-year period from 2016-2019 and an independent evaluation of the AIAP's implementation was due to occur in mid-2019. We have been unable to determine whether this evaluation occurred or to locate an updated action plan for the period commencing in 2020.

Full-time members[1658]

The Act sets out a specific duration for the CCYP and CACYP mandate (the period specified in the instrument of appointment, not exceeding 5 years), and both the CCYP and CACYP are eligible for reappointment.[1659] The CCYP must be appointed on a full-time basis. However, the CACYP may be appointed on a full-time or part-time basis.[1660]

The Act provides that the CCYP or CACYP hold office "*on the terms and conditions determined by the Governor in Council*".[1661] These terms and conditions are not outlined in the Act. The Governor in Council also determines the remuneration and allowances of the CCYP or CACYP "*from time to time*".[1662] As such, in practice, the remuneration, allowances and terms and conditions of the Commissioners' employ are determined on a discretionary basis by the ruling party.

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: The Act is sparsely drafted and largely does not comply with the Paris Principles with respect to the selection and appointment of the decision-making body of NHRIs.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[1663]

[1652] Available at <https://www.legislation.vic.gov.au/in-force/acts/public-administration-act-2004/075>.

[1653] *Commission for Children and Young People Act 2012* (Vic) s 21(1).

[1654] *Commission for Children and Young People Act 2012* (Vic) s 21(2).

[1655] Commission for Children and Young People, *Working for the Commission,* available at <https://ccyp.vic.gov.au/about-the-commission/working-for-the-commission/>.

[1656] See, for example, Commission for Children and Young People, *Annual Report 2019-19* (Report, 2019) 114 <https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1657] Commission for Children and Young People, *Aboriginal Inclusion Action Plan 2016-2019* (Report, 2019) 4 <https://ccyp.vic.gov.au/assets/corporate-documents/aboriginal-inclusion-action-plan-2016-19.pdf>.

[1658] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

[1659] *Commission for Children and Young People Act 2012* (Vic) s 14.

[1660] *Commission for Children and Young People Act 2012* (Vic) s 11(3), 12(3).

[1661] *Commission for Children and Young People Act 2012* (Vic) s 14(c).

[1662] *Commission for Children and Young People Act 2012* (Vic) s 13.

[1663] GAHNRI General Observations, G.O. 1.8

The selection and appointment of the CCYP (or CACYP) is to be made by the Governor in Council, on the recommendation of the Minister.[1664] The only clear requirement for appointment is that the person is "*qualified for appointment as a Commissioner because of his or her knowledge and experience*". The Act does not provide further information on the procedures behind the appointment, which raises concerns regarding whether the appointment process is sufficiently clear, transparent, and participatory.[1665]

However, we were able to locate the previous job listing for the CACYP, which suggests that position vacancies are publicised broadly (at least in respect of the CACYP).[1666] We further note that the Commission has a "*Careers*" page on its website on which it advertises job vacancies at the Commission.[1667] We note that some positions are only advertised to existing Victorian Public Service employees and are not published on the Careers page.[1668]

1.9 Political representatives on NHRIs

Summary: the Act should be better drafted in order to expressly comply with the Paris Principles with respect to political representatives on NHRIs.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[1669] An NHRI should also be independent from government.

As outlined above, there is a lack of transparency around the appointment and selection process for the CCYP and CACYP. The Act does not expressly restrict the participation of government representatives or members of parliament in the decision-making of the Commission.[1670] However, the Act does provide that the CCYP (or CACYP) ceases to hold office if he or she "*nominates for election for the Parliament of Victoria or of the Commonwealth or of another State or a Territory of the Commonwealth".*[1671]

Furthermore, while the Act provides that the Commission must act independently and impartially in performing its functions,[1672] there is no express provision stating that the CCYP or CACYP is not subject to any direction or oversight by the Minister or Governor in Council. In fact, the Governor in Council sets the terms and conditions of office for both commissioners.[1673] This may undermine the perceived (and real) independence of the CCYP and CACYP.

Guarantee of tenure[1674]

The Act sets out a specific duration for the CCYP and CACYP mandate (the period specified in the instrument of appointment, not exceeding 5 years), and both the CCYP and CACYP are eligible for reappointment.[1675]

[1664] *Commission for Children and Young People Act 2012* (Vic) ss 11 , 12.

[1665] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.8.

[1666] Fisher Leadership, *Commissioner for Aboriginal Children and Young People,* available at <https://fisherleadership.com/opportunities/commissioner-for-aboriginal-children-and-young-people/>.

[1667] See Commission for Children and Young People, *Careers* (Webpage) <https://ccyp.vic.gov.au/about-the-commission/working-for-the-commission/careers/>.

[1668] See Commission for Children and Young People, *Working for the Commission* (Webpage) <https://ccyp.vic.gov.au/about-the-commission/working-for-the-commission/>.

[1669] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[1670] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 1.9.

[1671] *Commission for Children and Young People Act 2012* (Vic) s 15(d).

[1672] *Commission for Children and Young People Act 2012* (Vic) s 8(2).

[1673] *Commission for Children and Young People Act 2012* (Vic) s 14(c).

[1674] GAHNRI General Observations, G.O. 2.1.

[1675] *Commission for Children and Young People Act 2012* (Vic) s 14.

While the Act sets out specific grounds for removal from office, it also allows the Governor in Council to remove the CCYP or CACYP on "*any other ground"* if satisfied that the CCYP or CACYP is "*unfit to hold his or her office*".[1676] Arguably, this broad removal power could be exercised subjectively or on a partisan basis and may result in apprehension about inappropriate interference (and undermine the independence of the CCYP or CACYP).[1677]

Finally, the Act provides that the CCYP or CACYP hold office "*on the terms and conditions determined by the Governor in Council".*[1678] These terms and conditions are not outlined in the Act. As such, in practice, the terms and conditions of the Commissioners' employ are determined on a discretionary basis by the ruling party. This does not provide the necessary independence and autonomy from government (an essential requirement under the Paris Principles).

Although the grounds for dismissal of a Commissioner are limited,[1679] they do not satisfy the recommendations made in the General Observations. As outlined above, the Act allows the Governor in Council to remove the CCYP or CACYP on "*any other ground"* if satisfied that the CCYP or CACYP is "*unfit to hold his or her office*".[1680] Furthermore, the Act does not expressly require the Governor in Council to provide the Commissioner with specific reasons for dismissal or to provide the Commissioner with an ability to contest dismissal.

Recruitment[1681]

The Commission may employ staff under the *Public Administration Act 2004* (Vic)[1682] to enable the Commission to perform its functions.[1683] The CCYP may also enter into agreements or arrangements for the use of the services of any staff of a Department, statutory authority or other public body.[1684] In this respect, the Commission holds substantial independence to control its own staffing arrangements.

1.10 Adequate funding of NHRIs

Summary: there is a lack of transparency around the funding of the Commission (particularly under the Act). However, in practice, the Commission partially complies with the Paris Principles on adequate funding of NHRIs.

NHRIs must be provided with adequate funding in order to function effectively and independently.[1685]

The statutory provisions do not provide an indication as to the source or amount of funding for the Commission, CCYP or CACYP. However, the Victorian Budget for 2019-20 allocates $3.9 million of "output initiative" funding to the Commission to enable it to "*continue to oversee the safety and quality of care for children and safeguard their rights and dignity*".[1686] The term "output initiative" relates to new programs or projects that deliver goods and services.[1687] The 2019-20 Budget also

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[1676] *Commission for Children and Young People Act 2012* (Vic) s 16.

[1677] See GANHRI General Observations, G.O. 2.1.

[1678] *Commission for Children and Young People Act 2012* (Vic) s 14(c).

[1679] These grounds include misconduct, neglect of duty, inability to perform the duties of office and engagement in any paid employment outside the duties of office.

[1680] *Commission for Children and Young People Act 2012* (Vic) s 16.

[1681] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

[1682] Available at <https://www.legislation.vic.gov.au/in-force/acts/public-administration-act-2004/075>.

[1683] *Commission for Children and Young People Act 2012* (Vic) s 21(1).

[1684] *Commission for Children and Young People Act 2012* (Vic) s 21(2).

[1685] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[1686] See Victoria State Government, *Victorian Budget 2019-20 Service Delivery – Budget Paper No. 3* (Paper, 2020) 50, 55 < https://s3-ap-southeast-2.amazonaws.com/budgetfiles201920.budget.vic.gov.au/2019-20+State+Budget+-+Service+Delivery.pdf>.

[1687] See Parliament of Victoria Public Accounts and Estates Committee, *Report on the 2018-19 Budget Estimates* (Report, 2019) xi <https://www.parliament.vic.gov.au/images/stories/committees/paec/2018-19_Budget_Estimates/PAEC_58-15_Report_on_the_2018-19_Budget_Estimates.pdf>.

invests an additional $16.2 million for the Commission to administer the Reportable Conduct Scheme and Child Safe Standards.[1688]

From 2016, the Commission's financial statements have been incorporated into the Department of Health and Human Services' annual reports. However, the Department's annual reports do not allocate a separate line item for the Commission and, as such, the Commission's budget is not transparent.[1689]

In 2018-9, the Commission expenditure totalled $12,577,852.[1690] While the Commission has autonomy over the allocation of its budget, it is obliged to comply with the financial accountability requirements applicable to public sector bodies under the *Financial Management Act 1994* (Vic) (see below).

NHRI staff and members[1691]

Both the CCYP and the CACYP are entitled to be paid the remuneration and allowances that are determined from time to time by the Governor in Council.[1692] In practice, this means that remuneration and allowances are determined on a discretionary basis by the ruling party.

The Commission publishes workforce data, such as the salaries of executives and other non-executive senior staff in its annual reports.[1693]

Accessibility and communications infrastructure[1694]

While the Commission does not appear to have an open-to-the-public office, the Commission does maintain a communications system for general enquiries.[1695] This system includes a telephone line, email address, mailing address and social media accounts. Interpreter services are available for any calls made to the Commission.[1696] However, as outlined above, the Commission does not have complaints-handling powers and the Commission's communications infrastructure is provided for general enquiries only.

1.11 Annual reports of NHRIs[1697]

Summary: the Act largely complies with the Paris Principles on annual reports of NHRIs.

The Commission is required to produce annual reports under Part 7 of the *Financial Management Act 1994* (Vic).[1698] These reports must include proper accounts and records of the transactions and affairs of the Commission, as well as any other records required to sufficiently explain the financial operations and financial position of the Commission.[1699]

[1688] The Hon Luke Donnellan MP, Minister for Child Protection, *Victorian Budget 2019-20* (page 5), available at <https://www.parliament.vic.gov.au/images/stories/committees/paec/2019-20_Budget_Estimates/Presentations/2019-20_BE_presentation_Child_Protection.pdf>.

[1689] Commission for Children and Young People *Annual Report 2018-19* (Report, 2019) 5 <https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf> Department of Health and Human Services, *Annual Report 2018-19* (Report, 2019) 101 <https://www.dhhs.vic.gov.au/sites/default/files/documents/201910/Department%20of%20Health%20and%20Human%20Services%20annual%20report%202018-19.pdf>.

[1690] Commission for Children and Young People, *Annual Report 2018-19* (Report, 2019) 104 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1691] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[1692] *Commission for Children and Young People Act 2012* (Vic) s 13.

[1693] See, eg, Commission for Children and Young People, *Annual Report 2018-19* (Report, 2019) 104 <https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1694] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[1695] Commission for Children and Young People, *Contact us* (Webpage) <https://ccyp.vic.gov.au/contact-us/>.

[1696] For a list of languages, see Department of Home Affairs, *Languages available through TIS National,* available at <https://www.tisnational.gov.au/en/Agencies/Help-using-TIS-National-services/Languages-available-through-TIS-National>.

[1697] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.11.

[1698] *Commission for Children and Young People Act 2012* (Vic) s 72.

[1699] *Financial Management Act 1994* (Vic) s 44 <https://content.legislation.vic.gov.au/sites/default/files/77475f8c-7c9d-3bab-b14e-9124ee5b8d61_94-18aa065%20authorised.pdf>.

The reports are then provided to the Minister for Child Protection and tabled before each House of the Victorian Parliament (provided that the expenses and obligations exceed $5,000,000).[1700] The Commission's annual reports are made available on the Commission's website.[1701]

In practice, the Commission's annual reports include a full summary of the activities undertaken in the financial year, as well as its opinions, recommendations and proposals. In addition, the reports often track the implementation of recommendations from past inquiries.

2 Any criticisms made publicly about this role?

We have been unable to locate and specific criticisms about this role.

The Royal Commission into the Protection and Detention of Children in the Northern Territory noted that the Commission and the CCYP do not have an individual complaints resolution and investigatory function (unlike the equivalent bodies in the Australian Capital Territory and the Northern Territory).[1702]

In 2015, the Council for the Care of Children noted that there has been little formal recognition of the need to include children in the selection process of children's commissioners across Australia.[1703]

3 What are the best features of this role?

- The Commission has own-motion inquiry powers and is able to compel access to information during inquiries.[1704] However, we note that these powers are unduly limited under the Act.
- The Commission maintains consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships.[1705]
- In practice, the Commission publishes a wide range of information (including submissions, reports and inquiries) on its website, making it publicly accessible.
- The Commission publicly tracks and reviews the implementation of its recommendations.[1706]
- The annual reporting requirements of Commission are closely aligned with the GANHRI General Observations and may act as a useful model.[1707]

[1700] *Financial Management Act 1994* (Vic) s 46.

[1701] See Commission for Children and Young People, *Annual Reports* (Webpage) <https://ccyp.vic.gov.au/about-the-commission/annual-reports/>.

[1702] *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Volume 4, Chapter 40 (page 11), available at <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-4.pdf>.

[1703] The Council for the Care of Children, *Conversations Report 2015: Rights and a Commissioner for Children and Young People* (Report, 2015) <http://childrensa.host.recite.com.au/assets/documents/Conversations_Report2015.pdf>.

[1704] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 2.6.

[1705] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[1706] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.6.

[1707] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.11.

C. The Commissioner for Aboriginal Children and Young People and the Principal Commissioner for Children and Young People in Victoria: Impacts

4 Improving outcomes for Aboriginal and Torres Strait Islander children in 2018-19

4.1 Review of the Aboriginal Children's Forum

In the late 2018, the CACYP, in collaboration with a consultant, conducted a review of the Aboriginal Children's Forum (**ACF**), with the aim to support the ACF to continue its work in holding government and agencies to account for the gap between the stated objectives of laws and policies, and their real impact in the lives of Aboriginal children and young people.

The review report was completed in January 2019 and was presented to the Minister for Child Protection, the Secretary of Department of Health and Human Services, and members of the ACF. The ACF meetings in March and June 2019 accepted the recommendations made by the CACYP and developed processes to incorporate them into the structure and agenda of the ACF.[1708]

4.2 Wungurilwil Gapgapduir Agreement

As part of a three-year action plan developed pursuant to the 2018 *Wungurilwil Gapgapduir* tripartite agreement between the Victorian Government, Victorian Aboriginal communities and the child and family services sector,[1709] the Commission had responsibility for two actions in 2018-19. These were to:

- evaluate and audit cultural support plans to determine the extent to which plans support Aboriginal children and young people to connect with Aboriginal community and culture, and
- convene an annual forum with Aboriginal children and young people in out-of-home care, supported by a series of regional forums.

In responding to the first action, the Commission commenced discussions and planning with 18 senior cultural advisers to develop a framework to assess the quality of cultural support plans. The Commission has plans to use the framework to:

- assess the quality of a random sample of current cultural support plans; and
- report on their ability to achieve effective connection to community and culture.[1710]

In response to the second action, the Commission developed a forum agenda and program for the first annual out-of-home care forum and worked with Child Protection practitioners and Aboriginal Community Controlled Organisations to identify and support Aboriginal children and young people aged 14–17 years in out-of-home care to attend.[1711]

[1708] Commission for Children and Young People, *Annual Report 2018-19* (Report, 2019) 59 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1709] Victoria State Government, *Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement* (Report, April 2018) <https://www.dhhs.vic.gov.au/sites/default/files/documents/201804/Aboriginal%20Children%20and%20Families%20Agreement%202018_1.pdf>.

[1710] Commission for Children and Young People, *Annual Report 2018-19* (Report, 2019) 60 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1711] Commission for Children and Young People, *Annual Report 2018-19* (Report, 2019) 60 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

4.3 General actions

In addition to the above (and to the sections set out below), in the 2018-19 financial year, the Commission: [1712]

- began the development of specific communications for an Aboriginal audience, including videos to promote the Child Safe Standards and the Reportable Conduct Scheme;
- participated in work to progress independent, unannounced inspections of places of detention under the United Nations Optional Protocol to the Convention Against Torture;
- participated in the Aboriginal Justice Forum, working to ensure a greater youth focus;
- conducted 32 child death inquiries to review services provided to children who died after being involved with Child Protection in the year before their death (five inquiries related to Aboriginal children), resulting in 19 recommendations for improvement; and
- took Child Safe Standards compliance action with 77 organisations, proactively targeting organisations where compliance concerns were identified.

5 Systemic Inquiries

5.1 Systemic inquiries in 2019

In 2019, the Commission released two significant systemic inquiries related to young people's experiences of the out-of-home care system:

- the *Lost, not forgotten Inquiry;*[1713] and
- the *In our own words Inquiry*.[1714]

The *Lost, not forgotten Inquiry* was tabled in the Victorian Parliament on 13 November 2019. The report captures the stories of the 35 children and young people that died by suicide within a year of their last involvement with Victoria's child protection system between 2007 and 2019. The report reflects on the responses the children received from different service systems and makes six recommendations aimed at improving these systems.[1715]

The *In our own words Inquiry* was initiated to examine what it is like to be a child or young person in the out-of-home care system, by hearing directly from those living in out-of-home care or with recent lived experience in care. As part of this inquiry, the Commission spoke to over 200 children and young people across care types (including over 80 Aboriginal children and young people) and consulted with carers and workers, both from Department of Health and Human Services and from community service organisations. The inquiry resulted in 17 separate recommendations and was tabled in the Victorian Parliament on 27 November 2019.[1716] Both the CCYP and the CACYP made media statements when the report was released.[1717]

[1712] Commission for Children and Young People, *Annual Report 2018-19* (Report, 2019) 59 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1713] Commission for Children and Young People, *Lost, not forgotten: Inquiry into children who died by suicide and were known to Child Protection* (Report, 2019) <https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-Lost-not-forgotten-web-final.PDF>.

[1714] Commission for Children and Young People, *In our own words: Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system* (Report, November 2019) <https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-In-Our-Own-Words.pdf>.

[1715] See also, Commission for Children and Young People, *Lost to suicide, known to child protection* (Report, 2019) < https://ccyp.vic.gov.au/news/lost-to-suicide-known-to-child-protection/>.

[1716] Commission for Children and Young People, *In our own words: Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system* (Report, November 2019) <https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-In-Our-Own-Words.pdf>.

[1717] Commission for Children and Young People, *Connection to community and culture vital for Aboriginal children and young people in broken state care system: report,* available at <https://ccyp.vic.gov.au/news/connection-to-community-and-culture-vital-for-

5.2 Anticipated inquiry reports

In May 2019, the Commission also established the *Our youth, our way systemic inquiry* into the over-representation of Aboriginal children and young people in Victoria's youth justice system.[1718] This inquiry builds on the work of the Koori Youth Justice Taskforce – a joint initiative of the Commission and the Department of Justice and Community Safety.

Coupled with the Taskforce, the inquiry engages directly with Aboriginal and Torres Strait Islander children and young people, their families and communities about the impact of the youth justice system at many levels. The Taskforce also recently began auditing the client files of all Aboriginal and Torres Strait Islander children and young people who were involved in the youth justice system from October 2018 to March 2019 in order to identify areas of concern and good practice.[1719]

The Commission was due to release the resulting report, highlighting the stories of Aboriginal young people involved in youth justice and making recommendations for reform, in March 2020,[1720] however we have been unable to locate the final report.

5.3 Monitoring previous inquiries

During 2018–19, the Commission also monitored the implementation of the following previously tabled systemic inquiries:

- *'…as a good parent would…'* (2015);[1721]
- *Neither seen nor heard* (2016);[1722]
- *Always was, always will be Koori Children* (2016);[1723]
- *In the child's best interests* (2016);[1724] and
- *'…safe and wanted…'* (2017).[1725]

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aboriginal-children-and-young-people-in-broken-state-care-system-report/>; Commission for Children and Young People, *Children and young people speak out about a state care system they say is broken: report,* available at https://ccyp.vic.gov.au/news/in-our-own-words-launch/

[1718] Commission for Children and Young People, *Our youth, our way,* available at <https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way/>.

[1719] Commission for Children and Young People, *Annual Report 2018-19* (Report, 2019) 60 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB>.

[1720] Commission for Children and Young People, *Our youth, our way,* available at <https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way/>.

[1721] Commission for Children and Young People, *'…as a good parent would…' Inquiry into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in residential care,* available at <https://ccyp.vic.gov.au/assets/Publications-inquiries/as-a-good-parent-would.pdf>.

[1722] Commission for Children and Young People, *Neither seen nor heard: Inquiry into issues of family violence in child deaths,* available at <https://ccyp.vic.gov.au/assets/Publications-inquiries/Neither-seen-nor-heard-Inquiry-into-issues-of-family-violence-in-child-deaths.pdf>.

[1723] Commission for Children and Young People, *Always was, always will be Koori Children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria,* available at <https://ccyp.vic.gov.au/assets/Publications-inquiries/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf>.

[1724] Commission for Children and Young People, *In the child's best interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria,* available at <https://ccyp.vic.gov.au/assets/Publications-inquiries/In-the-childs-best-interests-inquiry-report.pdf>.

[1725] Commission for Children and Young People, '*… safe and wanted…' Inquiry into the implementation of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*, available at <https://www.dhhs.vic.gov.au/sites/default/files/documents/201712/Safe%20and%20wanted%20inquiry%20into%20permanency%20arrangements%20report%20June%202017.pdf>.

The results of these reviews are set out extensively in the Commission's Annual Report for 2018-19.[1726]

6 Submissions

6.1 Submissions from 2019 to 2020

From 2019 to the time of writing, the Commission also made the following submissions on policy and law reform relating to issues affecting children and young people:[1727]

Date	Organisation	Topic (and link)
10 January 2019	Department of Home Affairs	National Public Register of Children Sex Offenders Consultation
17 January 2019	Department of Premier and Cabinet	Submission on the terms of reference for the Royal Commission into Mental Health
5 March 2019	Productivity Commission	Submission to Productivity Commission's Inquiry into Mental Health
13 March 2019	Corrections Victoria	Corrections Regulations 2019
27 March 2019	Department of Prime Minister and Cabinet	Draft Terms of Reference for a Royal Commission into Violence, Neglect and Exploitation of People with Disability
1 May 2019	Department of Health and Human Services	Review of Victoria's Child Safe Standards
15 July 2019	Royal Commission into Victoria's Mental Health System	Submission to the Royal Commission into Victoria's Mental Health System
6 December 2019	Parliament of Victoria Legal and Social Issues Committee (Legislative Assembly)	Inquiry into anti-vilification protections
28 February 2020	Council of Attorneys-General	Age of Criminal Responsibility Working Group Review
17 March 2020	Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability	Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability (see also: General Submissions and Inclusive Education Submissions)

[1726] Commission for Children and Young People, *Annual Report 2018-19* (Report, 2019) 31-34 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

[1727] Commission for Children and Young People, *Submissions* (Webpage) <https://ccyp.vic.gov.au/upholding-childrens-rights/submissions/>.

6.2 Monitoring previous submissions

The Commission monitors responses to its submissions in its Annual Reports.

For example, in its 2018-19 Annual Report, Commission reports that its submissions on the Corrections Regulations secured additional protections, including requirements that a child's age, vulnerability and best interests be considered in certain situations, such as before an instrument of restraint is applied or a separation order is made.[1728]

[1728] Commission for Children and Young People, *Annual Report 2018-19* (Report, 2019) 53 < https://ccyp.vic.gov.au/assets/corporate-documents/CCYP-Annual-Report-2018-19-WEB.pdf>.

17 Queensland Family and Child Commission

A. Queensland Family and Child Commission: Summary table

Question	Summary response
Country/State/Territory	Queensland, Australia
Commissioner entity name	Queensland Family & Child Commission ("**QFCC**")
Date established	The *Family and Child Commission Act 2014* (Qld)[1729] (the **Act**) was assented on 28 May 2014 to establish the QFCC. The QFCC was established on 1 July 2014.[1730]
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The QFCC is largely compliant with the Paris Principles, however there are some gaps: • The QFCC, and the roles of the QFCC commissioners, are formally entrenched in law, pursuant to the Act. • The Minister is required to recommend at least one person who is an Aboriginal person or Torres Strait Islander in making recommendations for QFCC commissioners. • The Act does not contain any express human rights references. • The QFCC does not have a complaints-handling power. • The Act does not comprehensively set out the terms and conditions of office for the QFCC commissioners. • There is a significant lack of transparency around the appointment and selection process for the QFCC commissioners. However, the Act provides the QFCC with broad discretion regarding the selection and appointment of advisory councils. • The QFCC commissioners do not have functional immunity for acts or omissions done in good faith under the Act. • The QFCC maintains consultation with stakeholders and other bodies responsible for the promotion and protection of human rights. • The Act contains no limit on political representatives (at least in respect of the QFCC and commissioners). • In practice, the QFCC publishes a wide range of information on its website, making it publicly accessible. • The QFCC is good at publicly tracking and reviewing the implementation of its recommendations. • The QFCC appears to receive adequate funding and the annual reporting requirements of the QFCC are closely aligned with the GANHRI General Observations.

[1729] Available at <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-2014-027>.

[1730] *Family and Child Commission Act 2014* (Qld) s 2; Queensland Family & Child Commission, *Our role & how we work* (Webpage) <https://www.qfcc.qld.gov.au/about-us/our-role-how-we-work>.

Question	Summary response
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The QFCC is an independent statutory body which represents the State of Queensland.[1731] The QFCC is made up of: • one principal commissioner (the **principal commissioner**); • one commissioner (the **commissioner**); • deputy commissioners; • the Advisory Council; and • the Youth Advisory Council. In performing their functions under the Act, QFCC commissioners are subject to, and must comply with, the directions of the Minister.[1732] Notably, the QFCC's website has a Queensland Government domain (www.qfcc.qld.gov.au) and both the QFCC's website and annual reports contain the Queensland Government logo. This signalling may go towards undermining the perceived independence of the QFCC from Government.

Accountability arrangements
 	
What is the reporting line for the role?
 	
Who sets the budget?
	• The QFCC's budget is set by the Government of Queensland.[1733]
	• QFCC commissioners are entitled to be paid the remuneration and allowances decided by the Governor in Council.[1734]
	  ○ *NOTE:* The term 'Governor in Council' refers to the Queensland Governor acting with the advice of the Executive Council. The Governor in Council is not a deliberative body, but one that acts on the advice of the relevant Ministers. As such, in practice, remuneration and allowances are determined on a discretionary basis by the ruling party.
	• QFCC commissioners hold office:
	  ○ for a specified period (period not to exceed 3 years and there is no provision supporting re-appointment.)[1735]; and
	  ○ on the terms and conditions determined by the Governor in Council.[1736]
	• QFCC commissioners may exercise all of the powers of the QFCC and any other powers given to the commissioner under the Act or another Act.[1737]
	• QFCC commissioners may be removed from office on recommendation of the Minister, but only for misconduct, incapacity, neglect of duty or incompetence.[1738]

[1731] *Family and Child Commission Act 2014* (Qld) ss 7, 8(1)(b).

[1732] *Family and Child Commission Act 2014* (Qld) s 22.

[1733] See, eg, Queensland Treasury, *Queensland Budget 2019-20: Budget measures – Budget Paper No. 4* (Paper, 2020) 66 <https://budget.qld.gov.au/files/BP4.pdf>.

[1734] *Family and Child Commission Act 2014* (Qld) s 14(1).

[1735] *Family and Child Commission Act 2014* (Qld) s 13.

[1736] *Family and Child Commission Act 2014* (Qld) s 14(2).

[1737] *Family and Child Commission Act 2014* (Qld) s 21.

[1738] *Family and Child Commission Act 2014* (Qld) s 15(2) & (3).

Question	Summary response
	• The QFCC / principal commissioner must produce an annual report for each financial year.[1739] • The principal commissioner must also prepare and give the Minister reports regarding its functions relating to child deaths.[1740] • The Minister must table the above-mentioned QFCC reports in the Legislative Assembly within 14 sitting days.[1741] • The principal commissioner must maintain a register of information relating to child deaths.[1742]
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	• There must be two commissioners; one commissioner is to be appointed as the principal commissioner.[1743] • Each commissioner is appointed by the Governor in Council on the recommendation of the Minister.[1744] • In making this recommendation, the Minister must be satisfied that the person is "*appropriately qualified to exercise the commission's functions effectively and efficiently*".[1745] • At least one person recommended by the Minister must be an Aboriginal person or a Torres Strait Islander.[1746] The current commissioner, Natalie Lewis, is a Gamilaraay woman.[1747]

Scope
What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?
	• Section 9 of the Act sets out the functions of the QFCC, which are:
	  ○ to provide oversight of the child protection system;
	  ○ to promote and advocate—
	  ▪ the responsibility of families and communities to protect and care for children and young people; and
	  ▪ the safety and wellbeing of children and young people, particularly children in need of protection or in the youth justice system;
	  ○ to develop and review workforce planning and development strategies for the child protection system by collaborating with relevant agencies, the private sector and education providers;
	  ○ to inform and educate the community about—
	  ▪ services available to strengthen and support families; and
	  ▪ the way in which the child protection system operates; and
	  ▪ research relevant to the child protection system;
	  ○ to develop and coordinate a multidisciplinary research program to inform policies and practices, in consultation with stakeholders and relevant agencies;

[1739] *Family and Child Commission Act 2014* (Qld) ss 29(1), 40.
[1740] *Family and Child Commission Act 2014* (Qld) ss 26, 29(2).
[1741] *Family and Child Commission Act 2014* (Qld) s 29(7).
[1742] *Family and Child Commission Act 2014* (Qld) s 25.
[1743] *Family and Child Commission Act 2014* (Qld) s 11(1), (3).
[1744] *Family and Child Commission Act 2014* (Qld) s 11(2).
[1745] *Family and Child Commission Act 2014* (Qld) s 11(4).
[1746] *Family and Child Commission Act 2014* (Qld) s 11(5).
[1747] Queensland Family and Child Commission, *Our Executive* (Webpage) <https://www.qfcc.qld.gov.au/our-people/our-executive>.

Question	Summary response
	○ to assist relevant agencies to evaluate the efficacy of their programs and identify the most effective service models; ○ to provide leadership and give expert advice to relevant agencies about laws, policies, practices and services; ○ to increase collaboration and build capacity across different sectors to improve the delivery of services to children, young people and families; ○ to analyse and evaluate, at a systemic level, policies and practices relevant to the child protection system and the performance of relevant agencies in delivering services; ○ to report to the Minister about matters relating to one of the above functions; and ○ to perform a function incidental to one of the above functions. • The QFCC's scope is limited insofar as the QFCC is <u>not</u> able *"to investigate the circumstances of a particular child, young person or family or to advocate on their behalf*".[1748] • Section 18 of the Act sets out the commissioners' functions, which are: ○ to ensure the QFCC performs its functions under the Act effectively and efficiently; ○ to make recommendations to the Minister about any matter that— ▪ relates to the performance or exercise of the functions or powers of the QFCC or a commissioner; and ▪ may help the Minister in the proper administration of the Act; and ○ to perform any other function given to a commissioner under the Act or another Act. • The principal commissioner's functions also include controlling the QFCC.[1749] • The commissioner's functions also include ensuring the QFCC is adequately and appropriately performing its promotion and advocacy functions.[1750]
Purpose What is the purpose and objective of the role?	• Section 4 of the Act sets out the objects of the QFCC, which are: ○ to promote the safety, wellbeing and best interests of children and young people; and ○ to promote and advocate the responsibility of families and communities to protect and care for children and young people; and ○ to improve the child protection system. • In 2013, the Queensland Child Protection Commission of Inquiry (**QCPCOI**) released a report confirming that Queensland's child protection system was under immense stress and making 121 recommendations aimed at

[1748] *Family and Child Commission Act 2014* (Qld) s 9(2).
[1749] *Family and Child Commission Act 2014* (Qld) s 19.
[1750] *Family and Child Commission Act 2014* (Qld) s 20.

Question	Summary response
	addressing the risk of systemic failure and making Queensland the safest place to raise children.[1751] The QFCC was established in response to the QCPCOI's report.[1752] • The Explanatory Notes for *the Family and Child Commission Bill 2014* (Qld) describe the policy objective as providing a new statutory body to:[1753] ○ provide systemic oversight of the child protection system delivered by public sector and publicly funded non-government organisations providing child safety services or support services to families to improve the safety and wellbeing of children and young people, including those in need of protection; ○ drive best practice in the provision of services to this cohort, including by developing a workforce development strategy, coordinating a research program, and by evaluating the performance at a systemic level; and ○ promote and advocate to families and communities their responsibility for protecting and caring for their children including through education and providing information to enhance community awareness.
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power	• ***QFCC:*** the QFCC has all the powers of an individual and may, for example, enter into contracts, deal with property, appoint agents and attorneys, engage consultants or contractors and do anything else necessary of convenient to be done in the performance of its functions.[1754] • ***Commissioners:*** QFCC commissioners may exercise the powers of the QFCC and any other powers given under the Act or another Act.[1755] • ***Reporting:*** one of the QFCC's main functions is to report on matters relating to its functions.[1756] In addition: ○ the QFCC must produce an annual report for each financial year.[1757] ○ the principal commissioner must prepare and give the Minister an annual report regarding the principal commissioner's activities and recommendations relating to child deaths,[1758] and may also prepare and give the Minister other reports regarding its functions relating to child deaths;[1759] ○ the Minister must table the above-mentioned child death reports in the Legislative Assembly within 14 sitting days.[1760]

[1751] Queensland Child Protection Commission of Inquiry, *Publications* (Webpage) <http://www.childprotectioninquiry.qld.gov.au/publications/index.html>.

[1752] Queensland Parliament, *Explanatory Notes: Family and Child Commission Bill 2014* , available at <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2014-1794>.

[1753] Queensland Parliament, *Explanatory Notes: Family and Child Commission Bill 2014,* available at <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2014-1794>.

[1754] *Family and Child Commission Act 2014* (Qld) s 10.

[1755] *Family and Child Commission Act 2014* (Qld) s 21.

[1756] *Family and Child Commission Act 2014* (Qld)s 9(1)(j).

[1757] *Family and Child Commission Act 2014* (Qld) s 40.

[1758] *Family and Child Commission Act 2014* (Qld) s 29(1).

[1759] *Family and Child Commission Act 2014* (Qld) ss 26, 29(2).

[1760] *Family and Child Commission Act 2014* (Qld) s 29(7).

Question	Summary response

to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries?
 	
Regard to UN human rights instruments required when performing their functions or exercising their powers?
	• ***Promotion of human rights:*** while the Act does not refer specifically to human rights or conventions, the QFCC's purpose is to promote the safety, wellbeing and best interests of children and young people.[1761]
	  ○ In so doing, the QFCC is empowered to promote and advocate the safety and wellbeing of children and young people.[1762]
	  ○ However, the QFCC is not empowered to advocate on behalf of a particular child, young person or family.[1763]
	• ***Review of laws:*** the QFCC's functions include:
	  ○ to provide leadership and give expert advice to relevant agencies about laws, policies, practices and services;[1764]
	  ○ to analyse and evaluate, at a systemic level, policies and practices relevant to the child protection system and the performance of relevant agencies in delivering services;[1765] and
	  ○ to make recommendations about laws, policies, practices and services relating to child deaths.[1766]
	The QFCC may also include opinions and recommendations about any matters relating to its functions in its annual reports.[1767]
	• ***Complaints-handling:*** complaints are not referenced in the Act, however the QFCC expressly does not have the power to investigate the circumstances of a particular child, young person or family.[1768] The QFCC's website refers complaints to the Queensland Ombudsman or the relevant agency.[1769]
	• ***Inquiries:*** in regard to child deaths, the principal commissioner:
	  ○ has the power to, by written notice, compel a public entity which is considered to have information about child deaths to provide that information to the principal commissioner within a reasonable time;[1770] and
	  ○ where the principal commissioner exercises this power, the public entity must comply unless it reasonably considers disclosing such information would prejudice an investigation of any potential contravention of law, would prejudice the effectiveness of a law, or would endanger a person's life or physical safety.[1771]

[1761] *Family and Child Commission Act 2014* (Qld) s 4.

[1762] *Family and Child Commission Act 2014* (Qld) s 9(1)(b)(ii).

[1763] *Family and Child Commission Act 2014* (Qld) s 9(1)(i).

[1764] *Family and Child Commission Act 2014* (Qld) s 9(1)(g).

[1765] *Family and Child Commission Act 2014* (Qld) s 9(1)(i).

[1766] *Family and Child Commission Act 2014* (Qld) s 26(d).

[1767] *Family and Child Commission Act 2014* (Qld) s 40(2).

[1768] *Family and Child Commission Act 2014* (Qld) s 9(2).

[1769] Queensland Family and Child Commission, *Contact us* (Webpage) <https://www.qfcc.qld.gov.au/about-us/contact-us> ; Queensland Family and Child Commission, *Complaints and reviews,* available at https://www.qfcc.qld.gov.au/kids/guide-child-protection-kids/complaints-reviews

[1770] *Family and Child Commission Act 2014* (Qld) s 27.

[1771] *Family and Child Commission Act 2014* (Qld) s 27(3).

Question	Summary response
	• ***Regard to human rights instruments***: the Act does not contain any express references to human rights instruments.[1772]

Budget
 	
What is the annual budget for the role?
	• The QFCC's budget is set by the Government of Queensland.[1773]
	• The Queensland Budget Measures for 2019-20 allocate $3,070,000 as a separate line item for Family Support and Child Protection Reforms – Queensland Family and Child Commission.[1774]
	• In the 2018-19 reporting period, the QFCC received a total revenue of $11,951,000 and had expenses totalling $11,684,000.[1775]
	  ○ $11,879,000 of the QFCC's revenue for this period was contributed in the form of grants received from the Department of Justice and Attorney-General.[1776]
	• In terms of remuneration expenses and benefits in the 2018-19 reporting period, the total expenses and benefits for the commissioners were as follows:[1777]
	  ○ Principal commissioner - $306,000; and
	  ○ Commissioner – $228,000.

Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	*Family and Child Commission Act 2014* (Qld)
Most recent annual report or equivalent document (link)	Annual Report 2018-2019

[1772] While the *Family and Child Commission Act 2014* does not make specific mention of human rights, the *Human Rights Act 2019* is in place in Queensland, which provides for protection of families and children (s. 26), cultural rights (ss. 27-28) and protections for children in the criminal process (s.33). All public entities, including the QFCC, must comply with the *Human Rights Act 2019*.

[1773] See, eg, Queensland Treasury, *Queensland Budget 2019-20: Budget measures – Budget Paper No. 4* (Paper, 2020) 66 <https://budget.qld.gov.au/files/BP4.pdf>.

[1774] See, eg, Queensland Treasury, *Queensland Budget 2019-20: Budget measures – Budget Paper No. 4* (Paper, 2020) 66 <https://budget.qld.gov.au/files/BP4.pdf>.

[1775] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 55, 83 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1776] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 71 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1777] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 90 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

B. Queensland Family and Child Commission: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs

Summary: the Act partially complies with the Paris Principles with respect to the establishment of NHRIs.

Entrenched in law[1778]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[1779] The QFCC is formally entrenched in law, pursuant to the Act.

The Act sets out the QFCC's mandate and powers[1780]and lines of accountability.[1781] However, the Act does not comprehensively set out the terms and conditions of office for the commissioners, and states that the commissioners hold office on the terms and conditions decided by the Governor in Council.[1782]

Furthermore, although the QFCC is an independent statutory body, QFCC commissioners are subject to, and are required to comply with, the directions of the Minister in performing their functions under the Act.[1783] This may raise concerns over the QFCC's independence from government and the commissioners' ability to exercise their mandate in an unfettered manner.[1784]

Mandate and powers[1785]

The Act broadly sets out the functions of the QFCC,[1786] including:

- to provide oversight of the child protection system;
- to promote and advocate—
  - the responsibility of families and communities to protect and care for children and young people; and
  - the safety and wellbeing of children and young people, particularly children in need of protection or in the youth justice system;
- to develop and review workforce planning and development strategies for the child protection system by collaborating with relevant agencies, the private sector and education providers;
- to inform and educate the community about—
  - services available to strengthen and support families; and
  - the way in which the child protection system operates; and
  - research relevant to the child protection system;

[1778] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.
[1779] GANHRI General Observations, G.O. 1.1.
[1780] *Family and Child Commission Act 2014* (Qld) ss 9, 10.
[1781] *Family and Child Commission Act 2014* (Qld) ss 22(2), 29, 40, 41, 42.
[1782] *Family and Child Commission Act 2014* (Qld) s 14(2).
[1783] *Family and Child Commission Act 2014* (Qld) s 22.
[1784] GAHRNI General Observations, G.O. 1.1.
[1785] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.
[1786] *Family and Child Commission Act 2014* (Qld) s 9.

- to develop and coordinate a multidisciplinary research program to inform policies and practices, in consultation with stakeholders and relevant agencies;
- to assist relevant agencies to evaluate the efficacy of their programs and identify the most effective service models;
- to provide leadership and give expert advice to relevant agencies about laws, policies, practices and services;
- to increase collaboration and build capacity across different sectors to improve the delivery of services to children, young people and families;
- to analyse and evaluate, at a systemic level, policies and practices relevant to the child protection system and the performance of relevant agencies in delivering services;
- to report to the Minister about matters relating to one of the above functions; and
- to perform a function incidental to one of the above functions.

The Act also sets out the commissioners' functions,[1787] which are:

- to ensure the QFCC performs its functions under the Act effectively and efficiently;
- to make recommendations to the Minister about any matter that—
  - relates to the performance or exercise of the functions or powers of the QFCC or a commissioner; and
  - may help the Minister in the proper administration of the Act; and
- to perform any other function given to a commissioner under the Act or another Act;
- in respect of the principal commissioner – to control the QFCC and record, analyse, research and report on information about child deaths; [1788] and
- in respect of the commissioner – to ensure the QFCC is adequately and appropriately performing its promotion and advocacy functions under the Act.[1789]

The commissioners may exercise the powers of the QFCC and any other powers given under the Act or another Act.[1790]

Appointment mechanisms[1791]

While the appointment mechanisms for the commissioners are set out in the Act,[1792] it is arguable that they are not sufficiently transparent. The only clear requirements are that:

- the persons are appropriately qualified to exercise the QFCC's functions effectively and efficiently;[1793] and

[1787] *Family and Child Commission Act 2014* (Qld) s 18.
[1788] *Family and Child Commission Act 2014* (Qld) s 19.
[1789] *Family and Child Commission Act 2014* (Qld) s 20.
[1790] *Family and Child Commission Act 2014* (Qld) s 21.
[1791] GANHRI General Observations, G.O. 1.1.
[1792] *Family and Child Commission Act 2014* (Qld) Part 2, Division 3.
[1793] *Family and Child Commission Act 2014* (Qld) s 11(4).

- at least one person recommended for appointment is an Aboriginal person or a Torres Strait Islander.[1794]

Quasi-judicial competency (complaints-handling)[1795]

The Act does not set out an ability for the QFCC to receive or investigate complaints. In fact, the QFCC's scope is expressly limited insofar as the QFCC is not able *"to investigate the circumstances of a particular child, young person or family or to advocate on their behalf*".[1796] The QFCC's website refers complaints to the Queensland Ombudsman or the relevant agency.[1797]

1.2 Human rights mandate[1798]

Summary: the Act is partially compliant with the Paris Principles with respect to human rights mandate.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[1799] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[1800]

Competence and responsibilities[1801]

As is described above, the Act sets out the broad mandate for the QFCC and its commissioners. The QFCC also has the overarching function of "*promoting the safety, wellbeing and best interests of children and young people and improving the child protection system*."[1802] Relevantly:

- a number of the QFFC's functions extend to the acts and omissions of both the public and private sectors;[1803] and
- The QFFC has the authority to "*inform and educate the community*" and so is able to freely address public opinion, raise public awareness and carry out education and training programs.[1804]

The principal commissioner also has powers with respect to monitoring and reporting on child deaths within Queensland.[1805] The purpose of this mandate is to "*reduce the likelihood of child deaths by classifying and analysing information to identify patterns or trends*."[1806] Although this is not a part of a national framework, the mandate is consistent with other jurisdictions in Australia.

[1794] *Family and Child Commission Act 2014* (Qld) s 11(5).

[1795] See Paris Principles, Additional principles concerning the status of commissions with quasi-jurisdictional competence; GANHRI General Observations, G.O. 2.9.

[1796] *Family and Child Commission Act 2014* (Qld) s 9(2).

[1797] Queensland Family and Child Commission, *Contact us* (Webpage) <https://www.qfcc.qld.gov.au/about-us/contact-us>; Queensland Family and Child Commission, *Complaints and reviews* (Webpage) <https://www.qfcc.qld.gov.au/kids/guide-child-protection-kids/complaints-reviews>.

[1798] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

[1799] GAHNRI General Observations, G.O. 1.2.

[1800] GAHNRI General Observations, G.O. 1.2.

[1801] See Paris Principles, *Competence and responsibilities,* principle 2; GANHRI General Observations, G.O. 2.6.

[1802] *Family and Child Commission Act 2014* (Qld) ss 4, 9.

[1803] *Family and Child Commission Act 2014* (Qld) s 9(1)(b), (c), (e), (h), (i).

[1804] *Family and Child Commission Act 2014* (Qld) s 9(1)(d).

[1805] *Family and Child Commission Act 2014* (Qld) ss 25, 26.

[1806] Queensland Parliament, *Explanatory Notes: Family and Child Commission Bill 2014* (page 5), available at <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2014-1794>.

Functional immunity[1807]

The Act provides the QFCC and its commissioners with very limited protection from criminal or civil liability for the exercise of their official powers in good faith.

The Act provides that it is a lawful excuse for the publication of any defamatory statement made in a QFCC child death report that the publication is made in good faith and for the Act.[1808] Furthermore, an official (the Minister or a member of an advisory council) is not civilly liable for an act done, or omission made, honestly and without negligence under the Act – instead, such liability will attach to the State.[1809]

The QFCC may employ staff under the *Public Service Act 2008* (Qld).[1810] Under the provisions of that Act, staff will not incur civil liability for engaging, or for the result of engaging, in conduct in an official capacity.[1811]

Powers of investigation and inquiry[1812]

As outlined above, 'protection' of human rights is understood to include powers of inquiry and investigation that address and seek to prevent human rights violations.[1813]

The QFCC and its commissioners do not possess broad investigative powers outside of the principal commissioner's powers with respect to child deaths.[1814] In respect of this limited investigatory power, the principal commissioner does have the power to give written notice to a public entity which is considered to have information about child deaths, requesting that the entity provide that information to the commissioner within a reasonable time.[1815] If the public entity refuses to comply with the request, it must give the principal commissioner written notice of the reasons for its refusal.[1816]

- The QFCC and its commissioners do not have powers of unannounced and free access to inspect and examine any public premises. Furthermore, the QFCC commissioners are subject to, and are required to comply with, the directions of the Minister in performing their functions under the Act.[1817]Although the explicit powers of investigation and inquiry are limited, the functions of the QFCC include: providing leadership and giving expert advice to relevant agencies about laws, policies, practices and services;[1818]

- analysing and evaluating, at a systemic level, policies and practices relevant to the child protection system and the performance of relevant agencies in delivering services;[1819] and

- making recommendations about laws, policies, practices and services relating to child deaths.[1820]

The QFCC may also include opinions and recommendations about any matters relating to its functions in its annual reports.[1821] Arguably, these functions could be used to review and make

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[1807] General Observation 2.3.

[1808] *Family and Child Commission Act 2014* (Qld) s 29(6).

[1809] *Family and Child Commission Act 2014* (Qld) s 39.

[1810] *Family and Child Commission Act 2014* (Qld) s 24; the *Public Service Act 2008* (Qld) is available at <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-2008-038>.

[1811] *Public Service Act 2008* (Qld) s 26C.

[1812] GANHRI General Observations, G. O. 1.2.

[1813] GANHRI General Observations, G. O. 1.2

[1814] *Family and Child Commission Act 2014* (Qld) Part 3.

[1815] *Family and Child Commission Act 2014* (Qld) s 27.

[1816] *Family and Child Commission Act 2014* (Qld) s 27(5).

[1817] *Family and Child Commission Act 2014* (Qld) s 22.

[1818] *Family and Child Commission Act 2014* (Qld) s 9(1)(g).

[1819] *Family and Child Commission Act 2014* (Qld) s 9(1)(i) t.

[1820] *Family and Child Commission Act 2014* (Qld) s 26(d).

[1821] *Family and Child Commission Act 2014* (Qld) s 40(2).

recommendations about laws, policies, practices and services and whether they are compatible with any obligations arising from international human rights standards.

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Act is partially compliant with the Paris Principles in regard to encouraging ratification or accession to international human rights instruments.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[1822] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[1823]

The Act does not explicitly reference international human rights standards and/or instruments.

However, the QFCC has a history of consulting on the implementation of human rights instruments in Australia and of invoking international human rights instruments in its submissions and letters. For instance:

- in May 2016, the QFCC made a submission to the Australian Human Rights Commission (**AHRC**) providing research, information and advice to inform the establishment of an independent National Preventative Mechanism under the United Nations *Optional Protocol to the Convention against Torture* (**OPCAT**) in the context of Youth Justice Detention Centres;[1824]
- in July 2017, the QFCC made a submission to the AHRC regarding the ratification of OPCAT;[1825]
- in April 2018, the QFCC made a submission to the Registry of Births, Deaths and Marriages regarding recognising sex and gender diversity and same-sex families.[1826] In this submission the QFCC relied upon the United Nations *Convention on the Rights of the Child* as well as the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity;
- in May 2018, the QFCC made a submission to the AHRC regarding Queensland's initiatives relevant to the United Nations *Convention on the Rights of the Child*;[1827]
- in 2019, the QFCC made a submission to the AHRC in response the AHRC's *Free + Equal: An Australian Conversation on Human Rights – Issues Paper April 2019*[1828]*.* In this submission, the QFCC refers to the following:[1829]
    - the United Nations *Convention on the Rights of the Child;*
    - the United Nations *Declaration on the Rights of Indigenous Peoples;*

[1822] GANHRI General Observations, G. O. 1.3.

[1823] GANHRI General Observations, G. O. 1.3.

[1824] Queensland Family and Child Commission, *Submission: The Optional Protocol to the Convention against Torture (OPCAT) in the context of Youth Justice Detention Centres,* available at <https://www.qfcc.qld.gov.au/sites/default/files/2020-06/qfcc-submission-300516-opcat-npm.pdf>

[1825] Queensland Family and Child Commission, *Submission: OPCAT in Australia,* available at <https://humanrights.gov.au/sites/default/files/37.QFCC%20Sub%2028%20July%202017.pdf>.

[1826] Queensland Family and Child Commission, *Submission: Registering life events: Recognising sex and gender diversity and same-sex families,* available at <https://www.qfcc.qld.gov.au/sites/default/files/2020-06/qfcc-submission-births-deaths-marriages.pdf>.

[1827] Queensland Family and Child Commission, *Submission: Progress on implementation of the rights of children,* available at <https://humanrights.gov.au/sites/default/files/2020-02/82._qld_family_and_child_commission_.pdf>.

[1828] Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights,* available at <https://humanrights.gov.au/free-and-equal>.

[1829] Queensland Family and Child Commission, *Submission: Free + Equal: An Australian Conversation on Human Rights – Issues Paper,* available at <https://www.qfcc.qld.gov.au/sites/default/files/2020-01/submission-ahrc-free-equal-human-rights.pdf>.

- the *Human Rights Act 2019* (Qld); and
- the recommendation of the United Nations to raise the minimum age of criminal responsibility to 14 years in Australia.

The QFCC has recently updated its strategic plan to reflect a commitment to realising the UN Convention on the Rights of the Child, to allow every child in Queensland to have full enjoyment of their rights.

1.4 Interaction with the international human rights system

Summary: the Act is partially compliant with the Paris Principles with respect to interaction with the international human rights system.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[1830] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[1831]

While there are no human rights or convention references in the Act, the QFCC's most recent Annual Report indicates that the QFCC recognises the applicability of the United Nations *Convention on the Rights of the Child* to its functions.[1832] The QFCC's recent history of consulting on the implementation of human rights instruments in Australia and of invoking international human rights instruments in its submissions and letters is detailed above.

1.5 Cooperation with other human rights bodies

Summary: the Act and the QFCC largely comply with the Paris Principles on the cooperation with other human rights bodies.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[1833] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[1834]

The QFCC and its commissioners are mandated to engage in regular and constructive engagement with relevant stakeholders, including Aboriginal and Torres Strait Islander service providers.[1835] In practice, the QFCC has developed a number of formal partnering mechanisms including:[1836]

- the Advisory Council;
- the Community Partnership Group;
- the Youth Advisory Council;
- the Strategic Cross-Agency Oversight Group;

[1830] GAHNRI General Observations, G.O. 1.4.

[1831] GAHNRI General Observations, G.O. 1.4.

[1832] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 34 < https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1833] GAHNRI General Observations, G.O. 1.5.

[1834] GAHNRI General Observations, G.O. 1.5.

[1835] *Family and Child Commission Act 2014* (Qld) ss 9(1)(c) & (e) – (h), 23(1)(c), (e), (f).

[1836] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 22 < https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

- the Reviews Strategic Oversight Group; and
- the Joint Agency Protocol Reference Group and Working Group.

These groups include representatives from:[1837]

Agency	Advisory Group
Government	
Crime and Corruption Commission	Advisory Council, QFCC Strategic Cross-Agency Oversight Group
Australian Institute of Family Studies	Advisory Council
Non-government	
Queensland Council of Social Services	Community Partnerships Group
Bravehearts	Advisory Council
Kummara Association Inc.	Advisory Council
Community Services Industry Alliance	Community Partnerships Group
Queensland Aboriginal and Torres Strait Islander Child Protection Peak	Community Partnerships Group
PeakCare	Community Partnerships Group
Queensland Aboriginal and Islander Health Council	Community Partnerships Group
Queensland Council of Social Services	Community Partnerships Group
CREATE	Community Partnerships Group Youth Advisory Council
Other	
Griffith Law School	Advisory Council
Watson Advisory & Consulting Pty Ltd	Advisory Council
Royal Brisbane and Women's Hospital	Advisory Council
Darling Downs and West Moreton Primary Health Network	Advisory Council

The QFCC commissioners also attend biannual members meetings of the Australian and New Zealand Children's Commissioners and Guardians (**ANZCCG**), which aims to promote and

[1837] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 23-25 < https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

protect the safety, wellbeing and rights of children and young people in Australia and New Zealand.[1838]

1.6 Recommendations by NHRIs

Summary: the Act largely complies with the Paris Principles on recommendations by NHRIs.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[1839] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[1840] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[1841]

In terms of reporting:

- one of the QFCC's main functions is to report on matters relating to its functions;[1842]
- the QFCC must produce an annual report for each financial year, which may contain any opinions or recommendations about any matter relating the QFCC's functions;[1843]
- the principal commissioner must prepare and give the Minister an annual report regarding the commissioner's recommendations relating to child deaths,[1844] and may also prepare and give the Minister other reports regarding its functions relating to child deaths;[1845] and
- the Minister must table the above-mentioned child death reports in the Legislative Assembly within 14 sitting days.[1846]

The QFCC commissioners are also empowered to make recommendations about any matters that relate to the performance or exercise of the commissioner's or the QFCC's functions or powers, or that may help the Minister in the proper administration of the Act.[1847]

The QFCC's annual reports include detailed information on its recommendations throughout the reporting period and the measures taken, or not taken, in implementing these recommendations.[1848] The QFCC publishes its annual reports on its website,[1849] along with its government reviews and inquiries,[1850] submissions, and other reports.[1851]

1.7 Ensuring pluralism of the NHRI[1852]

Summary: the Act is partially compliant with the Paris Principles in respect of ensuring the pluralism of the NHRI.

[1838] Queensland Family and Child Commission, *ANZCCG* (Webpage) <https://www.qfcc.qld.gov.au/sector/research-policy/anzcc>.

[1839] GAHNRI General Observations, G.O. 1.6.

[1840] GAHNRI General Observations, G.O. 1.6.

[1841] GAHNRI General Observations, G.O. 1.6.

[1842] *Family and Child Commission Act 2014* (Qld) s 9(1)(j).

[1843] *Family and Child Commission Act 2014* (Qld) s 40(1), (2).

[1844] *Family and Child Commission Act 2014* (Qld) s 29(1).

[1845] *Family and Child Commission Act 2014* (Qld) ss 26, 29(2).

[1846] *Family and Child Commission Act 2014* (Qld) s 29(7).

[1847] *Family and Child Commission Act 2014* (Qld) s 18(b).

[1848] See, eg, Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 14-17 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1849] Queensland Family & Child Commission, *Corporate publications* (Webpage) <https://www.qfcc.qld.gov.au/find-resource/corporate-publications>.

[1850] Queensland Family & Child Commission, *Government reviews & inquiries* (Webpage) <https://www.qfcc.qld.gov.au/find-resource/government-reviews-inquiries>.

[1851] Queensland Family & Child Commission, *Knowledge and Resource Hub* (Webpage) <https://www.qfcc.qld.gov.au/knowledge-and-resource-hub>.

[1852] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[1853] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[1854]

QFCC commissioners

It is important that the NHRI is representative of diverse segments of society. The Act provides that at least one person recommended by the Minister for appointment as commissioner must be an Aboriginal person or a Torres Strait Islander.[1855] The QFCC has interpreted this to be a statutory mandate that at least one commissioner must be an Aboriginal person or a Torres Strait Islander.[1856]

QFCC staff

The Paris Principles also require NHRIs to be legislatively empowered to determine its own staffing structure, in a way which allows it to best fulfil its mandate. Staff should be recruited in a transparent and fair selection manner to ensure pluralism and diverse composition.[1857]

The QFCC may employee the staff it considers appropriate to perform its functions.[1858] These staff are to be employed under the *Public Service Act 2008* (Qld),[1859] thereby making it equivalent to the recruitment of staff of other independent of State agencies. The QFCC also follows a *Strategic Workforce Plan,* which includes workforce strategies such as contemporary and innovative recruitment practices that target a diverse and wide pool of candidates with a focus on attracting Aboriginal and Torres Strait Islander candidates in order to strengthen the QFCC's cultural capability.[1860] As at 30 June 2019, the QFCC staff profile was 79% female and 21% male, with 8% of staff identifying as Aboriginal and Torres Strait Islander and 5% identifying as having a disability.[1861]

The QFCC also receives advice from the Youth Advisory Council. The Council is made up of young people aged between 14 and 25 and its members (known as Youth Champions) have diverse backgrounds and represent regional and metropolitan areas.[1862]

Full-time members[1863]

The Act *does not* expressly require the QFCC commissioners to be appointed on a full-time basis. The Act does not provide a minimum term of appointment for the commissioners, or other office holders. However, the Act does set out a specific duration for the Commissioner's

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[1853] GANHRI General Observations, G.O. 1.7.

[1854] GANHRI General Observations, G.O. 1.7.

[1855] *Family and Child Commission Act 2014* (Qld) s 11(5).

[1856] See, eg, Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 8 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1857] GAHNRI General Observations, G.O. 2.4.

[1858] *Family and Child Commission Act 2014* (Qld) s 24.

[1859] *Family and Child Commission Act 2014* (Qld) s 24; the *Public Service Act 2008* (Qld) is available at <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-2008-038>.

[1860] See, eg, Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 56 < https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1861] See, eg, Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 56 < https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1862] See, eg, Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 24 < https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1863] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

mandate, which is the period to be specified in the instrument of appointment (not exceeding 3 years).[1864] The Act contains no reference to re-appointment.

The Act does not comprehensively set out the terms and conditions of office, and states that QFCC commissioners hold office on the terms and conditions determined by Governor in Council (including as to remuneration and allowances).[1865] As such, in practice, the remuneration, allowances and terms and conditions of the commissioners' employ are determined on a discretionary basis by the ruling party.

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: The Act is partially compliant with the Paris Principles with respect to the selection and appointment of the decision-making body of NHRIs.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[1866]

The method of recruitment of the QFCC commissioners is outlined below in section 1.9.

Advisory councils

The principal commissioner has the discretion to establish one or more advisory councils to advise on matters relating to the commissioner's functions.[1867] However, the Act stipulates that such councils are not to advise the principal commissioner on the day-to-day management of the commission.[1868]

The principal commissioner has discretion to appoint anyone to the advisory council, provided the principal commissioner is satisfied the person is appropriately qualified to advise on the matters referred to council.[1869] The principal commissioner must ensure that at least one member of each advisory council is an Aboriginal person or a Torres Strait Islander.[1870] The principal commissioner also has discretion regarding the length of term an advisory council member should serve, and how the advisory council itself will function.[1871]

One such advisory council is the Youth Advisory Council. The Council is made up of young people aged between 14 and 25, and its members (known as Youth Champions) have diverse backgrounds and represent regional and metropolitan areas.[1872] The QFCC recently launched an online recruitment campaign to increase the number of Youth Champions.[1873]

1.9 Political representatives on NHRIs

Summary: the Act does not comply with the Paris Principles with respect to political representatives on NHRIs.

[1864] *Family and Child Commission Act 2014* (Qld) s 13.

[1865] *Family and Child Commission Act 2014* (Qld) s 13.

[1866] GAHNRI General Observations, G.O. 1.8.

[1867] *Family and Child Commission Act 2014* (Qld) s 30.

[1868] *Family and Child Commission Act 2014* (Qld) s 32(2).

[1869] *Family and Child Commission Act 2014* (Qld) s 31(2).

[1870] *Family and Child Commission Act 2014* (Qld) s 31(3).

[1871] *Family and Child Commission Act 2014* (Qld) s 34(a), (b).

[1872] See, eg, Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 24 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1873] Queensland Youth eHub, *Youth Advisory Council recruitment,* available at <https://e-hub.engagementhub.com.au/youth-advisory-council-recruitment>.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[1874] An NHRI should also be independent from government.

As discussed in detail below, there is a lack of transparency around the tenure and appointment and selection process for the QFCC commissioners.[1875] The Act does not explicitly restrict the participation of government representatives or members of parliament in the decision-making of the QFCC.[1876] Furthermore, the QFCC commissioners are expressly subject to the directions of the Minister in performing their functions under the Act.[1877] This indicates that there is not a large degree of independence from the Queensland government.

Notably, the QFCC's website has a Queensland Government domain (www.qfcc.qld.gov.au) and both the QFCC's website and annual reports contain the Queensland Government logo. This signalling may go further towards undermining the perceived independence of the QFCC from Government.

Guarantee of tenure[1878]

The Act sets out a specific duration of the QFCC commissioners' mandate, which is the period specified in the instrument of appointment (not exceeding 3 years).[1879] The Act does not contain any provisions regarding re-appointment.

The Governor in Council may remove a QFCC commissioner from office, but only upon the recommendation of the Minister.[1880] Such recommendation can only be made if the Minister is satisfied that the commissioner:[1881]

- has been guilty of misconduct;
- is incapable or performing his or her duties; or
- has neglected his or her duties or performed them incompetently.

Although the grounds for, and method of, dismissal of a QFCC commissioner are limited, the dismissal is based solely on the discretion of appointing authorities.[1882] There is a lack of clarity around what these grounds might entail, and the Act does not expressly require the Governor in Council or Minister to provide specific reasons for the dismissal. In addition, the Act does not expressly provide the commissioners with an ability to contest any dismissal.

The Minister may also suspend a QFCC commissioner, for up to 60 days, if there has been an allegation of misconduct made against the commissioner, or the Minister is satisfied a matter has arisen in relation to one of the grounds for dismissal.[1883]

Finally, the Act provides that the QFCC commissioners hold office on the terms and conditions decided by the Governor in Council.[1884] These terms and conditions are not outlined in the Act. As such, in practice, the terms and conditions of the commissioners' employ are determined on a

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[1874] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[1875] *Family and Child Commission Act 2014* (Qld) s 15(2).

[1876] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 1.9.

[1877] *Family and Child Commission Act 2014* (Qld) s 22.

[1878] GAHNRI General Observations, G.O. 2.1.

[1879] *Family and Child Commission Act 2014* (Qld) s 13.

[1880] *Family and Child Commission Act 2014* (Qld) s 15(2).

[1881] *Family and Child Commission Act 2014* (Qld) s 15(3).

[1882] GANHRI General Observations, G.O. 2.1.

[1883] *Family and Child Commission Act 2014* (Qld) s 15(4).

[1884] *Family and Child Commission Act 2014* (Qld) s 14(2).

discretionary basis by the ruling party. This does not provide the necessary independence and autonomy from government (an essential requirement under the Paris Principles).

Recruitment of QFCC commissioners

The selection and appointment of the QFCC commissioners is to be made by the Governor in Council, on the recommendation of the Minister.[1885] The only clear requirements for appointment are that:[1886]

- the person is appropriately qualified to exercise the commission's functions effectively and efficiently; and
- at least one person recommended by the Minister for appointment as a commissioner must be an Aboriginal person or a Torres Strait Islander.

The Act does not provide further information on the procedures behind the appointment, which raises concerns regarding whether the appointment process is sufficiently clear, transparent, and participatory.[1887]

This can be directly contrasted with the Child Death Review Board,[1888] which is also established under the Act (but which is separate and independent from the QFCC).[1889] In respect of this board, the Act expressly provides that a member of the Legislative Assembly is ineligible to be appointed as a member.[1890]

1.10 Adequate funding of NHRIs

Summary: the Act is largely compliant with the Paris Principles on adequate funding of NHRIs.

NHRIs must be provided with adequate funding in order to function effectively and independently.[1891]

The QFCC's funding is provided the Queensland government as a separate budget line item applicable only to QFCC.[1892] The Queensland Budget Measures for 2019-20 allocate $3,070,000 as a separate line item for Family Support and Child Protection Reforms – Queensland Family and Child Commission.[1893]

In the 2018-19 reporting period, the QFCC received a total revenue of $11,951,000 and had expenses totalling $11,684,000,[1894] suggesting that the QFCC receives an adequate allocation for its activities. $11,879,000 of the QFCC's revenue for this reporting period was contributed in the form of grants received from the Department of Justice and Attorney-General.[1895]

While QFCC has complete autonomy over the allocation of its budget, it is obliged to comply with the financial accountability requirements applicable to other independent agencies of the state

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[1885] *Family and Child Commission Act 2014* (Qld) s 11.

[1886] *Family and Child Commission Act 2014* (Qld) s 11(4), (5).

[1887] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.8.

[1888] *Family and Child Commission Act 2014* (Qld) Part 3A.

[1889] Queensland Government, *Chair for the New Child Death Review Board in Queensland announced*, available at <https://statements.qld.gov.au/statements/90136>.

[1890] *Family and Child Commission Act 2014* (Qld) s 29X(4)(c).

[1891] GANHRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[1892] See, eg, Queensland Treasury, *Queensland Budget 2019-20: Budget measures – Budget Paper No. 4* (Paper, 2020) 66 <https://budget.qld.gov.au/files/BP4.pdf>.

[1893] See, eg, Queensland Treasury, *Queensland Budget 2019-20: Budget measures – Budget Paper No. 4* (Paper, 2020) 66 <https://budget.qld.gov.au/files/BP4.pdf>.

[1894] Q Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 55, 83 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1895] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 71 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

and in particular,[1896] to the *Financial Accountability Act 2009* (Qld)[1897] and the *Statutory Bodies Financial Arrangements Act 1982* (Qld)[1898].

NHRI staff and members[1899]

The Act states that the QFCC commissioners are entitled to remuneration and allowances as decided by the Governor in Council.[1900] In practice, this means that remuneration and allowances are determined on a discretionary basis by the ruling party.

The QFCC publishes workforce and financial data, such as remuneration expenses, in its annual reports. In terms of remuneration expenses and benefits in the 2018-19 reporting period, the total expenses and benefits for the QFCC commissioners were as follows:[1901]

- principal commissioner - $306,000; and
- commissioner – $228,000.

These salaries appear to be comparable with other civil servants performing similar tasks.[1902]

Accessibility and communications infrastructure[1903]

While the QFCC does not appear to have an open-to-the-public office, it does maintain a communications system for general enquiries. This system consists of a postal address, telephone line, facsimile line, and email.[1904] However, as outlined above, the QFCC does not have complaints-handling powers and the QFCC's communications infrastructure is provided for general enquiries only.

1.11 Annual reports of NHRIs

Summary: the Act largely complies with the Paris Principles on annual reports of NHRIs.

The QFCC is required to produce and give to the Minister annual reports regarding the principal commissioner's child-death related activities and recommendations during the financial year.[1905] This report must be tabled in the Legislative Assembly within 14 days after being received by the Minister.[1906]

The QFCC is also required to produce annual reports regarding matters pertaining to the QFCC's and Queensland's performance during the financial year (which may include information, opinions and recommendation about any matter relating to the QFCC's functions).[1907] As a statutory body, these annual reports must also meet the annual report requirements for

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[1896] *Family and Child Commission Act 2014* (Qld) s 8(1)(b).

[1897] Available at <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2009-009>.

[1898] Available at <https://www.legislation.qld.gov.au/view/html/inforce/current/act-1982-033>.

[1899] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[1900] *Family and Child Commission Act 2014* (Qld) s 14(1).

[1901] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 90 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1902] For example, the National Children's Commissioner received remuneration of $326,211 for the 2018-2019 financial year; see Australian Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 96 <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2018-2019?_ga=2.34077350.661288988.1596505623-688638973.1596176623>.

[1903] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[1904] Queensland Family and Child Commission, *Contact us* (Webpage) <https://www.qfcc.qld.gov.au/about-us/contact-us>.

[1905] *Family and Child Commission Act 2014* (Qld) s 29(1).

[1906] *Family and Child Commission Act 2014* (Qld) s 29(7).

[1907] *Family and Child Commission Act 2014* (Qld) s 40.

Queensland Government agencies,[1908] the requirements under the *Financial Accountability Act 2009* (Qld)[1909] (including as to tabling reports in the Legislative Assembly),[1910] and the *Financial and Performance Management Standards 2009* (Qld)[1911].

In practice, the QFCC's annual reports contain a full summary of the activities undertaken in the financial year, as well as its opinions, recommendations and proposals. The reports also track the implementation of the QFCC's recommendations. The QFCC's annual reports are made available on the QFCC's website.[1912]

2 Any criticisms made publicly about this role?

2.1 Anticipated independent review

Under the Act, the Minister is required to arrange an independent review of the QFCC's performance of its functions, and of the effectiveness of the Act, within 5 years.[1913] Reports of these reviews must be tabled in the Legislative Assembly as soon as practicable upon completion of the review(s).[1914] While we note that this 5 year period has passed, we have been unable to locate any such report(s) to date.

2.2 QAO performance audit: Family support and child protection system

On 4 August 2020, the Queensland Audit Office (**QAO**) released a performance audit of the family support and child protection system.[1915] The review determined that the QFCC is fulfilling its legislated responsibilities, including its mandate to provide oversight of the system.[1916] However, the review noted that:[1917]

- the QFCC is continuing to mature how it performs its oversight function; and
- some stakeholders are not informed about the QFCC's role and how it is being fulfilled.

QAO recommended that the QFCC collaborate with the Department of Child Safety, Youth and Women to improve outcomes for children placed in out-of-home care.[1918] On 24 July 2020, the principal commissioner of the QFCC accepted this recommendation.[1919]

[1908] Department of the Premier and Cabinet, *Annual requirements for Queensland Government agencies (2019-20 reporting period)*, available at <https://www.forgov.qld.gov.au/sites/default/files/annual-report-requirements.pdf>.

[1909] Available at <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2009-009>.

[1910] *Financial Accountability Act 2009* (Qld) s 63.

[1911] Available at <https://www.legislation.qld.gov.au/view/pdf/asmade/sl-2019-0182>.

[1912] Queensland Family and Child Commission, *Corporate publications* (Webpage) <https://www.qfcc.qld.gov.au/find-resource/corporate-publications>.

[1913] *Family and Child Commission Act 2014* (Qld) ss 41(1), 42(1).

[1914] *Family and Child Commission Act 2014* (Qld) ss 41(2), 42(2).

[1915] Queensland Audit Office, *Performance Audit, Family support and child protection system: Report 1 2020-21* (Report, 4 August 2020) <https://www.qao.qld.gov.au/sites/default/files/2020-08/Family%20support%20and%20child%20protection%20system%20%28Report%201%E2%80%942020%E2%80%9321%29.pdf>.

[1916] Queensland Audit Office, *Performance Audit, Family support and child protection system: Report 1 2020-21* (Report, 4 August 2020) 35 <https://www.qao.qld.gov.au/sites/default/files/2020-08/Family%20support%20and%20child%20protection%20system%20%28Report%201%E2%80%942020%E2%80%9321%29.pdf>.

[1917] Queensland Audit Office, *Performance Audit, Family support and child protection system: Report 1 2020-21* (Report, 4 August 2020) 35 <https://www.qao.qld.gov.au/sites/default/files/2020-08/Family%20support%20and%20child%20protection%20system%20%28Report%201%E2%80%942020%E2%80%9321%29.pdf>.

[1918] Queensland Audit Office, *Performance Audit, Family support and child protection system: Report 1 2020-21* (Report, 4 August 2020) 13 <https://www.qao.qld.gov.au/sites/default/files/2020-08/Family%20support%20and%20child%20protection%20system%20%28Report%201%E2%80%942020%E2%80%9321%29.pdf>.

[1919] Queensland Audit Office, *Performance Audit, Family support and child protection system: Report 1 2020-21* (Report, 4 August 2020) 55 <https://www.qao.qld.gov.au/sites/default/files/2020-08/Family%20support%20and%20child%20protection%20system%20%28Report%201%E2%80%942020%E2%80%9321%29.pdf>.

2.3 Miscellaneous

The Royal Commission into the Protection and Detention of Children in the Northern Territory noted that the Commission and the CCYP do not have an individual complaints resolution and investigatory function (unlike the equivalent bodies in the Australian Capital Territory and the Northern Territory).[1920]

3 What are the best features of this role?

- At least one person recommended by the Minister for appointment as a QFCC commissioner must be an Aboriginal person or a Torres Strait Islander.[1921]
- The QFCC is empowered to develop and coordinate a multidisciplinary research program to inform policies and practices, in consultation with stakeholders and relevant agencies.[1922]
- In practice, the Commission publishes a wide range of information (including submissions, reports and inquiries) on its website, making it publicly accessible.
- The Commission publicly tracks and reviews the implementation of its recommendations.[1923]

[1920] *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Volume 4, Chapter 40 (page 11), available at <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-4.pdf>.

[1921] *Family and Child Commission Act 2014* (Qld) s 11(5); GANHRI General Observations, G.O. 1.7.

[1922] *Family and Child Commission Act 2014* (Qld) s 9(1)(e).

[1923] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.6.

C. Queensland Family and Child Commission: Impacts

4 Connecting with children and young people

The QFCC is responsible for engaging with, and taking account of, the views of children, young people and their families. We have summarised two of the QFCC's main mechanisms for engaging with children and young people during the 2018-19 reporting period below.

4.1 Growing Up in Queensland project[1924]

In 2018, the QFCC visited 62 schools and heard from more than 7,000 children and young people (aged 4 to 18 years) from across Queensland, using a variety of engagement methods. These consultations focused on three main lines of inquiry:[1925]

- how children and young people experience life in their community, including their relationships with friends and family; safety; support; and the places they spend time;
- the career aspirations of children and young people and the supports and barriers that might affect them; and
- the big issues that worry children and young people and their ideas for solutions.

The QFCC detailed its findings in a report,[1926] signposting ways for adults to assist children and young people to feel safe in their communities, achieve their hopes and dreams and address their concerns. On 21 May 2020, the QFCC announced that it had launched another Growing Up in Queensland project to amplify children and young people's voices during the COVID-19 pandemic.[1927]

4.2 Youth participation plan[1928]

The QFCC develops and annual youth participation plan in collaboration with its Youth Advisory Council. These plans detail how to include children and young people in the WFCC's work, connect children and young people with their communities and amplify the voices and stories of children and young people. The plan also provides measures for clearly reporting and evaluating how well the QFCC is performing on its commitments.

5 Systems reviews

The QFCC's oversight role includes conducting reviews into systemic issues affecting the performance of the child protection and family support system. In 2018–19, several systems reviews were progressed or completed.[1929] We have summarised a recent example of a QFCC system review below.

5.1 *Example*: A systems review of individual agency findings following the death of a child[1930]

In June 2016, a 21-month-old toddler known to Child Safety died in Caboolture. In July 2016, the Premier asked the QFCC to oversee the reviews being undertaken by the Department of

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[1924] Queensland Family and Child Commission, *Growing Up in Queensland* (Webpage) <https://www.qfcc.qld.gov.au/keeping-kids-more-safe/listening-children-young-people/growing-queensland>.

[1925] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 32 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1926] Queensland Family and Child Commission, *This Place I Call Home: The views of children and young people on growing up in Queensland* (Report, 2018) <https://www.qfcc.qld.gov.au/sites/default/files/This-place-I-call-home-report_FULL.pdf>.

[1927] Queensland Family and Child Commission, *Growing Up in Queensland: Make Their Voices Heard!* (Webpage) <https://www.qfcc.qld.gov.au/growing-queensland-make-their-voices-heard-0>.

[1928] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 35 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1929] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 14 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1930] Queensland Family and Child Commission, *A systems review of individual agency findings following the death of a child* (Report, March 2017) <https://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/death-of-a-child-report-march-2017.pdf>.

Communities, Child Safety and Disability Services and by the child death case review panel, and the investigation conducted by Queensland Health about the services provided to the toddler before his death.[1931]

In March 2017, the QFCC provided the Queensland Government with a report detailing the QFCC's analysis and findings following its consideration of the individual agency reviews.[1932] The report recommended that the Queensland Government consider a revised external and independent model for reviewing the deaths of children known to the child protection system.

Following this report, the Government accepted the QFCC's recommendation,[1933] and QFCC and other relevant agencies worked with the Department of Justice and Attorney-General to develop a new child death review model. As a result of those consultations, in early 2020 the Parliament passed legislative amendments to establish a new and independent Child Death Review Panel[1934] under Part 3A of the Act.[1935]

5.2 Review of the implementation of QFCC's recommendations (2018-19)

The table below summarises the number of recommendations made across the QFCC's recent systems review reports and the progress of the implementation of those recommendations. With the exception of one report, all recommendations made have either been fully implemented or are in the process of implementation.

Table 1: Review of implementation of QFCC's recommendations

Name of Report (and link)	Number of recommendations	Implementation record
Keeping Queensland's children more than safe: Review of the blue card system Blue Card and Foster Care Systems Review	81 recommendations (made to the Department of Justice and the Attorney-General)	5 fully implemented; 45 implementations in process.[1936]
Keeping Queensland's children more than safe: Review of the foster care system Blue Card and Foster Care Systems Review	42 recommendations (made to various government officials and departments, including the Office of the Public Guardian and the Department of	16 fully implemented; 35 implementations in process.[1937]

[1931] Queensland Family and Child Commission, *Review into the death of a child known to Child Safety,* available at <https://www.qfcc.qld.gov.au/kids/monitoring-reviewing-systems/following-death-child-known-child-safety>.

[1932] Queensland Family and Child Commission, *A systems review of individual agency findings following the death of a child* (Report, March 2017) <https://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/death-of-a-child-report-march-2017.pdf>.

[1933] Queensland Parliament, *Explanatory Note: Child Death Review Legislation Amendment Bill 2019,* available at <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-030>.

[1934] Queensland Government, *New Child Death Review Board to be established in Queensland,* available at <https://statements.qld.gov.au/statements/89273>.

[1935] See *Child Death Review Legislation Amendment Bill 2019* (Qld), available at <https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2019/5619T1501.pdf>.

[1936] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 14 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1937] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 15 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

Name of Report (and link)	Number of recommendations	Implementation record
	Communities, Child Safety and Disability Services)	
Blue Card and Foster Care Systems Review Report on Term of Reference 5: Strengthening capacity across Queensland's child protection system	14 recommendations (made to the Queensland Government)	13 fully implemented; 1 implementation in process.[1938]
When a Child is Missing: Remembering Taihleigh – A report into Queensland's children missing from out-of-home care	29 recommendations (made to various government officials and departments, including the Department of Premier and Cabinet)	All recommendations fully implemented.[1939]
Supplementary Review: A report on information sharing to enhance the safety of children in regulated home-based services[1940]	17 recommendations (made to various government officials and departments, including the Department of Communities, Child Safety and Disability Services)	5 fully implemented; 12 implementation in process.[1941]
A systems review of individual agency findings following the death of a child	1 (overarching) recommendation	Recommendation fully implemented.[1942]

[1938] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 15 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1939] Queensland Family and Child Commission, *When a Child is Missing: Post-Implementation Review,* available at <https://www.qfcc.qld.gov.au/sites/default/files/When%20a%20Child%20Missing%20Post%20Implementation%20review%20summary%20report.pdf>.

[1940] This review was recommendation 28 of the "*When a child is missing*" report.

[1941] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 15 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

[1942] Queensland Family and Child Commission, *2018-2019 Annual Report* (Report, 2019) 15 <https://www.qfcc.qld.gov.au/sites/default/files/2020-03/Complete%20%20QFCC%20Annual%20Report%202018-19.pdf>.

18 Children's Commissioner in the Northern Territory

A. Children's Commissioner in the Northern Territory: Summary table

Question	Summary response
Country/State/Territory	Northern Territory, Australia
Commissioner entity name	Children's Commissioner (the **Commissioner**) Office of the Children's Commissioner (the **Commission**)
Current emblem	
Date established	The position of the Commissioner was created by s 259 of the *Care and Protection of Children Act 2007* (NT)[1943] (the **Establishing Act**), which commenced 7 May 2008. The position of the Commissioner is now established by the *Children's Commissioner Act 2013* (NT)[1944] (the **Act**), which commenced 1 January 2014.
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The Commissioner is partially compliant with the Paris Principles, however there are some gaps: • The role of the Commissioner is formally entrenched in law pursuant to the Act. • The Commissioner's mandate is expressed in broad terms. • The Act provides the Commissioner with functional immunity and some guarantee of tenure, including a due process that must be followed in order to terminate the Commissioner's appointment. • The Act does not comprehensively set out the terms and conditions of office for the Commissioner. • There is a lack of transparency around the appointment and selection process for the Commissioner. • The Commissioner has complaints-handling powers. • The Commissioner has own-motion powers of inquiry, including the power to compel access to information during in inquiry. The Act creates offences for non-compliance. • There are no express human rights or convention references in the Act. However, some of the Commissioner's functions and powers may arguably be extended for the promotion of these rights and the

[1943] Available at <https://legislation.nt.gov.au/Pages/~/link.aspx?_id=0144EE84F1304786BAFD0EDE12238E43&_z=z>.

[1944] Available at <https://legislation.nt.gov.au/en/Bills/Childrens-Commissioner-Bill-2013?format=assented> (Date of Asset 18 December 2013).

Question	Summary response
	Commissioner regularly uses its powers for this purpose in practice. • The Commissioner maintains consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships. • In practice, the Commissioner publishes a wide range of information on its website, making it publicly accessible. • The Commissioner is good at publicly tracking and reviewing the implementation of its recommendations. • The annual reporting requirements of Commissioner are closely aligned with the GANHRI General Observations (although they do not contain financial records).
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The Commissioner is an independent statutory officer,[1945] and, subject to the laws of the Northern Territory, is not subject to the direction of anyone in relation to the performance of its functions.[1946] Notably, the Commissioner's website has a Northern Territory Government domain (www.occ.nt.gov.au). This signalling may go towards undermining the perceived independence of the Commissioner from Government. The following bodies can refer a complaint to the Commissioner if the complaint relates to a matter under the Act: • the Commissioner for Health and Community Services Complaints;[1947] • the "person-in-charge" of a mental health service;[1948] • the Ombudsman;[1949] and • the Superintendent under the Youth Justice Act 2006.[1950]
Accountability arrangements What is the reporting line for the role? Who sets the budget?	• The Commissioner is appointed by the Administrator by Gazette notice.[1951] The Administrator may only make such appointment on the recommendation of the Minister.[1952] • The Commissioner holds office for a specified period, which must not exceed 5 years, and is eligible for reappointment.[1953]

[1945] Office of the Children's Commissioner Northern Territory, *About* (Webpage) <https://occ.nt.gov.au/about>.

[1946] *Children's Commissioner Act 2013* (NT) s 11.

[1947] *Health and Community Services Complaints Act 1998* (NT) s 27(4A), available at <https://legislation.nt.gov.au/en/Legislation/HEALTH-AND-COMMUNITY-SERVICES-COMPLAINTS-ACT-1998>.

[1948] *Mental Health and Related Services Act 1998* (NT) s 100(8A), available at <https://legislation.nt.gov.au/Legislation/MENTAL-HEALTH-AND-RELATED-SERVICES-ACT-1998>.

[1949] *Ombudsman Act 2009* (NT) ss 10(2), 32(1)(a), available at <https://legislation.nt.gov.au/en/Legislation/OMBUDSMAN-ACT-2009>.

[1950] *Youth Justice Regulations 2006* (NT) reg 66(5A), available at <https://legislation.nt.gov.au/en/Legislation/YOUTH-JUSTICE-REGULATIONS-2006>.

[1951] *Children's Commissioner Act 2013* (NT) s 9(2).

[1952] *Children's Commissioner Act 2013* (NT) s 9(3).

[1953] *Children's Commissioner Act 2013* (NT) s 12.

Question	Summary response
	• The Administrator determines the conditions of office (including remuneration, expenses and allowances).[1954] • The Administrator may suspend the Commissioner on specified grounds.[1955] The Minister must present reasons for suspension to the NT Legislative Assembly and,[1956] if a two-thirds majority of the Assembly pass a resolution requesting termination, the Administrator must terminate the Commissioner.[1957] • The Administrator must terminate the Commissioner's appointment if the Commissioner on grounds of bankruptcy.[1958] • The Commissioner is considered an independent entity under the *Independent Commissioner Against Corruption Act 2017* (NT)[1959] and therefore accountable to the definitions of corrupt conduct, misconduct, unsatisfactory conduct, anti-democratic conduct etc.[1960] • The Commissioner must submit annual reports to the Minister,[1961] and the Commissioner may submit additional reports relating to the performance of its functions.[1962] • The Minister must table each report in the Legislative Assembly within 6 sitting days.[1963] • The NT Government sets the budget for the Commissioner.

Qualification and Experience
What qualifications and experiences are required for the role?
Does the person need to be an Aboriginal or Torres Strait Islander person?
What is the selection and appointment process?
	• The Administrator[1964] appoints the Commissioner on the recommendation of the Minister.[1965]
	• In making this recommendation, the Minister must be satisfied that the person:[1966]
	  ○ has qualifications of experience relating to the Commissioner's functions; and
	  ○ is committed to the objects of the Act and its underlying principles.

Scope What is the scope of the role in relation to advocating on a national or state level for the	• Section 10 of the Act sets out the functions of the Commissioner, which are: ○ to deal with:

[1954] *Children's Commissioner Act 2013* (NT) s 13.

[1955] These grounds are misbehaviours or physical or mental incapacity; *Children's Commissioner Act 2013* (NT) s 16(1).

[1956] *Children's Commissioner Act 2013* (NT) s 16(2).

[1957] *Children's Commissioner Act 2013* (NT) s 16(3).

[1958] *Children's Commissioner Act 2013* (NT) s 16(6).

[1959] Available at <https://legislation.nt.gov.au/en/Legislation/INDEPENDENT-COMMISSIONER-AGAINST-CORRUPTION-ACT-2017>.

[1960] *Independent Commissioner Against Corruption Act 2017* (NT) s 4, 9.

[1961] *Children's Commissioner Act 2013* (NT) s 43(1).

[1962] *Children's Commissioner Act 2013* (NT) s 43(2).

[1963] *Children's Commissioner Act 2013* (NT) s 43(4).

[1964] The Administrator of the Northern Territory is an official appointed by the Governor-General of Australia to represent the government of the Commonwealth in the Northern Territory.

[1965] *Children's Commissioner Act 2013* (NT) s 9(2), (3).

[1966] *Children's Commissioner Act 2013* (NT) s 9(4).

Question	Summary response
rights, views and needs of the relevant individuals?	▪ a complaint about required services; or ▪ on the Commissioner's own initiative, a matter that may form a ground for making a complaint; ○ to monitor the ways in which service providers respond to reports made by the Commissioner; ○ to monitor the administration of the *Care and Protection of Children Act* (NT)[1967] in so far as it relates to vulnerable children; ○ to undertake inquiries related to the care and protection of vulnerable children; ○ to monitor the implementation of any government decision arising from: ▪ an inquiry undertaken by the Commissioner under Part 6 of the Act; or ▪ any other inquiry related to the care and protection of vulnerable children, regardless of who undertook the inquiry; ○ to monitor the ways in which the Chief Executive Officer of the Agency administering the *Care and Protection of Children Act* (NT) deals with suspected or potential harm to, or exploitation of, children in the CEO's care; ○ to report to the Minister on a matter relating to the Commissioner's functions as required by the Minister; ○ to promote an understanding of, and inform public discussion about, the rights, interests and wellbeing of vulnerable children. • The definition of "vulnerable children" is set out in more detail below.
Purpose What is the purpose and objective of the role?	• The Act was designed to ensure accountability in the Northern Territory's child protection system, with the Commissioner to provide "*accountability and oversight at every conceivable level for the individual through investigations, the systematic via enquiries and the broader discussion of ideas through the explicit informed public discussion function*".[1968] • Section 4 of the Act sets out the Act's objectives, which are to: ○ ensure the safety and wellbeing of vulnerable children; and ○ promote continuous improvement and innovation in policies, practices and services relating to the safety and wellbeing of vulnerable children. • The Act comprehensively defines a "vulnerable child" as any of the following:[1969] ○ a child who is the subject of the exercise of a power or performance of a function under Chapter

[1967] Available at <https://legislation.nt.gov.au/en/Legislation/CARE-AND-PROTECTION-OF-CHILDREN-ACT-2007>.

[1968] Legislative Assembly of the Northern Territory, *Second Reading Speech: Children's Commissioner Bill 2013,* available at <https://legislation.nt.gov.au/Bills/Childrens-Commissioner-Bill-2013>.

[1969] *Children's Commissioner Act 2013* (NT) s 7.

Question	Summary response
	2 of the *Care and Protection of Children Act* (NT)[1970]; ○ a child who has been arrested or is on bail, or in relation to whom an order made under the *Youth Justice Act* (NT)[1971] is in force; ○ a child in relation to whom an order made under the *Volatile Substance Abuse Prevention Act* (NT)[1972] is in force; ○ a child who is suffering from a mental illness or is mentally disturbed; ○ a child who has a disability; ○ a child who has sought or is seeking child-related services, or for whom a family member of the child has sought or is seeking child-related services, for any of the following: ▪ the prevention of harm to, or exploitation of, the child; ▪ the protection of the child; ▪ care or support of the child; ○ a person prescribed by regulation; and ○ a young person who has left the care of the Chief Executive Officer of the Agency administering the *Care and Protection of Children Act* (NT). • While the objects set out in the Act particularly concern vulnerable children, the Explanatory Statement for the Bill expressly stated that the object extends to the wellbeing of children who are not technically "vulnerable" under the Act, including those who are in danger of becoming a vulnerable child.[1973]
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws?	• The functions of the Commissioner's office are prescribed by the legislation (see above).[1974] • In addition to these functions, the Commissioner also has the power to: ○ request a person to allow the Commissioner to have contact with a child who is, or whom the Commissioner reasonably believes to be, a vulnerable child or a witness to a matter which is the subject of an inquiry, complaint or investigation;[1975] and ○ request that a person: [1976] ▪ give specified information;

[1970] Available at <https://legislation.nt.gov.au/en/Legislation/CARE-AND-PROTECTION-OF-CHILDREN-ACT-2007>.

[1971] Available at <https://legislation.nt.gov.au/en/Legislation/YOUTH-JUSTICE-ACT-2005>.

[1972] Available at <https://legislation.nt.gov.au/en/Legislation/VOLATILE-SUBSTANCE-ABUSE-PREVENTION-ACT-2005>.

[1973] Legislative Assembly of the Northern Territory, *Explanatory Statement: Children's Commissioner Bill 2013,* available at <https://legislation.nt.gov.au/Bills/Childrens-Commissioner-Bill-2013>.

[1974] *Children's Commissioner Act 2013* (NT) s 10(1).

[1975] *Children's Commissioner Act 2013* (NT) s 34.

[1976] *Children's Commissioner Act 2013* (NT) s 35.

Question	Summary response
Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	▪ attend before the Commissioner to give information, answer questions or produce a specified thing; or ▪ communicate with the Commissioner in any other way. • ***Reporting:*** ○ One of the Commissioner's main functions is to report to the Minister on matters relating to the Commissioner's functions as required by the Minister.[1977] If the Minister so requests, the Commissioner must prepare and give the Minister such report.[1978] ○ The Commissioner must prepare and give the Minister an annual report on the operation of the Act.[1979] ○ The Commissioner may also prepare and give the Minister a report about a matter relating to the performance of a function of the Commissioner.[1980] ○ The Minister must table these reports in the Legislative Assembly within 6 sitting days.[1981] ○ If the reports would otherwise contain aspects of a matter that should not be publicly disclosed, the Commissioner may prepare and give the Minister a second report containing these aspects on a confidential basis.[1982] • ***Promotion of human rights:*** there are no human rights or convention references in the Act. ○ However, one of the main functions of the Commissioner is to promote an understanding of, and inform public discussion about, the rights, interests and wellbeing of vulnerable children.[1983] ○ Furthermore, the Second Reading of the Bill contained references to consistency with the *United Nations Convention on the Rights of the Child.*[1984] • ***Review of laws:*** the Commissioner does not have an express power to review legislation, however the Commissioner does have the "*powers necessary to perform the Commissioner's functions*"[1985], which could arguably be used to review legislation, and, in particular, to review the *Care and Protection of Children Act* (NT)[1986], to which a lot of the Commissioner's functions relate.

[1977] *Children's Commissioner Act 2013* (NT) s 10(1)(g).

[1978] *Children's Commissioner Act 2013* (NT)s 43(1)(b).

[1979] *Children's Commissioner Act 2013* (NT) s 43(1)(a).

[1980] *Children's Commissioner Act 2013* (NT) s 43(2).

[1981] *Children's Commissioner Act 2013* (NT) s 43(4).

[1982] *Children's Commissioner Act 2013* (NT) s 43(5), (6).

[1983] *Children's Commissioner Act 2013* (NT) s 10(1)(h).

[1984] Legislative Assembly of the Northern Territory, *Second Reading Speech: Children's Commissioner Bill 2013,* available at <https://legislation.nt.gov.au/Bills/Childrens-Commissioner-Bill-2013>.

[1985] *Children's Commissioner Act 2013* (NT) s 10(2).

[1986] Available at <https://legislation.nt.gov.au/en/Legislation/CARE-AND-PROTECTION-OF-CHILDREN-ACT-2007>.

Question	Summary response

	• ***Complaints handling:***
	  ○ One of the Commissioner's main functions is to deal with: [1987]
	  ▪ complaints about required services[1988]; or
	  ▪ any matters that may form a ground for making a complaint.
	  ○ On receiving a complaint, the Commissioner must decide whether to investigate the complaint, not deal with the complaint, refer the complaint to another person or resolve the complaint without investigation.[1989]
	• ***Inquiries and reporting:*** the Commissioner:
	  ○ may undertake own-motion inquiries related to the care and protection of children in the Territory;[1990]
	  ○ must undertake Minister-requested inquiries related to the care and protection of children in the Territory;[1991] and
	  ○ must give the Minister a report of the findings of any inquiry, which the Minister must table in the Legislative Assembly within 6 sitting days. [1992]
	• ***Regard to human rights instruments:*** the Act does not contain any express references to human rights instruments.

Budget What is the annual budget for the role?	• The Northern Territory Budget for 2019-20 allocates $1,865,000 as a separate line item for the Commissioner.[1993] • The NT government has recently added an extra $580,000 per annum to the budget of the Office of the Children's Commissioner.[1994] • This should be considered in light of the $538 million total funding on children and family services in the NT split between Commonwealth and NT Government in the 2018-19 financial year.[1995]
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	*Children's Commissioner Act 2013* (NT), The Act transferred the Commissioner's role from the *Care and Protection of Children Act* (NT)[1996] to a standalone Act in order to "*better reflect the independence of the Office and the fact that the*

[1987] *Children's Commissioner Act 2013* (NT) s 10(1).

[1988] The grounds for a complaint are that a service provider failed to provide the reasonably expected services to a vulnerable child or that the required services that were provided failed to meet the reasonably expected standard; see *Children's Commissioner Act 2013* (NT) s 21.

[1989] *Children's Commissioner Act 2013* (NT) s 23(1).

[1990] *Children's Commissioner Act 2013* (NT) s 30(1)(a).

[1991] *Children's Commissioner Act 2013* (NT) s 30(1)(b).

[1992] *Children's Commissioner Act 2013* (NT) s 33.

[1993] Northern Territory Government, *Agency Budget Statements 2019-20* (Report, 2020) 95 < https://budget.nt.gov.au/__data/assets/pdf_file/0005/689945/2019-20-BP3-book.pdf>.

[1994] Northern Territory Government, *Safe, Thriving and Connected Annual Report 2018-19* (Report, 2019) 92 <https://rmo.nt.gov.au/__data/assets/pdf_file/0005/747257/Safe-Thriving-and-Connected-Annual-Report-2018-19.pdf>.

[1995] See Australian Government Productivity Commission, *Expenditure on Children in the Northern Territory, Productivity Commission Study Report* (Report, March 2020) 67-68 <https://www.pc.gov.au/inquiries/completed/nt-children/report/nt-children.pdf>,

[1996] Available at <https://legislation.nt.gov.au/en/Legislation/CARE-AND-PROTECTION-OF-CHILDREN-ACT-2007>.

Question	Summary response
	Commissioner has investigation powers for systems other than that of child protection".[1997]
Most recent annual report or equivalent document (link)	Annual Report 2018-19

[1997] Legislative Assembly of the Northern Territory, *Second Reading Speech: Children's Commissioner Bill 2013,* available at <https://legislation.nt.gov.au/Bills/Childrens-Commissioner-Bill-2013>.

B. Children's Commissioner (Northern Territory): Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs[1998]

Summary: the Act largely complies with the Paris Principles on the establishment of NHRIs.

Entrenched in law[1999]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[2000]

The Commissioner's role is formally entrenched in law, pursuant to the Act. In fact, the Act was created in for the purposes of transferring the Commissioner's role to a standalone Act, in order to "*better reflect the independence of the Office*".[2001]

The Act sets out the Commissioners mandate and powers,[2002] including the Commissioner's lines of accountability and independence.[2003] However, the Act does not comprehensively set out the terms and conditions of office, and states that the Commissioner holds office on the terms and conditions determined by the Administrator.[2004]

Mandate and powers[2005]

The Act broadly sets out the functions of the Commissioner,[2006] including:

- to deal with:
  - a complaint about required services; or
  - on the Commissioner's own initiative, a matter that may form a ground for making a complaint;
- to monitor the ways in which service providers respond to reports made by the Commissioner;
- to monitor the administration of the *Care and Protection of Children Act* (NT)[2007] in so far as it relates to vulnerable children[2008];
- to undertake inquiries related to the care and protection of vulnerable children;
- to monitor the implementation of any government decision arising from:
  - an inquiry undertaken by the Commissioner under Part 6 of the Act; or
  - any other inquiry related to the care and protection of vulnerable children, regardless of who undertook the inquiry;
- to monitor the ways in which the Chief Executive Officer of the Agency administering the *Care and Protection of Children Act* (NT) deals with suspected or potential harm to, or exploitation of, children in the CEO's care;
- to report to the Minister on a matter relating to the Commissioner's functions as required by the Minister; and

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[1998] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[1999] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2000] GANHRI General Observations, G.O. 1.1.

[2001] Legislative Assembly of the Northern Territory, *Second Reading Speech: Children's Commissioner Bill 2013,* available at <https://legislation.nt.gov.au/Bills/Childrens-Commissioner-Bill-2013>.

[2002] *Children's Commissioner Act 2013* (NT) s 10, Part 7.

[2003] *Children's Commissioner Act 2013* (NT) s 11.

[2004] *Children's Commissioner Act 2013* (NT) s 13.

[2005] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2006] *Children's Commissioner Act 2013* (NT) s 10.

[2007] Available at <https://legislation.nt.gov.au/en/Legislation/CARE-AND-PROTECTION-OF-CHILDREN-ACT-2007>.

[2008] For the definition of "vulnerable children", see "purpose" in the summary table listed in Part A of this document.

- to promote an understanding of, and inform public discussion about, the rights, interests and wellbeing of vulnerable children.

The Commissioner has the powers necessary to perform these functions.[2009] In addition, the Commissioner has the power to:

- request a person to allow the Commissioner to have contact with a child who is, or whom the Commissioner reasonably believes to be, a vulnerable child or a witness to a matter which is the subject of an inquiry, complaint or investigation;[2010] and
- request that a person: [2011]
  - give specified information;
  - attend before the Commissioner to give information, answer questions or produce a specified thing; or
  - communicate with the Commissioner in any other way.

Appointment mechanisms[2012]

While the appointment mechanisms for the Commissioner are set out in the Act,[2013] it is arguable that they are not sufficiently transparent. The only clear requirement is that the person:[2014]

- has qualifications or experience relating to the Commissioner's functions; and
- is committed to the objects and the underlying principles of the Act.

Quasi-judicial competency (complaints-handling)[2015]

The Commissioner's role encompasses almost all of the features of quasi-judicial competency identified in the GAHNRI General Observations, including the power to:

- investigate both private and public bodies;[2016]
- hear complaints filed on behalf of another (see more below);[2017]
- conduct own-motion investigations;[2018]
- compel production of information[2019] (including offences to deter obstructive conduct – see Item 2.2 below);[2020]
- follow up its recommendations;[2021] and
- protect complainants and witnesses.[2022]

[2009] *Children's Commissioner Act 2013* (NT) s 10(2).

[2010] *Children's Commissioner Act 2013* (NT) s 34.

[2011] *Children's Commissioner Act 2013* (NT) s 35.

[2012] See GANHRI General Observations, G.O. 1.1.

[2013] *Children's Commissioner Act 2013* (NT) s 9.

[2014] *Children's Commissioner Act 2013* (NT) s 9(4).

[2015] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[2016] See definition of "responsible service provider" and *Children's Commissioner Act 2013* (NT) s 21(1)(a).

[2017] *Children's Commissioner Act 2013* (NT) s 20(1)(b).

[2018] *Children's Commissioner Act 2013* (NT) s 30(1)(a).

[2019] *Children's Commissioner Act 2013* (NT) s 35.

[2020] *Children's Commissioner Act 2013* (NT) ss 36, 37.

[2021] *Children's Commissioner Act 2013* (NT) s 29(6).

[2022] *Children's Commissioner Act 2013* (NT) s 48.

As is noted, the Commissioner is vested with the ability to receive and investigate complaints.[2023] One of the key features when the role was updated in 2013 was the power to resolve complaints informally, helping to resolve complaints expeditiously, and that the Commissioner could inquire into systemic issues.[2024] We have set out the complaints process in more detail below.

A person who is or has been a vulnerable child or an adult acting on behalf of such person, may make a written or oral complaint to the Commissioner.[2025] The grounds for a complaint are that a service provider failed to provide the reasonably expected required services to a vulnerable child, or that the required services that were provided failed to meet the reasonably expected standard.[2026] The "required services" include any services relating to the care or wellbeing of the child.[2027] The timeframe for making a complaint is one year after the matter arose, however the Commissioner may accept a complaint outside of this timeframe if it would be appropriate to do so in the public interest or because of personal circumstances.[2028]

Once a complaint is received, the Commissioner must decide whether to investigate the complaint, not deal with the complaint, refer the complaint to another person or resolve the complaint without investigation.[2029] The Act sets out the grounds on which the Commissioner should base this decision.[2030]

Administrative regulations

The Commissioner is considered an independent entity under the *Independent Commissioner Against Corruption Act 2017* (NT)[2031] and is therefore accountable to the definitions of corrupt conduct, misconduct, unsatisfactory conduct, anti-democratic conduct etc.[2032]Administrative regulations such as these are generally considered appropriate to make sure there is financial propriety and operational accountability.

The current Commissioner Colleen Gwynne has recently been charged with abuse of office following an investigation by the Special References Unit of the Northern Territory Police.[2033] Ms Gwynne faced Darwin Local Court on 27 August 2020 and, while the specific allegations were not aired in court, police say the charge relates to alleged "*arbitrary and prejudicial conduct*".[2034] The case is expected to return to court on 11 November 2020.

1.2 Human rights mandate[2035]

Summary: the Act is largely compliant with the Paris Principles in respect of the Commissioner's human rights mandate.

[2023] *Children's Commissioner Act 2013* (NT) Part 4.

[2024] Legislative Assembly of the Northern Territory, *Explanatory Statement: Children's Commissioner Bill 2013,* available at <https://legislation.nt.gov.au/Bills/Childrens-Commissioner-Bill-2013>.

[2025] *Children's Commissioner Act 2013* (NT) s 20.

[2026] *Children's Commissioner Act 2013* (NT) s 21.

[2027] *Children's Commissioner Act 2013* (NT) s 21(2).

[2028] *Children's Commissioner Act 2013* (NT) s 22.

[2029] *Children's Commissioner Act 2013* (NT) s 23(1).

[2030] *Children's Commissioner Act 2013* (NT) ss 24, 25.

[2031] Available at <https://legislation.nt.gov.au/en/Legislation/INDEPENDENT-COMMISSIONER-AGAINST-CORRUPTION-ACT-2017>.

[2032] *Independent Commissioner Against Corruption Act 2017* (NT) ss 4, 9.

[2033] Christopher Walsh, 'Behind the scenes of the Colleen Gwynne 'abuse of office' charge', *NT Independent* (online, 19 July 2020) <https://ntindependent.com.au/behind-the-scenes-of-the-colleen-gwynne-abuse-of-office-charge/>; Melissa Mackay, 'Northern Territory Children's Commissioner Colleen Gwynne to defend abuse-of-office charge', *ABC News* (online, 17 July 2020) < https://www.abc.net.au/news/2020-07-17/nt-childrens-commissioner-colleen-gwynne-abuse-of-office-charge/12468366>.

[2034] Melissa Mackay, 'Northern Territory Children's Commissioner Colleen Gwynne to defend abuse-of-office charge', *ABC News* (online, 17 July 2020) < https://www.abc.net.au/news/2020-07-17/nt-childrens-commissioner-colleen-gwynne-abuse-of-office-charge/12468366>.

[2035] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[2036] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[2037]

Competence and responsibilities[2038]

As is set out above, the Act sets out a broad mandate for the Commissioner, including to promote an understanding of, and inform public discussion about, the rights, interests and wellbeing of vulnerable children.[2039]

Powers of inquiry and investigation

The Commissioner is also vested with the competence to launch inquiries related to the care and protection of vulnerable children,[2040] and may determine the procedures of such inquiries.[2041] The Commissioner may undertake an inquiry on its own initiative, however the Commissioner must undertake an inquiry if directed to do so by the Minister.[2042]

In the course of performing an inquiry, the Commissioner may request contact with a vulnerable child or a witness.[2043]

The Commissioner may also, by written notice, request that a person:[2044]

- give specified information;
- attend before the Commissioner to give information, answer questions or produce a specified thing; or
- communicate with the Commissioner in any other way.

To illustrate the above, on 19 September 2019, the Commissioner launched an own motion investigation into the treatment of 12 Aboriginal children by various service providers in accordance with section 28(2) of the Act. On 12 November 2019, the Commissioner issued a request for information to the service provider, Life Without Barriers in accordance with section 35 of the Act.[2045] The requested information included carer screening and assessment processes, details of all children placed with the carers and all policies and procedures regarding placement of clients and any response to standard of care reviews. However, the service provider substantially failed to provide adequate information and ensure the information was stored properly. The report records that the Commissioner interviewed the Executive Director of the service provider in regard to the failure and this was apparently deemed an incident of section 37 of the Act, being an obligation comply with a request for information attracting a maximum of 100 penalty units or imprisonment for 12 months.[2046] There is no further information in the report on whether the Executive Director was charge with the offence;

[2036] GAHNRI General Observations, G.O. 1.2.

[2037] GAHNRI General Observations, G.O. 1.2.

[2038] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 2.6.

[2039] *Children's Commissioner Act 2013* (NT) s 10(1)(h).

[2040] *Children's Commissioner Act 2013* (NT) s 10(1)(d), Part 6.

[2041] *Children's Commissioner Act 2013* (NT) s 32.

[2042] *Children's Commissioner Act 2013* (NT) s 30.

[2043] *Children's Commissioner Act 2013* (NT) s 34.

[2044] *Children's Commissioner Act 2013* (NT) s 35..

[2045] Office of the Children's Commissioner Northern Territory, *Own Initiative Investigation Report* (Report, 9 June 2020) 4-9 <https://occ.nt.gov.au/__data/assets/pdf_file/0012/899454/2020-06-10-Redacted-Final-Own-Initiative-Report-TFC1-and-TFC2.pdf>.

[2046] It is worth noting that the Court can become involved if prosecution is brought against an individual under s 37 of the Act and that individual wishes to raise a defence. *Children's Commissioner Act 2013* (NT) s 37(6).

The Commissioner does not have the power to inspect and examine without notice. In the Commissioner's latest Annual Report, the Commissioner called for legislative reform giving the Office free and unfettered access to sites.[2047] In the Commissioner's Alice Springs Youth Detention Centre Monitoring Report dated 9 June 2020 and Don Dale Youth Detention Centre Monitoring Report dated 9 June 2020, this shortcoming was recognised.[2048] However, the Commissioner was able to obtain voluntary consent to conduct the site visits.

Importantly, the Act creates a number of offences designed to facilitate the performance of the Commissioner's functions and powers, including:[2049]

- offences for any failures to comply with the above requests without a reasonable excuse, subject to some exceptions (maximum penalties of 100 penalty units or imprisonment for 12 months);[2050]
- an offence for failing to give information on oath, without a reasonable excuse, if requested to do so by the Commissioner (maximum penalty 20 penalty units);[2051]
- an offence for giving the Commissioner false or misleading information (including within a document), with some exceptions (maximum penalty of 200 penalty units or imprisonment for 2 years);[2052]
- an offence for preventing or obstructing a complaint (maximum penalty of 100 penalty units or imprisonment for 12 months);[2053]
- an offence for making a knowingly false representation in a complaint (maximum penalty of 100 penalty units or imprisonment for 12 months);[2054] and
- an offence for obstructing (including resisting and hindering) or improperly influencing an investigation (maximum penalty of 200 penalty units or imprisonment for 2 years).[2055]

Functional immunity[2056]

The Act grants the Commissioner and the Commissioner's staff with express protection from civil and criminal liability for acts done or omitted to be done in good faith in the exercise of a power or performance of a function under this Act.[2057]

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Act is partially compliant with the Paris Principles in regard to encouraging ratification or accession to international human rights instruments.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human

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[2047] Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (Report, 2019) 44 <https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf>.

[2048] See Office of the Children's Commissioner Northern Territory, *Don Dale Youth Detention Centre: Monitoring Report* (Report, June 2020) 4 <https://occ.nt.gov.au/__data/assets/pdf_file/0005/899456/DDYDC-Monitoring-Report-June-2020.pdf>; Office of the Children's Commissioner Northern Territory, *Alice Springs Youth Detention Centre: Monitoring Report* (Report, June 2020) 5 <https://occ.nt.gov.au/__data/assets/pdf_file/0004/899455/ASYDC-Monitoring-Report-June-2020.pdf>.

[2049] *Children's Commissioner Act 2013* (NT) Part 8.

[2050] *Children's Commissioner Act 2013* (NT) ss 36, 37.

[2051] *Children's Commissioner Act 2013* (NT) s 38.

[2052] *Children's Commissioner Act 2013* (NT) s 39.

[2053] *Children's Commissioner Act 2013* (NT) s 40.

[2054] *Children's Commissioner Act 2013* (NT) s 41.

[2055] *Children's Commissioner Act 2013* (NT) s 42.

[2056] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1 & 2.3.

[2057] *Children's Commissioner Act 2013* (NT) s 49.

rights obligations.[2058] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[2059]

The Act does not explicitly reference international human rights standards and/or instruments. However, the Commissioner is empowered to:

- promote an understanding of, and inform public discussion about, the rights, interests and wellbeing of vulnerable children;[2060]
- monitor the administration of the *Care and Protection of Children Act* (NT) in so far as it relates to vulnerable children;[2061] and
- report to the Minister on a matter relating to the Commissioner's functions as required by the Minister.[2062]

Furthermore, one of the objects of the Act is to promote continuous improvement and innovation in the policies, practices and services relating to the safety and wellbeing of vulnerable children.[2063]

Arguably, these functions could be used to promote discussion about any policies, practices and services that are inconsistent with the requirements of international human rights standards, particularly in relation to the *Care and Protection of Children Act* (NT).

In fact, the Commissioner has a history of consulting on the implementation of human rights instruments in Australia and of invoking international human rights instruments in its submissions and letters. For instance:

- in May 2012, the Commissioner issued a joint media release calling on the media to stop publicly naming children and young people involved in the youth justice system and noting that such public naming violated Australia's commitment to the *UN Convention on the Rights of the Child;*[2064]
- in May 2018, the Commissioner attended a roundtable hosted by the National Children's Commissioner examining the extent to which Australia is progressing the implementation of the *UN Convention on the Rights of the Child*;[2065]
- the Commissioner has invoked articles of the *UN Convention on the Rights of the Child* in its last three monitoring reports;[2066] and

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[2058] GANHRI General Observations, G. O. 1.3.

[2059] GANHRI General Observations, G. O. 1.3.

[2060] *Children's Commissioner Act 2013* (NT) s 10(1)(h).

[2061] *Children's Commissioner Act 2013* (NT) s 10(1)(c).

[2062] *Children's Commissioner Act 2013* (NT) s 10(1)(g).

[2063] *Children's Commissioner Act 2013* (NT) s 4(b).

[2064] NT Children's Commissioner, NT Anti-Discrimination Commissioner and NT Information Commissioner, *Joint media release: Call to stop the public naming of children and young people involved in the youth justice system,* available at <https://occ.nt.gov.au/__data/assets/pdf_file/0011/440858/call-to-stop-the-public-naming-of-children-and-young-people-involved-in-the-youth-justice-system.pdf>.

[2065] Office of the Children's Commissioner Northern Territory, *Annual Report 2017-2018* (Report, 2018) 23 < https://occ.nt.gov.au/__data/assets/pdf_file/0005/590720/OCC-Annual-Report-2017-18_web.pdf>.

[2066] See Office of the Children's Commissioner Northern Territory, *Don Dale Youth Detention Centre: Monitoring Report* (Report, June 2020) 18 <https://occ.nt.gov.au/__data/assets/pdf_file/0005/899456/DDYDC-Monitoring-Report-June-2020.pdf>; Office of the Children's Commissioner Northern Territory, *Alice Springs Youth Detention Centre: Monitoring Report* (Report, June 2020) 19 <https://occ.nt.gov.au/__data/assets/pdf_file/0004/899455/ASYDC-Monitoring-Report-June-2020.pdf>; Office of the Children's Commissioner Northern Territory, *Residential Care in the Northern Territory: Monitoring Report* (Report, 2019) 11 < https://occ.nt.gov.au/__data/assets/pdf_file/0003/760368/2019-11-21-OCC-Residential-Care-Monitoring-Final-Report-redacted.pdf>.

- the Commissioner is currently implementing a monitoring framework modelled closely on the approach set out in the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment* (**OPCAT**), which was ratified by the Australian Government on 21 December 2017.[2067]

1.4 Interaction with the international human rights system

Summary: the Act is partially compliant with the Paris Principles with respect to interaction with the international human rights system.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[2068] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[2069]

While there are no human rights or convention references in the Act, the Second Reading of the Bill contained the following:

> *"Consistent with the United Nations Convention on the Rights of the Child, the best interests of children should be paramount concern for any person exercising power performing a function under the Children's Commissioner Act."*[2070]

Furthermore, the Commission's most recent Annual Report indicates the Commission's desire to engage with newly ratified conventions like OPCAT, as well as well-founded Conventions like the *United Nations Convention on the Rights of the Child*.[2071] The Commissioner's recent history of consulting on the implementation of human rights instruments in Australia and of invoking international human rights instruments in its submissions and letters is detailed above.

The Commissioner's role encompasses both promotional and protective functions. In terms of promotion, one of the objects of the Act is to promote continuous improvement and innovation in policies, practices and services relating to the safety and wellbeing of vulnerable children.[2072] The Commissioner is tasked to promote an understanding of, and inform public discussion about, the rights, interests and wellbeing of vulnerable children.[2073] In terms of protection, the Commissioner has a number of monitoring and investigative powers (as set out in the preceding sections).[2074]

1.5 Cooperation with other human rights bodies

Summary: although in practice the Commissioner largely complies with the Paris Principles on the cooperation with other human rights bodies, the Act is partially compliant.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[2075] This can involve engagement within a national

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[2067] Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (page 8), available at https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf ; Office of the Children's Commissioner Northern Territory, *Annual Report 2017-2018* (page 109), available at https://occ.nt.gov.au/__data/assets/pdf_file/0005/590720/OCC-Annual-Report-2017-18_web.pdf

[2068] GAHNRI General Observations, G.O. 1.4.

[2069] GAHNRI General Observations, G.O. 1.4.

[2070] Legislative Assembly of the Northern Territory, *Second Reading Speech: Children's Commissioner Bill 2013,* available at <https://legislation.nt.gov.au/Bills/Childrens-Commissioner-Bill-2013>.

[2071] Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (Report, 2019) 8, 17 <https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf>; Office of the Children's Commissioner Northern Territory, *Annual Report 2017-2018* (Report, 2018) 109 <https://occ.nt.gov.au/__data/assets/pdf_file/0005/590720/OCC-Annual-Report-2017-18_web.pdf>.

[2072] *Children's Commissioner Act 2013* (NT) s 4(b).

[2073] *Children's Commissioner Act 2013* (NT) s 10(1)(h).

[2074] *Children's Commissioner Act 2013* (NT) Parts 4-6.

[2075] GAHNRI General Observations, G.O. 1.5.

human rights framework or other domestic institutions and actors mandated to promote human rights.[2076]

While the Act does not expressly mandate cooperation with other entities, in practice, the Commissioner maintains consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships.[2077] For example:

- the Commissioner attends biannual members meetings of the Australian and New Zealand Children's Commissioners and Guardians (**ANZCCG**), which aims to promote and protect the safety, wellbeing and rights of children and young people in Australia and New Zealand;[2078]
- in the 2017-2018 reporting year, the Commissioner and staff attended an event hosted by the Australian Youth Representative to the United Nations in Darwin;[2079]
- in the 2017-2018 reporting year, the Commissioner met with the Alice Springs Youth Action Group (**YAG**) chairperson to discuss engagement opportunities. The Commissioner maintains open communication with YAG to ensure that the voices of young people in Alice Springs are heard;[2080]
- in the 2018-2019 reporting year, the Commissioner partnered with the CREATE Foundation to help shine a light on youth homelessness at Anglicare's annual Couch Surfing event in Darwin.[2081]

1.6 Recommendations by NHRIs

Summary: the Act largely complies with the Paris Principles on recommendations by NHRIs.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[2082] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[2083] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[2084]

In terms of reporting:

- one of the Commissioner's main functions is to report to the Minister on matters relating to the Commissioner's functions as required by the Minister.[2085] If the Minister so requests, the Commissioner must prepare and give the Minister such report;[2086]
- the Commissioner must prepare and give the Minister an annual report on the operation of the Act;[2087]

[2076] GAHNRI General Observations, G.O. 1.5.

[2077] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[2078] Office of the Children's Commissioner Northern Territory, *Australian Children's Commissioners and Guardians (ACCG) documents*, available at <https://occ.nt.gov.au/publications?>.

[2079] Office of the Children's Commissioner Northern Territory, *Annual Report 2017-2018* (Report, 2017) 27 <https://occ.nt.gov.au/__data/assets/pdf_file/0005/590720/OCC-Annual-Report-2017-18_web.pdf>.

[2080] Office of the Children's Commissioner Northern Territory, *Annual Report 2017-2018* (Report, 2017) 27 <https://occ.nt.gov.au/__data/assets/pdf_file/0005/590720/OCC-Annual-Report-2017-18_web.pdf>.

[2081] Office of the Children's Commissioner Northern Territory, *Annual Report 2017-2018* (Report, 2017) 18 <https://occ.nt.gov.au/__data/assets/pdf_file/0005/590720/OCC-Annual-Report-2017-18_web.pdf>.

[2082] GAHNRI General Observations, G.O. 1.6.

[2083] GAHNRI General Observations, G.O. 1.6.

[2084] GAHNRI General Observations, G.O. 1.6.

[2085] *Children's Commissioner Act 2013* (NT) s 10(1)(g).

[2086] *Children's Commissioner Act 2013* (NT) s 43(1)(b).

[2087] *Children's Commissioner Act 2013* (NT) s 43(1)(a).

- the Commissioner may also prepare and give the Minister a report about a matter relating to the performance of a function of the Commissioner.[2088]
- the Minister must table these reports in the Legislative Assembly within 6 sitting days.[2089]

The Act creates a regime by which the Commissioner is encouraged to follow-up compliance with the Commissioner's recommendations. In preparing a report following the investigation of a complaint, the Commissioner is empowered to include recommendations with respect to specified actions to be taken within a specified time.[2090] If the relevant service provider of Agency fails to take a recommended action within the specified time, the Commissioner may give another report about the failure to a responsible Minister.[2091]

The Commissioner's most recent Annual Report asserts that the Commissioner made a total of 23 recommendations in the 2018-19 reporting period. Each of these recommendations are set out in the report and are accorded a status by the Commissioner as to the progress of implementation (e.g. "implemented", "in progress", "not implemented" and "unable to be determined").[2092]

The Commissioner publishes its annual reports on its website, and regularly also publishes its investigative or inquiry-related reports.[2093]

1.7 Ensuring pluralism of the NHRI[2094]

Summary: the Act and the Commissioner largely fall short of the Paris Principles with respect to ensuring pluralism of the NHRI.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[2095] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[2096]

Where the NHRI is a single-member, such as the Commissioner, it is important that the NHRI is representative of diverse segments of society.[2097] However, there are no clear requirements for the Commissioner's role under the Act, other than that the Commissioner:[2098]

- has qualifications or experience relating to the Commissioner's functions; and
- is committed to the objects of this Act and the underlying principles.

There is no process which enables diverse societal groups (such as by gender, ethnicity and minority status) to be involved in the appointment of the Commissioner. At least, it is not expressly stated in the Act.

Staff of the Commissioner

[2088] *Children's Commissioner Act 2013* (NT) s 43(2).

[2089] *Children's Commissioner Act 2013* (NT) s 43(4).

[2090] *Children's Commissioner Act 2013* (NT) s 29(1), (2).

[2091] *Children's Commissioner Act 2013* (NT) s 29(6).

[2092] Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (Report, 2019) 34-41, 46-63 <https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf>.

[2093] Office of the Children's Commissioner Northern Territory, *Publications* (Webpage) <https://occ.nt.gov.au/publications?>.

[2094] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[2095] GANHRI General Observations, G.O. 1.7.

[2096] GANHRI General Observations, G.O. 1.7.

[2097] GANHRI General Observations, G.O. 1.7.

[2098] *Children's Commissioner Act 2013* (NT) s 9(4).

The Paris Principles also require NHRIs to be legislatively empowered to determine its own staffing structure, in a way which allows it to best fulfil its mandate. Staff should be recruited in a transparent and fair selection manner to ensure pluralism and diverse composition.[2099]

The Commissioner is entitled to employ public sector employees, or any agency staff made available under an arrangement of the Chief Executive Officer of that agency.[2100] The Commissioner's staff are subject only to the direction of the Commissioner or another member of the Commissioner's staff.[2101] However, the Act does not set out any provisions regarding the selection and appointment of staff.

Recently, there have been reports of a number of allegations surrounding improper hiring processes in the Commissioner's office.[2102] The Commissioner is alleged to have hired a personal friend as a senior officer, without any qualifications for the position, and the government was allegedly forced to undertake a new hiring process as a result.[2103]

To the extent that the Commissioner hires public sector employees, the *Public Sector Employment and Management Act 1993* (NT)[2104] requires human resource management to be directed towards:[2105]

- ensuring that all persons have equal opportunity to complete for employment;
- eliminating unlawful discrimination; and
- promoting diversity among employees reflective of the diversity of persons in the community.

Full-time members[2106]

The Commissioner is to be appointed by the Administrator by written instrument.[2107] The Act does not expressly require the Commissioner to be appointed on a full-time basis. The Act sets out a specific duration for the Commissioner's mandate, which is the period to be specified in the instrument of appointment (not exceeding 5 years), and the Commissioner is eligible for re-appointment.[2108] The Act does not appear to limit re-appointment in any way, which may not constitute appropriate mechanisms of pluralism, particularly given the NCC is a single-body NHRI.

The Act does not comprehensively set out the terms and conditions of office, and states that the Commissioner holds office on the terms and conditions to be determined by the Administrator (including remuneration, expenses and allowances).[2109]

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: the Act is sparsely drafted and largely does not comply with the Paris Principles with respect to the selection and appointment of the decision-making body of NHRIs.

[2099] GAHNRI General Observations, G.O. 2.4.

[2100] *Children's Commissioner Act 2013* (NT) s 19(1).

[2101] *Children's Commissioner Act 2013* (NT) s 19(2).

[2102] Christopher Walsh, 'Behind the scenes of the Colleen Gwynne 'abuse of office' charge', *NT Independent* (online, 19 July 2020) <https://ntindependent.com.au/behind-the-scenes-of-the-colleen-gwynne-abuse-of-office-charge/>.

[2103] Christopher Walsh, 'Behind the scenes of the Colleen Gwynne 'abuse of office' charge', *NT Independent* (online, 19 July 2020) <https://ntindependent.com.au/behind-the-scenes-of-the-colleen-gwynne-abuse-of-office-charge/>.

[2104] Available at <https://legislation.nt.gov.au/Legislation/PUBLIC-SECTOR-EMPLOYMENT-AND-MANAGEMENT-ACT-1993>.

[2105] *Public Sector Employment and Management Act 1993* (NT) s 5E.

[2106] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

[2107] *Children's Commissioner Act 2013* (NT) s 9.

[2108] *Children's Commissioner Act 2013* (NT) s 12.

[2109] *Children's Commissioner Act 2013* (NT) s 13.

The GANHRI Observations emphasise the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that position is filled by an applicant who has undergone a fair and merit-based selection process.[2110]

There is a paucity of information on the hiring criteria and processes for the Commissioner's office. The Commissioner is appointed by the Administrator on the recommendation of the Minister.[2111] While the appointment mechanisms are set out in the Act,[2112] the only clear requirements are that the person:[2113]

- has qualifications or experience relating to the Commissioner's functions; and
- is committed to the objects of this Act and the underlying principles.

The Act does not provide further information on the procedures behind the appointment and there is limited statutory or administrative material available as to how the Minister assesses this criteria, which raises concerns about whether the appointment process is sufficiently clear, transparent, and participatory.[2114]

1.9 Political representatives on NHRIs

Summary: the Act largely complies with the Paris Principles with respect to political representatives on NHRIs.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[2115]

As outlined above, there is a lack of transparency around the appointment and selection process for the Commissioner. While the Act does not expressly restrict the participation of government representatives or members of parliament in the decision-making of the Commission, it does provide that the Commissioner is not subject to the direction of anyone in relation to the way in which its functions are performed or the order of priority it gives to investigations.[2116] As such, the Act prevents political representatives from inappropriately influencing the Commissioner's decision-making.[2117]

Funding

The Commissioner is considered an "Independent Office" in the Northern Territory Budget document for 2019-20. Despite the categorisation, the budget is decided by the NT Government.

Tenure[2118]

[2110] GANHRI General Observations, G.O. 1.8.

[2111] *Children's Commissioner Act 2013* (NT) s 9.

[2112] *Children's Commissioner Act 2013* (NT) Part 3.

[2113] *Children's Commissioner Act 2013* (NT) s 9.

[2114] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.8.

[2115] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[2116] *Children's Commissioner Act 2013* (NT) s 11.

[2117] GANHRI General Observations, G.O. 1.9.

[2118] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1.

The Act sets out a specific duration for the Commissioner's mandate, which is the period instrument of appointment (not exceeding 5 years).[2119] The Commissioner is eligible for reappointment.[2120]

The Act further provides that the Commissioner holds office "*on the conditions* (*including as to remuneration, expenses and allowances) determined by the Administrator".*[2121] These terms and conditions are not outlined in the Act. As such, in practice, the terms and conditions of the Commissioners' employ are determined on a discretionary basis.

The Act also sets out specific grounds for removal from office. The Administrator must terminate the Commissioner's appointment on grounds of bankruptcy.[2122] However, for grounds of misbehaviour or of physical or mental incapacity, there is a due process that the Administrator must follow in order to terminate the Commissioner. That is, the Administrator may suspend the Commissioner and, within three sitting days of the suspension, the Minister must present the reasons for suspension to the Legislative Assembly.[2123] If, within 7 sitting days, the Legislative Assembly passes a resolution by a two-thirds majority requesting the termination, then the Administrator must terminate the Commissioner.[2124]

While not exactly an "independent body", requiring a two-thirds majority of the Legislative Assembly to vote on the Commissioner's removal from office goes further towards upholding public confidence and ensuring security of tenure for the Commissioner.[2125]

Recruitment[2126]

The Commissioner is entitled to employ public sector employees, or any agency staff made available under an arrangement of the Chief Executive Officer of that agency.[2127] The Commissioner's staff are subject only to the direction of the Commissioner or another member of the Commissioner's staff.[2128]

1.10 Adequate funding of NHRIs

Summary: there is a lack of transparency around the funding of the Commissioner (particularly under the Act). However, in practice, the Commissioner partially complies with the Paris Principles requiring adequate funding of NHRIs.

NHRIs must be provided with adequate funding in order to function effectively and independently.[2129]

The statutory provisions do not provide an indication as to the source or amount of funding for the Commissioner and the Commissioner's annual reports do not appear to set out the Commissioner's annual financial statements.

However, the Northern Territory Budget for 2019-20 allocates $1,865,000 as a separate line item for the Commissioner.[2130] It is noteworthy that for the purpose of funding by the NT government, the office of the Commissioner is considered part of the "Independent Offices" output group under the Department of Attorney-General and Justice. Other offices under this output group include

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[2119] *Children's Commissioner Act 2013* (NT) s 12.

[2120] *Children's Commissioner Act 2013* (NT) s 12.

[2121] *Children's Commissioner Act 2013* (NT) s 13.

[2122] *Children's Commissioner Act 2013* (NT) s 16(6).

[2123] *Children's Commissioner Act 2013* (NT) s 16(2).

[2124] *Children's Commissioner Act 2013* (NT) s 16(3).

[2125] See GAHNRI General Observations, G.O. 2.1.

[2126] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

[2127] *Children's Commissioner Act 2013* (NT) s 19(1).

[2128] *Children's Commissioner Act 2013* (NT) s 19(2).

[2129] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

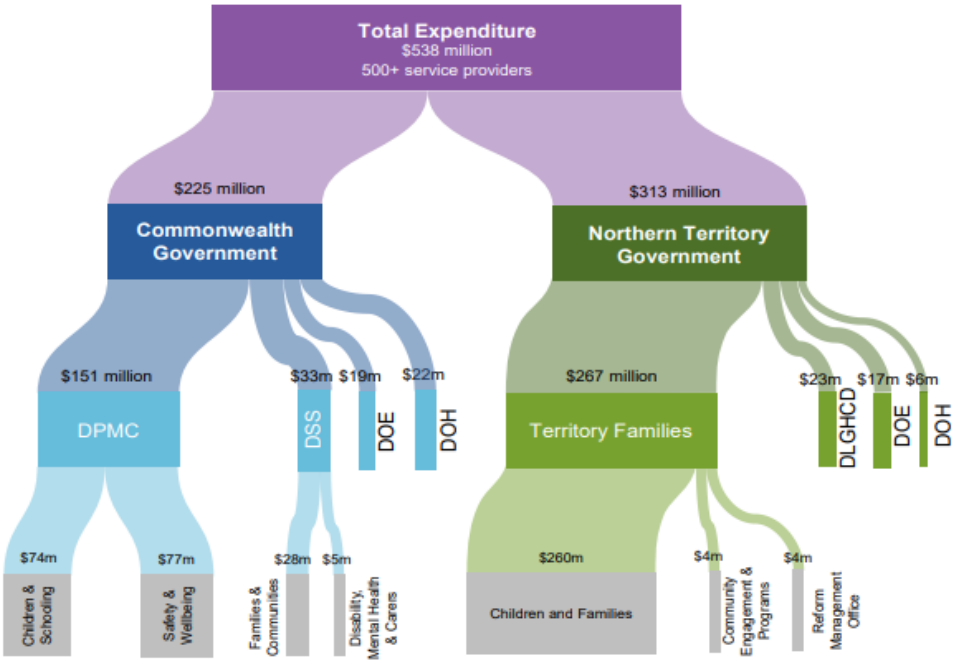
[2130] Northern Territory Government, *Agency Budget Statements 2019-20* (Report, 2020) 95 <https://budget.nt.gov.au/__data/assets/pdf_file/0005/689945/2019-20-BP3-book.pdf>.

Consumer Affairs, Anti-Discrimination Commission, Registrar-General, Public trustee, Office of the Public Guardian, Health and Community Services Complains Commission. To place the Commissioner budget in context, the "Independent Offices" output group was budgeted for $14,927,000 for 2019-20; The entire Department of Attorney-General was budgeted for $406,733,000 for 2019-20.

The NT government has recently added an extra $580,000 per annum to the budget of the Office of the Children's Commissioner.[2131]

The Commissioner's budget should be considered in light of the $538 million total funding on children and family services in the NT split between Commonwealth and NT Government in the 2018-19 financial year.[2132] A diagram used by the Productivity Commission of the Australian Governing in its Draft Expenditure on Children in the Northern Territory Report dated November 2019, shows a useful breakdown of this expenditure:

Figure 1 **Expenditure flows for children and family services in the Northern Territory, 2018-19**



Source: Productivity Commission estimates based on departmental data.

While this may appear to be an adequate allocation for the Commissioner's activities, this may not always have been the case. The report of the Royal Commission into the Detention and Protection of Children in the Northern Territory, tabled in Parliament on 17 November 2017, found that the Commissioner's Office was under-resourced to perform its full range of statutory functions in relation to the care and protection of vulnerable children in the Northern Territory.[2133]

It is not known that there are any other sources of funding.

[2131] Northern Territory Government, *Safe, Thriving and Connected Annual Report 2018-19* (Report, 2019) 92 < https://rmo.nt.gov.au/__data/assets/pdf_file/0005/747257/Safe-Thriving-and-Connected-Annual-Report-2018-19.pdf>.

[2132] See Australian Government Productivity Commission, *Expenditure on Children in the Northern Territory, Productivity Commission Study Report* (Report, March 2020) 67- 68 <https://www.pc.gov.au/inquiries/completed/nt-children/report/nt-children.pdf>.

[2133] NT Royal Commission, *Royal Commission into the Detention and Protection of Children in the Northern Territory – Report Overview* (Report, 2017) 5 <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-report-overview.pdf>.

NHRI staff and members[2134]

The Commissioner is entitled to be paid remuneration, expenses and allowances as determined by the Administrator.[2135] The Commissioner does not appear to make workforce data on the remuneration of its executives publicly available on its website or in its annual reports.

Accessibility and communications infrastructure[2136]

The Commissioner maintains a free call line for complaints, which is open between 8:00am and 4:00pm on weekdays (excluding public holidays).[2137] The Commissioner also maintains a communications system for general enquiries. This system includes a telephone line, email address, mailing address and active social media accounts.[2138] The Commissioner also has an open-to-the-public office in Darwin.

1.11 Annual reports of NHRIs

Summary: the Act largely complies with the Paris Principles on annual reports of NHRIs.

The Commissioner is required to produce annual reports for the Minister,[2139] which the Minister must table to the Legislative Assembly within 6 sitting days.[2140] The Commissioner's annual reports are made available on its website.[2141]

In practice, the Commission's annual reports include a summary of the activities undertaken in the financial year, as well as its opinions, recommendations and proposals. In addition, the reports track the implementation of the Commissioner's recommendations (e.g. "implemented", "in progress", "not implemented" and "unable to be determined").[2142] However, unlike other Australian children's commissioners, the Commissioner's annual reports do not appear to set out any financial records or workforce data for the Commissioner.

2 Any criticisms made publicly about this role?

2.1 Suspension of Colleen Gwynne

As above, the current Commissioner Colleen Gwynne has recently been charged with abuse of office following an investigation by the Special References Unit of the Northern Territory Police.[2143] Ms Gwynne faced Darwin Local Court on 27 August 2020 and, while the specific allegations were not aired in court, police say the charge relates to alleged "*arbitrary and prejudicial conduct*".[2144] The case is expected to return to court on 11 November 2020.

2.2 Royal Commission into the Protection and Detention of Children in the Northern Territory

Following the airing of "*Australia's Shame*" – a documentary featuring disturbing imagery and footage of children being abused while held in the Don Dale Juvenile Detention Centre in Darwin

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[2134] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[2135] *Children's Commissioner Act 2013* (NT) s 13.

[2136] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[2137] Office of the Children's Commissioner Northern Territory, *Make a complaint,* available at <https://occ.nt.gov.au/home/make-a-complaint>.

[2138] Office of the Children's Commissioner Northern Territory, *Social feeds,* available at <https://occ.nt.gov.au/home/social-feeds>.

[2139] *Children's Commissioner Act 2013* (NT) s 43(1).

[2140] *Children's Commissioner Act 2013* (NT) s 43(6).

[2141] Office of the Children's Commissioner Northern Territory, *Publications* (Webpage) <https://occ.nt.gov.au/publications?>.

[2142] See, eg, Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (Report, 2019) 24-42, 46-63 <https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf>.

[2143] Christopher Walsh, 'Behind the scenes of the Colleen Gwynne 'abuse of office' charge', *NT Independent* (online, 19 July 2020) <https://ntindependent.com.au/behind-the-scenes-of-the-colleen-gwynne-abuse-of-office-charge/>; Melissa Mackay, 'Northern Territory Children's Commissioner Colleen Gwynne to defend abuse-of-office charge' *ABC News* (online, 17 July 2020) <https://www.abc.net.au/news/2020-07-17/nt-childrens-commissioner-colleen-gwynne-abuse-of-office-charge/12468366>.

[2144] Melissa Mackay, 'Northern Territory Children's Commissioner Colleen Gwynne to defend abuse-of-office charge' *ABC News* (online, 17 July 2020) <https://www.abc.net.au/news/2020-07-17/nt-childrens-commissioner-colleen-gwynne-abuse-of-office-charge/12468366>.

on 25 July 2016,[2145] a Royal Commission was established by the Australian Government to inquire into, and report upon, failings in the child protection and youth detention systems of the Government of the Northern Territory. The Royal Commission's findings in relation to the Commissioner include the following:

- it is constrained by a lack of general power to investigate matters of a systemic nature rather than individual complaints;[2146] and
- it is under-resourced to perform its full range of stature functions.[2147]

One of the most significant recommendations was that the Act be repealed, and legislation passed establishing a Commission for Children and Young People, with jurisdiction for all children and young people in the Northern Territory. This Commission for Children and Young People would have two commissioners, one of whom would be an Aboriginal person, and the commissioners would have wider powers of inspection.[2148]

The findings of the Royal Commission are set out in more detail in Part C below.

3 What are the best features of this role?

- The Commissioner is vested with strong quasi-judicial competency (complaints-handling power).[2149]
- The Commissioner has own-motion inquiry powers, including powers to compel access to information during these inquiries.[2150] The Act creates a number of offences designed to facilitate the performance of the Commissioner's functions and powers.[2151]
- The Commissioner publicly tracks and reviews the implementation of its recommendations.[2152]
- The Commissioner appears to maintain consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships.[2153]
- In practice, the Commissioner publishes a wide range of information (including reports and inquiries) on its website, making it publicly accessible.[2154]

[2145] Kate Fitz-Gibbon and Faith Gordon, 'One year on from Royal Commission findings on Northern Territory child detention: what has changed?', *The Conversation* (online, 19 November 2018) <https://theconversation.com/one-year-on-from-royal-commission-findings-on-northern-territory-child-detention-what-has-changed-106993>.

[2146] NT Royal Commission, *Royal Commission into the Protection and Detention of Children in the Northern Territory – finding and recommendations* (Report, 2017) 16 <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-findings-and-recommendations.pdf>.

[2147] NT Royal Commission, *Royal Commission into the Protection and Detention of Children in the Northern Territory – finding and recommendations* (Report, 2017) 23 <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-findings-and-recommendations.pdf>.

[2148] NT Royal Commission, *Royal Commission into the Protection and Detention of Children in the Northern Territory – finding and recommendations* (Report, 2017) 61-62 <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-findings-and-recommendations.pdf>.

[2149] See Part 4 of the Act; Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[2150] *Children's Commissioner Act 2013* (NT) Parts 6, 7; Paris Principles, *Competence and responsibilities*; GANHRI General Observations, G.O. 2.6.

[2151] *Children's Commissioner Act 2013* (NT) Part 8.

[2152] *Children's Commissioner Act 2013* (NT) s 29(6); Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.6.

[2153] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[2154] Office of the Children's Commissioner Northern Territory, *Publications* (Webpage) <https://occ.nt.gov.au/publications?>.

C. Northern Territory Children's Commissioner: Impacts

In its 2018-2019 Annual Report, the Commissioner sets out the following statistics for the reporting year:[2155]

- the Commissioner received 45 complaints (90% of which were received from an Aboriginal or Torres Strait Islander young person). The Commissioner dealt with 36 of these complaints by resolution, and left no complaints undetermined;
- the Commissioner dealt with two monitoring activities;
- the Commissioner conducted five preliminary enquiries;
- the Commissioner used its own-motion powers to initiate two investigations in response to complaints;
- the Commissioner referred 21 matters to the relevant service provider for investigation;
- the Commissioner's content reached a total of 74,603 people; and
- the Commissioner and staff engaged with over 2,000 children and young people.

4 Royal Commission into the Detention and Protection of Children in the Northern Territory

4.1 Background and relevant recommendations

By way of Letters Patent, the Honourable Margaret Jean White AO and Michael Lloyd Gooda were appointed Royal Commissioners on 1 August 2016.[2156] The final report of the Royal Commission was tabled in Parliament on 17 November 2017 and its findings in relation to the Commissioner were that:

- the office of the Commissioner is under-resourced to perform its full range of statutory functions in relation to the care and protection of vulnerable children in the Northern Territory; and [2157]
- there is an ineffectiveness of external oversight mechanisms of detention centres.[2158]

In respect of the Commissioner, the Royal Commission made the following recommendations:

- *Recommendation 2.1*: the Northern Territory Government provide legislation for a Representative Council of Children who are or have been in and out of home care and who have been in the youth justice system including in youth detention to express their views on the development and implementation of laws and policies which affect children and young people in those systems and that those views be given due weight. The Representative Council of Children should be located in and supported by the Commissioner.
- *Recommendation 10.2*: The Northern Territory Government close the current Don Dale Youth Detention Centre (to be replaced with a new, purpose-built facility) and by 17

[2155] Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (Report, 2019) <https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf>.

[2156] Secretary to the Federal Executive Council, *Letters Patent issued under the Royal Commissions Act 1902* (1 August 2016) < https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-letters-patent-child-detention-nt.pdf>.

[2157] NT Royal Commission, *Royal Commission into the Protection and Detention of Children in the Northern Territory – finding and recommendations* (Report, 2017) 13 <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-findings-and-recommendations.pdf>.

[2158] NT Royal Commission, *Royal Commission into the Protection and Detention of Children in the Northern Territory – finding and recommendations* (Report, 2017) 16 <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-findings-and-recommendations.pdf>.

February 20183 months after the date of this report, the Northern Territory Government report to the Commissioner (or Commission for Children and Young People if that Commission has been established by that time) on the program for that closure.

- *Recommendation 14.1*: If the superintendent separates a detainee from other detainees under sub-paragraph (1)(d) above, it must be reported to the Chief Executive Officer of Territory Families and to the Commissioner as soon as reasonably practical.

- *Recommendation 37.7*: The Commissioner publish in its Annual Report the number of compulsory notices it issued under section 35 of the *Children's Commissioner Act* (NT) in that year and whether they were complied with, including any delays in compliance.

- *Recommendation 37.10*: In light of recommendations made in relation to the Office of the Commissioner, the *Children's Commissioner Act* (NT) be amended to provide that the Commissioner is the Convenor of the Child Death Review and Prevention Committee with statutory responsibility for its operations, with the Child Death Review and Prevention Committee adopting a more comprehensive and regular process for reporting on its monitoring of the implementation of recommendations.

- *Recommendation 40*: Legislative changes including repeal of *Children's Commissioner Act* (NT) and establishment of a Commission for Children and Young People, with dual Commissioners, broader functions and stronger investigative powers.

4.2 Response by the Commissioner

According to the Commissioner's 2017-18 Annual Report, the Commissioner implemented measures in line with the findings and recommendations of the Royal Commission:

- "Stage 1" implementations to increase the Office's capacity to monitor and audit the youth justice and child protection systems and inspect detention and out-of-home Care facilities. This involves the development and implementation of a new monitoring and auditing framework that is consistent with the *Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment,* ratified by the Australian Government on 21 December 2017;[2159] and

- commitments to monitor compliance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles following NT Government's investment of $4.2 million over four years to recruit and support Aboriginal foster and kinship carers on the Royal Commission's recommendation.[2160]

According to the Commissioner's 2018-19 Annual Report, the Commissioner progressed the following implementations in the reporting period:

- the Commissioner developed the monitoring framework to inspect youth justice detention centres, out-of-home care facilities and Bail Support Centres and applied this framework to the monitoring of the Don Dale Youth Detention Centre and the Alice Springs Youth Detention Centre;

- the Commissioner observed that there has been a significant reduction in incidents in the centres and enhanced compliance with legislation since monitoring commenced;[2161] and

[2159] Office of the Children's Commissioner Northern Territory, *Annual Report 2017-2018* (Report, 2018) 20, 109 <https://occ.nt.gov.au/__data/assets/pdf_file/0005/590720/OCC-Annual-Report-2017-18_web.pdf>.

[2160] Office of the Children's Commissioner Northern Territory, *Annual Report 2017-2018* (Report, 2018) 203 <https://occ.nt.gov.au/__data/assets/pdf_file/0005/590720/OCC-Annual-Report-2017-18_web.pdf>.

[2161] Office of the Children's Commissioner Northern Territory, *Annual Report 2017-2018* (Report, 2018) 8 <https://occ.nt.gov.au/__data/assets/pdf_file/0005/590720/OCC-Annual-Report-2017-18_web.pdf>.

- by May 2018, the NT Parliament had implemented Recommendation 14.1 so that the Commissioner is notified when detainees are separated.[2162]

5 Resolution of complaints

One way to measure the impact of the Commissioner is to analyse the number of complaints the Commissioner has received over the years:

- in the 2015-2016 reporting period, the Commissioner received 90 complaints involving 108 different children;[2163]
- in the 2016-2017 reporting period, the Commissioner received 86 complaints involving 127 different children;[2164]
- in the 2017-2018 reporting period, the Commissioner received 92 complaints involving 132 different children;[2165] and
- in the 2018-2019 reporting period, the Commissioner received 45 complaints involving 40 different children.[2166]

6 Recent Reports

6.1 Monitoring Reports: Don Dale and Alice Springs Youth Detentions Centre[2167]

As outlined above, the Royal Commission into the Protection and Detention of Children in the Northern Territory emphasised the importance of independent scrutiny in the context of ensuring that the rights of children being held in detention are both respected and upheld.

On 20 June 2019, the Commissioner's monitoring reports of the Don Dale and Alice Springs Youth Detention Centres were tabled in Northern Territory Parliament.[2168] The reports made a total of 26 recommendations, with the Commissioner finding that:

- positive and important changes have been made in relation to the Don Dale Youth Detention Centre; and
- there are ongoing concerns in regard to the management of separation within the Alice Springs Youth Detention Centre.

The reports were designed to address immediate risks to the wellbeing of young people and staff in these centres, and to complement the reform framework identified by the Royal Commission and the reform agenda to which the Northern Territory Government committed after the Royal Commission.[2169]

[2162] Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (Report, 2019) 65 <https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf>.

[2163] Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (Report, 2019) 27 <https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf>.

[2164] Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (Report, 2019) 27 <https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf>.

[2165] Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (Report, 2019) 34 <https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf>.

[2166] Office of the Children's Commissioner Northern Territory, *Annual Report 2018-2019* (Report, 2019) 30 <https://occ.nt.gov.au/__data/assets/pdf_file/0011/759926/OCCNT-Annual-Report-2018-19_FINAL.pdf>.

[2167] Office of the Children's Commissioner Northern Territory, *Don Dale Youth Detention Centre: Monitoring Report* (Report, June 2020) <https://occ.nt.gov.au/__data/assets/pdf_file/0005/899456/DDYDC-Monitoring-Report-June-2020.pdf>; Office of the Children's Commissioner Northern Territory, *Alice Springs Youth Detention Centre: Monitoring Report,* available at <https://occ.nt.gov.au/__data/assets/pdf_file/0004/899455/ASYDC-Monitoring-Report-June-2020.pdf>.

[2168] Office of the Children's Commissioner Northern Territory, *Media Statement 21 June 2019,* available at <https://occ.nt.gov.au/__data/assets/pdf_file/0010/709309/2019-06-21-OCC-Media-Statement-Independent-Monitoring.pdf>

[2169] Office of the Children's Commissioner Northern Territory, *Media Statement 21 June 2019,* available at <https://occ.nt.gov.au/__data/assets/pdf_file/0010/709309/2019-06-21-OCC-Media-Statement-Independent-Monitoring.pdf>.

6.2 Own Initiative Investigation Report: Abuse in Care[2170]

On 19 September 2019, the Commissioner commenced an own-motion investigation to examine the services provided to 12 children who were in the care of the Chief Executive Officer of NT Families and Children, the Department of Children and Families and Territory Families.[2171] The investigation examined all interactions and interventions by Territory Families, the Department of Health, the Northern Territory Police, Fire and Emergency Services and Life Without Barriers.

The report made a total of 14 recommendations, with the Commissioner making findings of:

- shortcomings and policy breaches in relation to appropriate assessment and provision of expected standards of care; and
- many opportunities which were missed by service providers in responding to standard of care reports, resulting in continued physical and emotional harm of the children in care.

On 24 June 2020, the Commissioner's report was tabled in the Northern Territory Legislative Assembly.[2172]

[2170] Office of the Children's Commissioner Northern Territory, *Own Initiative Investigation Report: Services Provided by Territory Families to the carers TFC1 and TFC2 and C1 and C2; C3 and C4; C5, C6 and C7; C8, C9 and C10; C 11; and C12,* available at <https://occ.nt.gov.au/__data/assets/pdf_file/0012/899454/2020-06-10-Redacted-Final-Own-Initiative-Report-TFC1-and-TFC2.pdf>.

[2171] Office of the Children's Commissioner Northern Territory, *Media Release: Own Initiative Investigation,* available at <https://occ.nt.gov.au/__data/assets/pdf_file/0011/899453/2020.06.24-OCC-Own-Initiative-Investigation-FINAL.pdf>

[2172] Office of the Children's Commissioner Northern Territory, *Media Release: Own Initiative Investigation,* available at <https://occ.nt.gov.au/__data/assets/pdf_file/0011/899453/2020.06.24-OCC-Own-Initiative-Investigation-FINAL.pdf>

19 Children and Young People Commissioner (Australian Capital Territory)

A. Children and Young People Commissioner (ACT): Summary table

Question	Summary response
Country/State/Territory	Australian Central Territory, Australia
Commissioner entity name	The Children and Young People Commissioner (the "**Commissioner**")
Date established	Established under the *Human Rights Commission (Children and Young People Commissioner) Amendment Act 2005* (ACT))[2173] that amended the *Human Rights Commission Act 2005* (ACT) (the **"Act**"). First notified on 2 September 2005 and came into effect on 1-2 November 2006.[2174]
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The role of the Commissioner is generally compliant with the Paris Principles, with the exception of the appointment process and separation from political representatives requirement. Improvements to the Commissioner's role need to be implemented in order for it to meet the Paris Principles more closely. As the Commissioner shares its role with the Public Advocate and sits under the ACT Human Rights Commission (the "**Commission"**), it falls short of meeting the Paris Principles since it relies on the Commission or other commissioners to carry out certain functions.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The Commissioner sits under the Commission along with other commissioners and the Public Advocate.[2175] The Commission is an independent statutory body.[2176] Commission members are encouraged to act in a way that promotes the collegiate nature of the commission.[2177] Commissioners are able to share statutory office-holder information with another commissioner and use that shared information if it is for the effective exercise of a function under the Act.[2178] The current Commissioner is also Public Advocate, who advocates not only for young people and children but all persons whose situation gives rise to a need for protection from abuse, exploitation or neglect.[2179] One of the Public Advocate's specific functions is to advocate for the rights of children and young people.[2180]

[2173] *Human Rights Commission (Children and Young People Commissioner) Amendment Act 2005* (ACT) s 8.

[2174] ACT Legislation Register, available at <https://www.legislation.act.gov.au/a/2005-46>.

[2175] *Human Rights Commission Act 2005* (ACT) s 12.

[2176] *Human Rights Commission Act 2005* (ACT) s 16

[2177] *Human Rights Commission Act 2005* (ACT) s 13

[2178] *Human Rights Commission Act 2005* (ACT) s 99A

[2179] ACT Human Rights Commission <https://hrc.act.gov.au/public-advocate/public-advocate-children-young-people-commissioner/>.

[2180] *Human Rights Commission Act 2005* (ACT) s 27B.

Question	Summary response
	The Commissioner is also a member of the Australian and New Zealand Children's Commissioners and Guardians and Australian Guardianship and Administration Council.[2181]
Accountability arrangements What is the reporting line for the role? Who sets the budget?	The President of the Commission ensures the commission's (and therefore the Commissioner's) functions are exercised in an orderly and prompt way.[2182] The President of the Commission sets the budget for the Commission after consulting with the Director-General for Justice and Community Safety Directorate ("**JACS**") and other commissioners, which is then published in the Governance and Corporate Support Protocol.[2183]
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	The ACT Executive appoints a Commissioner.[2184] The Commissioner cannot be appointed for a term longer than 5 years but can be reappointed at the end of that term.[2185] Requirements and process of the appointment are governed by Part 19.3 of the *Legislation Act 2001* (ACT), which includes administrative requirements such as appointments are to be in writing and the appointer may make an appointment by naming the person appointed.[2186] The ACT has to be satisfied that the person has the experience or expertise necessary to exercise the member's functions (see more on the Commissioner's functions below).[2187] There are no requirements in the Act that require the Commissioner to be an Aboriginal or Torres Strait Islander person.
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	The Commissioner can exercise:[2188] 1) functions for the commission in relation to services for children and young people, which is defined as a service provided in the ACT specifically for children, young people, both children and young people, or their carers.[2189] This is subject to any decision of the Commission in relation to the exercise of its functions in regard to services for children and young people.[2190] 2) exercise any other function given to the Commissioner under the Act or any other ACT law, including the following functions of the Commission in general under the Act:[2191]

[2181] Australian and New Zealand Children's Commissioners (Webpage) <https://accg.org.au/>; Australian Guardianship and Administration Council <https://hrc.act.gov.au/public-advocate/public-advocate-children-young-people-commissioner/>.

[2182] *Human Rights Commission Act 2005* (ACT) s 18(1)(c).

[2183] *Human Rights Commission Act 2005* (ACT) s 18A(a)(iv).

[2184] *Human Rights Commission Act 2005* (ACT) s 18D(1).

[2185] *Human Rights Commission Act 2005* (ACT) s 18D(3).

[2186] *Legislation Act 2001* (ACT).

[2187] *Human Rights Commission Act 2005* (ACT) s 18(D)(2).

[2188] *Human Rights Commission Act 2005* (ACT) s 19(B)(1).

[2189] *Human Rights Commission Act 2005* (ACT) s 8A.

[2190] *Human Rights Commission Act 2005* (ACT) s 19B(2).

[2191] *Human Rights Commission Act 2005* (ACT) s 14(1).

Question	Summary response
	a) encouraging the resolution of complaints made under the Act, and assisting in their resolution, by providing an independent, fair and accessible process for resolving the complaints; b) encouraging and assisting users and providers of prescribed services to make improvements in the provision of services, particularly by encouraging and assisting service users and providers to contribute to the review and improvement of service quality; c) encouraging and assisting people providing prescribed services and people engaging in conduct that may be complained about under the Act, to develop and improve procedures for dealing with complaints; d) identifying, inquiring into and reviewing issues relating to the matters that may be complained about under the Act; e) exercising any other function given to the commission under the Act or another Territory law.
Purpose What is the purpose and objective of the role?	The Act sets out the objective/purpose of the Commission in general, rather than singling out the objective/purpose of the Commissioner:[2192] The main object of the Act is to promote the human rights and welfare of people living in the ACT, to be achieved by the following acts:[2193] (a) promote the provision of community education, information and advice in relation to human rights; and (b) identify and examine issues that affect the human rights and welfare of vulnerable groups in the community; and (c) make recommendations to government and non-government agencies on legislation, policies, practices and services that affect vulnerable groups in the community; and (d) promote understanding and acceptance of, and compliance with, the *Discrimination Act 1991* (ACT) and the *Human Rights Act 2004 (ACT) (the "**HR Act")***; and (e) acknowledge, protect and promote the rights of victims; and (f) promote the protection of children and young people and people with a disability from abuse and exploitation; and (g) promote improvements in the provision of prescribed services; and (h) promote the rights of users of prescribed services; and (i) promote an awareness of the rights and responsibilities of users and providers of services to which the Act relates; and (j) provide an independent, fair and accessible process for the resolution of discrimination complaints and complaints between users and providers of prescribed services; and (k) provide a process to encourage and assist users and providers of prescribed services to make improvements in the provision of

[2192] *Human Rights Commission Act 2005* (ACT) s 6.

[2193] *Human Rights Commission Act 2005* (ACT) s 6(1).

Question	Summary response
	services, particularly by encouraging and assisting service users and providers to contribute to the review and improvement of service quality; and (l) foster community discussion, and the provision of community education and information, about— a. the Act and related acts; and b. the operation of the commission; and c. the procedures for making complaints. The most relevant purpose under the ACT for the Commissioner is above paragraph (f) ("promote the protection of children and young people") and other paragraphs in relation to "prescribed services"[2194]. "Prescribed services" includes a service for children and young people,[2195] as defined in the "Scope" section above.
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing	**Further details on functions and powers** In addition to the functions of the Commissioner in the "Scope" section above, the Act requires the Commissioner specifically to endeavour to:[2196] 1) Consult with children and young people in ways that promote their participation in decision-making 2) Listen to and seriously consider the views of children and young people 3) Ensure that the commission is accessible to children and young people 4) Be sensitive to the linguistically and culturally diverse backgrounds of children and young people The Commissioner, in order to carry out its functions:[2197] 1) May establish advisory committees to assist the commission to exercise its functions in relation to services r children and young people 2) May appoint children and young people and people with experience or expertise in relation to services for children and young people to the committee **Reporting and Inquiries** The Minister for Justice, Consumer Affairs and Road Safety (the "**Minister**") may direct the Commission to inquire into and report to the Minister in relation to a matter that can be complained about under the Act.[2198] The Minister may, but need not, present the advice to the Legislative Assembly.[2199]

[2194] *Human Rights Commission Act 2005* (ACT) ss 6(g), (h), (j), (k).
[2195] *Human Rights Commission Act 2005* (ACT) s 6A.
[2196] *Human Rights Commission Act 2005* (ACT) s 19B(3).
[2197] *Human Rights Commission Act 2005* (ACT) s 19(C).
[2198] *Human Rights Commission Act 2005* (ACT) s 17.
[2199] *Human Rights Commission Act 2005* (ACT) s 18(4).

Question	Summary response
their functions or exercising their powers?	The Commission can self-initiate a report on a commission-initiated consideration and give it to who it considers appropriate.[2200] The Commission can also give a third party a report in relation to a complaint if it is in the public interest to do so, and if the report is about matters of public policy, the third party has an appropriate interest in it or the third party has acted inconsistently with an applicable standard that applies to it/failed to do something that is required of it.[2201] If the Commission provides a report to the Minister on its own initiative on a matter of public importance related to the commission, the commission's functions or a matter that may be complained about under the Act or a third-party report, the Minister must present the report to the Legislative Assembly within 6 sitting days after the day of receipt.[2202] **Promotion of human rights** The Act specifically requires the Commission (including the Commissioner) to act: 1) in accordance with the human rights under the HR Act.[2203] The HR Act cites international conventions and covenants as sources for provisions and expressly states that international law is essential when interpreting human rights.[2204] International law is defined to include:[2205] a) the International Covenant on Civil and Political Rights and other human rights treaties to which Australia is a party; b) general comments and views of the United Nations human rights treaty monitoring bodies; and c) declarations and standards adopted by the United Nations General Assembly that are relevant to human rights. 2) with regard to the principles of indivisibility and universality of human rights and that every person is free and equal in dignity and rights[2206] In addition, as a public authority, the Commission (and therefore the Commissioner) is obliged to act consistently with human rights and give proper consideration to human rights when making decisions.[2207] **Review of laws** A function of the Commission (and therefore the Commissioner) is to identify, inquire into and review issues relating to the matters that may be complained about under the Act.[2208] The annual report also suggests that the Commissioner can provide feedback on cabinet

[2200] *Human Rights Commission Act 2005* (ACT) s 87.
[2201] *Human Rights Commission Act 2005* (ACT) s 83.
[2202] *Human Rights Commission Act 2005* (ACT) s 87.
[2203] *Human Rights Commission Act 2005* (ACT) s 15.
[2204] *Human Rights Act 2004 (ACT)* s 31.
[2205] See definition of "International Law" in the *Human Rights Commission Act 2005* (ACT).
[2206] *Human Rights Commission Act 2005* (ACT) s 14(2)(a).
[2207] *Human Rights Act 2004 (ACT)* s 40B.
[2208] *Human Rights Commission Act 2005* (ACT) s 14(d).

Question	Summary response
	submissions and provide advice through consultation for the purpose of influencing legislative change or policy reforms.[2209] **Complaints handling** The Commissioner does not have legislated responsibility for complaints handling, but referrals are often made across the Commission.[2210] The Commissioner can also support people to submit a complaint to the Discrimination, Health Services, Disability and Community Services Commissioner, who handles complaints in relation to services for children and young people.[2211] The Commission has specific powers to: 1) encourage the resolution of complaints made under the Act, and assisting in their resolution, by providing an independent, fair and accessible process for resolving the complaints[2212] 2) encourage and assist people providing prescribed services and people engaging in conduct that may be complained about under the Act, to develop and improve procedures for dealing with complaints[2213] 3) identify, inquire into and review issues relating to the matters that may be complained about under the Act[2214] The Commission must deal with complaints promptly and efficiently.[2215] The Act sets out detailed procedures on how to deal and resolve complaints, including how complaints are allocated, considered and reported.[2216]
Budget What is the annual budget for the role?	The budget for FY 2019/20 is $1,275,000 and covers both the Commissioner and Public Advocate.[2217]
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	The Commissioner's role is specifically provided for as a member of the Commission under section 12(1)(b) of the Act. https://www.legislation.act.gov.au/View/a/2005-40/current/PDF/2005-40.PDF
Most recent annual report or equivalent document (link)	https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf

[2209] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2210] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2211] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2212] *Human Rights Commission Act 2005* (ACT) s 14(1)(a).

[2213] *Human Rights Commission Act 2005* (ACT) s 14(1)(c).

[2214] *Human Rights Commission Act 2005* (ACT) s 14(1)(d).

[2215] *Human Rights Commission Act 2005* (ACT) s 45.

[2216] *Human Rights Commission Act 2005* (ACT) Part 4.

[2217] Governance and Corporate Support Protocol (2005) 12, available at <https://hrc.act.gov.au/wp-content/uploads/2019/09/HRC-Governance-Corporate-Support-Protocol-1920-update.doc>.

B. ACT Children and Young People Commissioner: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs[2218]

Summary: the Act partially complies with this requirement, lacking transparency in the appointment process

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[2219]

Entrenched in law[2220]

The Commission and Commissioner are both legislatively enshrined in the Act.[2221] The Commissioner sits under the Commission along with other human rights related commissioners.[2222] The Commission itself is an independent statutory body.[2223]

Mandate and powers[2224]

The Commissioner's functions are specifically to exercise functions for the commission in relation to services for children and young people, but also to exercise functions of the Commission in general which are broader.[2225] The Act also requires the Commissioner to endeavour to ensure the Commission is accessible to and actively consults young people/children.[2226] The Commissioner can establish advisory committees to assist them with exercising his or her functions.[2227]

Appointment and mechanisms[2228]

The Act sets out that the ACT Executive appoints the Commissioner but the appointment process is not transparent.[2229] The ACT Executive only has to be satisfied that the person has the experience or expertise necessary to exercise the member's functions.[2230]

Line of accountability[2231]

The President of the Commission ensures the commission's functions (including that of the Commissioner's) are exercised in an orderly and prompt way.[2232] The accountability of the Commissioner seems to be assessed on a whole together with the Commission via performance indicators for the Commission set out in the budget papers and reported through the JACS Annual Report.[2233]

[2218] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[2219] GANHRI General Observations, G.O. 1.1.

[2220] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2221] *Human Rights Commission Act 2005* (ACT) s 12.

[2222] *Human Rights Commission Act 2005* (ACT) s 12.

[2223] *Human Rights Commission Act 2005* (ACT) s 16.

[2224] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2225] *Human Rights Commission Act 2005* (ACT) s 19B(1).

[2226] *Human Rights Commission Act 2005* (ACT) s 19B(3).

[2227] *Human Rights Commission Act 2005* (ACT) s 19(c).

[2228] See GANHRI General Observations, G.O. 1.1.

[2229] *Human Rights Commission Act 2005* (ACT) s 18D(1).

[2230] *Human Rights Commission Act 2005* (ACT) 18(D)(2).

[2231] See GANHRI General Observations, G.O. 1.1.

[2232] *Human Rights Commission Act 2005* (ACT) 18(1)(c).

[2233] ACT Human Rights Commission, *Governance and Corporate Support Protocol* (Protocol, 5 July 2017) 9 <https://hrc.act.gov.au/wp-content/uploads/2019/09/HRC-Governance-Corporate-Support-Protocol-1920-update.doc>.

Quasi-judicial competency (complaints-handling)[2234]

The Disability and Community Services Commissioner deals with complaints about services for children and young people as the Commissioner does not have legislated responsibility for complaints handling.[2235] However, in practice, referrals are often made across the Commission[2236]. The Commissioner can also support people to submit a complaint to the Discrimination, Health Services, Disability and Community Services Commissioner.[2237]

1.2 Human rights mandate[2238]

Summary: the Act is substantially compliant in providing a broad mandate, with investigative and complaints-handling powers

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[2239] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[2240]

Competence and responsibilities[2241]

The Commissioner is given broad powers in relation to services for children and people in the ACT.[2242] In addition, the Commissioner can also exercise any other function given to the Commission, including encouraging resolution of complaints in relation to and improving the services provided by the Commission.[2243]

Although the functions do not specifically require the Commission to promote human rights, the Commissioner is required to act in accordance with the HR Act.[2244] The core of the Commissioners' activities include training and educating the community on human rights.[2245]

The Commissioner does have a legislative mandate under the Act, the *Children and Young People Act 2008* (ACT) and *Mental Health Act 2015* (ACT) to undertake a compliance monitoring role in respect to services for the protection of children and young people to ensure the government meets its statutory responsibilities.[2246] A function of the Commission (and therefore the Commissioner) is to identify, inquire into and review issues relating to the matters that may be complained about under the Act.[2247] The Commissioner's powers cover services, inquiries and

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[2234] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[2235] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2236] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2237] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2238] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

[2239] GAHNRI General Observations, G.O. 1.2.

[2240] GAHNRI General Observations, G.O. 1.2.

[2241] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 2.6.

[2242] *Human Rights Commission Act 2005* (ACT) s 19(B)(1).

[2243] *Human Rights Commission Act 2005* (ACT) ss 14(1), 19(B)(1).

[2244] *Human Rights Commission Act 2005* (ACT) s 15.

[2245] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 78-111 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2246] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2247] *Human Rights Commission Act 2005* (ACT) s 14(1)(d).

complaints are not limited to either public or private sectors under the Act. However, the Commission's powers are limited to ACT only and enshrined under state legislation.[2248]

Access and visits[2249]

The Commissioner visits facilities or organisations to meet with service users and also conducts inspections that involve a systemic and more rigorous examination of facility administration and standards.[2250] Visits can be announced or unannounced.[2251]

Functional immunity[2252]

The Act states that the Commissioner or its staff/person who exercises a function under the Act is not personally liable for anything done or omitted to be honestly without recklessness in exercise of a function under the Act.[2253] The civil liability that would attach to the Commissioner or staff would instead attach to the territory.[2254] The Act does not expressly provide protection form criminal liability for official actions and decisions undertaken in good faith by the Commissioner.

Powers of inquiry and investigation

The Commissioner's inquiry powers are able to be exercised without a Ministerial recommendation. The Commission can self-initiate a report on a commission-initiated consideration and give it to who it considers appropriate.[2255] The Commission can also give a third party a report if it is in the public interest to do so, and if the report is about matters of public policy, the third party has an appropriate interest in it or the third party has acted inconsistently with an applicable standard that applies to it/failed to do something that is required of it.[2256]

An example of the Commissioner exercising its inquiry powers include when the Commissioner discovered young people have been able to access medication intended for other young people at the Bimberi Youth Justice Centre.[2257] The Commissioner launched an inquiry into the lack of both supervision of young people during medication rounds and confidentiality in the medication administration. [2258] This prompted a review of medication administration practices and changes have since been implemented.[2259]

The Commission must be given access to information that it believes on reasonable grounds will be relevant to a consideration only in relation to a complaint and it is an offence if the person fails to produce the information.[2260] Any information that is given honestly and without recklessness to the Commissioner or its staff is not a breach of confidence, professional conduct/etiquette/ethics.[2261]

[2248] *Human Rights Commission Act 2005* (ACT) s 12.

[2249] GANHRI General Observations, G.O. 1.2.

[2250] ACT Human Rights Commission Annual Report 2018-2019, https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf, section B.2, pages 79.

[2251] ACT Human Rights Commission Annual Report 2018-2019, https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf, section B.2, pages 79.

[2252] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1 & 2.3.

[2253] *Human Rights Commission Act 2005* (ACT) s 100(1).

[2254] *Human Rights Commission Act 2005* (ACT) s 100(2).

[2255] *Human Rights Commission Act 2005* (ACT) s 87.

[2256] *Human Rights Commission Act 2005* (ACT) s 83.

[2257] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 102 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2258] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 102 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2259] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 102 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2260] *Human Rights Commission Act 2005* (ACT) s 73.

[2261] *Human Rights Commission Act 2005* (ACT) s 100A.

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Act is substantially compliant with this requirement, as requiring the Commissioner to consider and implement an evolving understanding of human rights

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[2262] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[2263]

The Act indirectly references the international human rights standards and/or instruments by requiring the Commission (and therefore Commissioner) to act in accordance with the HR Act.[2264] The HR Act states that public authorities such as the Commission (and therefore the Commissioner) is obliged to act consistently with human rights and give proper consideration to human rights when making decisions.[2265] The HR Act cites international conventions and covenants as sources for provisions and expressly states that international law is essential when interpreting human rights.[2266] Under the HR Act, international law is defined to include:[2267]

- the International Covenant on Civil and Political Rights and other human rights treaties to which Australia is a party;
- general comments and views of the United Nations human rights treaty monitoring bodies; and
- declarations and standards adopted by the United Nations General Assembly that are relevant to human rights.

The four main objects of the Act also focus on the promotion of human rights, including promoting community education, information and advice in relation to human rights, identifying and examining issues affecting the human rights and welfare of vulnerable groups, making recommendations on legislation, policies, practices and services affecting vulnerable groups promoting understanding and acceptance of compliance with the HR Act.[2268]

A function of the Commission (and therefore the Commissioner) is to identify, inquire into and review issues relating to the matters that may be complained about under the Act.[2269] Although the Commission is actively involved in highlighting human rights issues in proposed ACT Government policies and legislation through ACT Government consultation processes, ACT Legislative Assembly inquires and responding to draft cabinet submissions and bills,[2270] the Commissioner itself does not seem to participate in any of these.[2271] Although the Commissioner can provide feedback on cabinet submissions and provide advice through consultation for the purpose of influencing legislative change or policy reforms,[2272] the annual report suggests the

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[2262] GANHRI General Observations, G. O. 1.3.

[2263] GANHRI General Observations, G. O. 1.3.

[2264] *Human Rights Commission Act 2005* (ACT) s 15.

[2265] *Human Rights Act 2004* (ACT) s 40B.

[2266] *Human Rights Act 2004* (ACT) s 31.

[2267] See definition of "International Law" in the *Human Rights Commission Act 2005* (ACT).

[2268] *Human Rights Commission Act 2005* (ACT) s 6(2).

[2269] *Human Rights Commission Act 2005* (ACT) s 14(1)(d).

[2270] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 130 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2271] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 78-111 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2272] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

Commissioner takes on more of an advocacy role in promoting human rights rather than being involved in submissions and legislative processes.[2273]

The Commissioner does have a legislative mandate under the Act, the *Children and Young People Act 2008* (ACT) and *Mental Health Act 2015* (ACT) to undertake a compliance monitoring role in respect to services for the protection of children and young people to ensure the government meets its statutory responsibilities.[2274] It is an offence under an Act if an entity receives a report from the Commission and fails to inform the Commission how it has addressed the recommendation within a certain timeframe.[2275]

1.4 Interaction with the international human rights system

Summary: the Act is partially compliant as, whilst required to act consistently with international human rights, there is little legislated requirement to interact with the international human rights system more directly.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[2276] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[2277]

As mentioned above in section 1.3, the Commissioner takes a rights-based approach as it must act in accordance with human rights and convention referenced in the HR Act.[2278] In addition, as a public authority, the Commission (and therefore the Commissioner) is obliged to act consistently with human rights and give proper consideration to human rights when making decisions.[2279] Under the Commissioner's Decision-Making Framework Fact Sheet, the Commissioner also tries to act in accordance with relevant international conventions to which Australia is a state party.[2280]

Although the Commissioner can provide feedback on cabinet submissions and provide advice through consultation for the purpose of influencing legislative change or policy reforms,[2281] the annual report suggests the Commissioner takes on more of an advocacy role in promoting human rights rather than being involved in submissions and legislative processes.[2282]

In theory, the Commissioner can self-initiate a report on a commission-initiated consideration and give it to who it considers appropriate, including the United Nations body.[2283] The Commissioner can also give a third party such as the United Nations a report in relation to a complaint received if it is in the public interest to do so, and the report is about matters of public policy or the third party has an appropriate interest in it.[2284] These powers in relation to issuing reports can be exercised independently.[2285]

[2273] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 78-111 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2274] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2275] *Human Rights Commission Act 2005* (ACT) s 85.

[2276] GAHNRI General Observations, G.O. 1.4.

[2277] GAHNRI General Observations, G.O. 1.4.

[2278] *Human Rights Commission Act 2005* (ACT) s 15.

[2279] *Human Rights Act 2004* (ACT) s 40B.

[2280] ACT Public Advocate and Children and Young People Commissioner Decision-Making Framework Fact Sheet (Paper, 2020) 5 <https://hrc.act.gov.au/wp-content/uploads/2020/05/20200318-PACYPC-Decision-Making-Framework-FINAL.pdf>.

[2281] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2282] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 78-111 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2283] *Human Rights Commission Act 2005* (ACT) s 87.

[2284] *Human Rights Commission Act 2005* (ACT) s 83.

[2285] *Human Rights Commission Act 2005* (ACT) s 16.

1.5 Cooperation with other human rights bodies

Summary: the Act is substantially compliant with this requirement, as it engages in broad consultation and cooperation with human rights bodies

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[2286] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[2287]

The Commission maintains consultation with other bodies responsible for the promotion and protection of human rights and has formalised a number of clear and workable relationships,[2288] including the below:

- The Commissioner is a member of numerous boards and committees with responsibility for effecting policy development and/or systematic reform, including Early Childhood Strategy Inter-Directorate Committee Meeting, National Coalition on Child Safety and Wellbeing and the Children and Young People Death Review Committee.[2289]

- The Commissioner attends biannual members meetings of the Australia and New Zealand Children's Commissioners and Guardians, which aims to promote and protect the safety, wellbeing and rights of children and young people in Australia and New Zealand.[2290] The Commissioner also hosted the May 2019 biannual meeting in Canberra.[2291]

- The Commissioner is a member of the Australian Guardianship and Administration Council but it is unclear to how actively involved the Commissioner is.[2292]

- The Commissioner is a member of the Children and Young People Oversight Agencies Group, which targets systematic themes and trends emerging from discussions of its members, including the opportunities and challenges associated with facilitating effective interventions and outcomes for children and young people in the ACT.[2293] The Commissioner undertakes site visits to relevant service offerings in New South Wales and Victoria to assist the group develop an effective intervention model for children and young people with complex high-level needs.[2294]

- The Commissioner co-chairs the Blueprint for Youth Justice taskforce with former Executive Director, Children, Youth and Families in the Community Services Directorate to report and recommend pathways and supports available to children and young people who come into contact with the youth justice system.[2295]

- The Commissioner collaborates and partners with Directions ACT to establish a Local Drug Action Team, which seeks to connect children and young people at risk of developing their own patterns of substance use with recreational, sports and capacity

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[2286] GAHNRI General Observations, G.O. 1.5.

[2287] GAHNRI General Observations, G.O. 1.5.

[2288] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 82-83 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2289] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 82 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2290] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 82-83 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2291] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 83 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2292] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 83 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2293] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 83 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2294] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 82 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2295] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 85 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

building programs to assist in preventing and reducing harm from alcohol and other drugs.[2296]

1.6 Recommendations by NHRIs

Summary: the Act is partially compliant, with recommendation powers being exercised secondary to an advocacy focus.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[2297] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[2298] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[2299]

As mentioned above, although the Commissioner can provide feedback on cabinet submissions and provide advice through consultation for the purpose of influencing legislative change or policy reforms,[2300] the annual report suggests the Commissioner takes on more of an advocacy role in promoting human rights rather than being involved in submissions and legislative processes.[2301]

However, the Commissioner can investigate or review issues as a component of broader inquiries into particular aspects of service delivery for an individual or systemically.[2302] This may include investigating individual or systemic concerns referred to, or identified by, the Commissioner, thematic reviews of a particular area of service provision across a sector or facility or targeted reviews examining an individual's or group's particular experience of service provision.[2303]

The Commissioner does have a legislative mandate under the Act, the *Children and Young People Act 2008* (ACT) and *Mental Health Act 2015* (ACT) to undertake a compliance monitoring role in respect to services for the protection of children and young people to ensure the government meets its statutory responsibilities.[2304] The Commissioner publishes its reports and also actively monitors the implementation of the recommendations.[2305] For example, the Commissioner oversees residential care arrangements for children and young people and can visit any of the residential properties for quality inspections.[2306] The Commissioner has developed a framework for this assessment and also conducts consultations with young people and children in these residential care properties.[2307] The Commissioner has also commented on the ACT Government's response to the Royal Commission's child safe standards recommendations by developing an implementation strategy.[2308]

[2296] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 85 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2297] GAHNRI General Observations, G.O. 1.6.

[2298] GAHNRI General Observations, G.O. 1.6.

[2299] GAHNRI General Observations, G.O. 1.6.

[2300] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2301] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 78-111 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2302] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2303] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2304] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2305] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 78-111 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2306] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 85 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2307] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 85 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2308] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 84 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

The Disability and Community Services Commissioner deals with complaints about services for children and young people as the Commissioner does not have legislated responsibility for complaints handling.[2309] However, in practice, referrals are often made across the Commission.[2310] The Commissioner can also support people to submit a complaint to the Discrimination, Health Services, Disability and Community Services Commissioner.[2311]

1.7 Ensuring pluralism of the NHRI[2312]

Summary: the Act is substantially compliant, in promoting pluralism in the context of staffing

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[2313] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[2314]

The Commission has launched a Social Inclusion Plan for 2019 to 2022, which seeks to encourage social inclusion amongst its staff in regard to language, birthplace, ancestry, ethnicity, cultural traditions, societal structures and religion.[2315] The Commission is aiming to be a best practice employer and encourage job applications from key groups to ensure workforce reflects the diversity of the community.[2316] Under its annual report, the Commission publishes statistics on diversity in the workplace.[2317]

Full-time members[2318]

The Commissioner does not have tenure as he/she can only be appointed for a term of 5 years at a time (with an option to be reappointed).[2319] The Act is silent on whether the Commissioner has to be appointed on a full or part-time basis. The terms of appointment of the Commissioner are as agreed between the Commissioner and the Executive, subject to the *Remuneration Tribunal Act 1995* (ACT).[2320] Aside from remuneration, it seems that the Executive has discretion over what terms and conditions to appoint the Commissioner on.

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: the Act is not compliant in this respect, with no process for appointing a broader decision-making body, and a lack of transparency in appointing the Commissioner.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such

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[2309] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2310] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2311] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2312] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[2313] GANHRI General Observations, G.O. 1.7.

[2314] GANHRI General Observations, G.O. 1.7.

[2315] ACT Human Rights Commission, *Social Inclusion Plan 2019-2022* (2019) <https://hrc.act.gov.au/wp-content/uploads/2020/01/ACT-HRC-SIP-2019-2022-Revised-Jan2020.pdf>.

[2316] ACT Human Rights Commission, *Social Inclusion Plan 2019-2022* (2019) <https://hrc.act.gov.au/wp-content/uploads/2020/01/ACT-HRC-SIP-2019-2022-Revised-Jan2020.pdf>.

[2317] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 114 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2318] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

[2319] *Human Rights Commission Act 2005* (ACT) s 18D(3).

[2320] *Human Rights Commission Act 2005* (ACT) s 18D(4).

processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[2321]

As mentioned in section 1.1 above, the Act sets out that the ACT Executive appoints the Commissioner but the appointment process is not transparent.[2322] The ACT Executive only has to be satisfied that the person has the experience or expertise necessary to exercise the member's functions.[2323] As mentioned above in section 1.8, the process for how the Commissioner hires its staff is not transparent.

1.9 Political representatives on NHRIs

Summary: the Act is not compliant in this respect, with insufficient autonomy from government.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[2324] An NHRI should also be independent from government.

The Commissioner does not appear to be independent from the government as the Executive is able to exercise considerable control over the Commissioners, including in relation to the tenure and recruitment process of the Commissioner's role.

Tenure[2325]

The Act does not set out a specific duration for the Commissioner's mandate. The appointment period specified in the Act is 5 years and the person is eligible for reappointment.[2326] While this technically accords with the Paris Principles,[2327] it is arguable that this period is too short to achieve functional immunity for the Commissioners.

The Executive can end the appointment of the Commissioner if he/she contravenes an ACT law, becomes bankrupt/insolvent, is convicted of a crime or for misbehaviour.[2328] The Executive must end the Commissioner's appointment if he/she is absent for an extended amount of time or for physical/mental incapacity that substantially affects the exercise of the person's functions.[2329] This removal power is quite broad and can be relatively subjectively exercised. The Executive also does not have to provide reasons for dismissal.

Aside from remuneration, it seems that the Executive has discretion over what terms and conditions to appoint the Commissioner on.[2330] This does not provide the necessary independence and autonomy from government (an essential requirement under the Paris Principles).

Recruitment[2331]

The Commissioner is given wide discretion in deciding who to employ, but the process is relatively opaque. The Commissioner can establish advisory committees to assist them with exercising his or her functions,[2332] but neither the Act or other Commission policies/protocols cover the hiring process. The Commission Operations Protocol only states that the Commissioner is responsible for recruiting its staff in consultation with the Finance and

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[2321] GAHNRI General Observations, G.O. 1.8

[2322] *Human Rights Commission Act 2005* (ACT) s 18D(1).

[2323] *Human Rights Commission Act 2005* (ACT) s 18(D)(2).

[2324] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[2325] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1.

[2326] *Human Rights Commission Act 2005* (ACT) s 18D(3).

[2327] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3.

[2328] *Human Rights Commission Act 2005* (ACT) s 18E(1).

[2329] *Human Rights Commission Act 2005* (ACT) s 18E(2).

[2330] *Human Rights Commission Act 2005* (ACT) s 18D(4).

[2331] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

[2332] *Human Rights Commission Act 2005* (ACT) s 19(c).

Administration Manager.[2333] The Act does not explicitly restrict participation of government representatives or members of parliament in the decision-making of the Commissioner or Commission.

1.10 Adequate funding of NHRIs

Summary: the Commissioner is partially compliant, with a reasonable salary but lack of transparency over staff budgets.

NHRIs must be provided with adequate funding in order to function effectively and independently.[2334]

Funding[2335]

The Commissioner is allocated a budget by the President of the Commission that it shares with the Public Advocate.[2336] The President of the Commission sets the budget for the Commissioner after consulting with the Director-General for JACS and other commissioners, which is then published in the governance and corporate support protocol[2337]. The methodology for allocation is based on full-time equivalent staffing for the Commissioner, [2338] which is some indication that the Commissioner is provided funding in order for it to act independently.

Employee expenses and related supplies and services (including travel and training) are included in the Commissioner's budget and the Commission also has to contribute its share of costs for items shared by the Commission as a whole (including rent, electricity, phones, stationary).[2339]

The Commissioner has an office that is accessible to the public, however, it shares its office with the other Commissioners.[2340] The office appears to have adequate internet and phone access.[2341]

The Commissioner's remuneration is determined by the ACT Remuneration Tribunal,[2342] which is currently determined to be $202,111 annually.[2343] The published determination shows that the Commissioner's remuneration is similar to officeholders of a similar position.[2344] There is no transparency around staff remuneration.

1.11 Annual reports of NHRIs

Summary: the Act is substantially compliant in this respect.

Publication of reports[2345]

The Commission publishes its own annual report in line with statutory requirements and the Commission's finances are published in JACS' annual report.[2346] The annual reports are

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[2333] ACT Human Rights Commission, *Operations Protocol* (Report, June 2019) 18 <https://hrc.act.gov.au/wp-content/uploads/2019/06/Final-Operations-Protocol-June-2019.pdf>.

[2334] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[2335] See GANHRI General Observations, G.O. 2.7.

[2336] *Human Rights Commission Act 2005* (ACT) s 18A(a)(iv).

[2337] *Human Rights Commission Act 2005* (ACT) s 18A(a)(iv).

[2338] ACT Human Rights Commission, *Governance and Corporate Support Protocol* (Protocol, 5 July 2017) 8 <https://hrc.act.gov.au/wp-content/uploads/2019/09/HRC-Governance-Corporate-Support-Protocol-1920-update.doc>.

[2339] ACT Human Rights Commission, *Governance and Corporate Support Protocol* (Protocol, 5 July 2017) 8 <https://hrc.act.gov.au/wp-content/uploads/2019/09/HRC-Governance-Corporate-Support-Protocol-1920-update.doc>..

[2340] ACT Human Rights Commission, *Contact Us* (Webpage) <https://hrc.act.gov.au/contact-us/>.

[2341] ACT Human Rights Commission, *Contact Us* (Webpage) <https://hrc.act.gov.au/contact-us/>.

[2342] *Human Rights Commission Act 2005* (ACT) s 18D(4).

[2343] ACT Remuneration Tribunal, *Determination 15 of 2019, Full-Time Statutory Office Holders* (2019) 3 <https://www.remunerationtribunal.act.gov.au/__data/assets/pdf_file/0007/1458808/Determination-15-of-2019-FTSOH.pdf>.

[2344] ACT Remuneration Tribunal, *Determination 15 of 2019, Full-Time Statutory Office Holders* (2019) 3 <https://www.remunerationtribunal.act.gov.au/__data/assets/pdf_file/0007/1458808/Determination-15-of-2019-FTSOH.pdf>.

[2345] See GANHRI General Observations, G.O. 1.11.

[2346] ACT Human Rights Commission, *Operations Protocol* (Report, June 2019) 4 <https://hrc.act.gov.au/wp-content/uploads/2019/06/Final-Operations-Protocol-June-2019.pdf>.

available on the Commission and JACS' website.[2347] In addition, the Commission publishes reports at the direction of the Minister and can also self-initiate reports or provide reports to third parties in relation to its functions and powers.[2348]

Content of annual report[2349]

The annual report covers actions that the Commission and government has taken to address the Commission's 3 year strategy plan, including submissions to inquiries, commission-initiated considerations and handling of complaints.[2350]

Submission[2351]

The Commission's annual report is not required to be submitted to the Legislative Assembly. However, the Minister is required to present to the Legislative Assembly any Commission self-initiated reports or reports given by the Commission to third parties that are provided to the Minster.[2352]

2 Any criticisms made publicly about this role?

One of the Commission's functions is to receive and resolve complaints in relation to issues that come under their scope of power. The Disability and Community Services Commissioner deals with complaints about services for children and young people as the Commissioner does not have legislated responsibility for complaints handling.[2353] However, in practice, referrals are often made across the Commission.[2354] The Commissioner can also support people to submit a complaint to the Discrimination, Health Services, Disability and Community Services Commissioner.[2355]

The Commission has received 43 complaints in FY 2018-2019 in relation to services for children and young people or their carer, mostly around children protection and custody arrangements.[2356]

Other than formal complaints received by the Commission, no other public criticism regarding this role could be found online.

3 What are the best features of this role?

- The Commissioner is also the Public Advocate, which allows the Commissioner to also focus on advocating to promote human rights and the Commissioner's works and values
- The Commissioner sits under the Commission, which allows it to receive shared information from other Commissioners and rely on other Commissioners or the Commission for certain functions (such as receiving complaints). Although this is also what causes it to fall short of meeting the Paris Principles, this is an attractive option for

[2347] ACT Human Rights Commission, *Corporate documents* (Webpage) <https://hrc.act.gov.au/resources/corporate-documents/>; Justice and Community Safety Directorate, *Annual Report 2018-19* (Report, 2019) <https://justice.act.gov.au/annual-report-2018-2019>.

[2348] *Human Rights Commission Act 2005* (ACT) ss 17, 83, 87.

[2349] See GANHRI General Observations, G.O. 1.11.

[2350] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2351] See GANHRI General Observations, G.O. 1.11.

[2352] *Human Rights Commission Act 2005* (ACT) s 87.

[2353] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2354] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2355] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 79 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2356] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 52 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

a newly established commissioner role to be able to rely on the resources of existing commissioners/commission.

C. ACT Children and Young People Commissioner: Impacts

4 Impacts of the ACT Children and Young People Commissioner

Given the current Commissioner is also Public Advocate (who advocates not only for young people and children but all persons whose situation gives rise to a need for protection from abuse, exploitation or neglect),[2357] the Commissioner's recommendations that are subsequently adopted/implemented or inquiries/investigations that have led to reforms are not achieved solely within its own functions.

With that in mind, the Commissioner has made the following impact on the Community:

- The Commissioner supported the ACT Government's exploration of sector readiness in respect of child safe standards by contributing to the development of a national practice guide centred on applying a children's rights framework to complaints handling.[2358] The guide is led by the NSW Ombudsman and due for release in 2019-20.[2359]

- In order to promote the National Principles for Creating Child-Safe Organisations, the Commissioner consulted children and young people in residential care in 2017-18 and produced a report based on those consultations.[2360] Drawing on the consultation and report, the Commissioner developed a residential environment assessment framework centred on the themes of children's rights, participation and empowerment. [2361]

- In efforts to divert children and young people from the youth justice system, the Commissioner co-chairs the Blueprint for Youth Justice Taskforce.[2362] The Commissioner produced and monitors the implementation of the *Blueprint for Youth Justice in the ACT 2012-2022*, which adopts an evidence-based, trauma-informed and human rights compliant policy approach to youth justice in the ACT.[2363]

- The Commissioner discovered young people have been able to access medication intended for other young people at the Bimberi Youth Justice Centre.[2364] The Commissioner launched an inquiry into the lack of both supervision of young people during medication rounds and confidentiality in the medication administration. [2365] This prompted a review of medication administration practices and changes have since been implemented.[2366]

[2357] ACT Human Rights Commission, *Public Advocate and Children and Young People Commissioner* (Webpage) <https://hrc.act.gov.au/public-advocate/public-advocate-children-young-people-commissioner/>.

[2358] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 84 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2359] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 84 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2360] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 85 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2361] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 85 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2362] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 85 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2363] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 85 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2364] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 102 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2365] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 102 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

[2366] ACT Human Rights Commission *Annual Report 2018-2019* (Report, 2019) 102 <https://hrc.act.gov.au/wp-content/uploads/2019/10/191138-HRC-Annual-Report-2018-19-web.pdf>.

20 National Commissioner for Defence and Veteran Suicide Prevention

A. National Commissioner for Defence and Veteran Suicide Prevention: Summary table

Question	Summary response
Country/State/Territory	Australia
Commissioner entity name	National Commissioner for Defence and Veteran Suicide Prevention (the **Commissioner**)
Date established	On 5 February 2020, the Prime Minister announced that the Australian Government will establish a new National Commissioner for Defence and Veteran Suicide Prevention.[2367] The *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth)[2368] (the **Bill**) was introduced into the House of Representatives and read for the first time on 27 August 2020.[2369] The Bill was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee on 3 September 2020, for review and comment by 30 November 2020.[2370] Submissions to the Committee close on 9 October 2020.[2371] The new statutory office of the Commissioner is expected to be fully operational by July 2021.[2372]
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The Commissioner is expected to be at least partially compliant with the Paris Principles, however there are some gaps: • The Commissioner's role is set to be formally entrenched in law, pursuant to the Bill. • The Commissioner's mandate is expressed in broad terms. • The Bill provides the Commissioner with the same level of functional immunity as a Justice of the High Court, and with some guarantee of tenure. • The Bill does not comprehensively set out the terms and conditions of office for the Commissioner. • It is unclear whether the Commissioner will have complaints-handling powers. However, the Commissioner will maintain

[2367] Department of Defence, *Media Release: Powerful new body to tackle ADF and veteran suicides,* available at <https://www.minister.defence.gov.au/minister/lreynolds/media-releases/powerful-new-body-tackle-adf-and-veteran-suicides>.

[2368] Available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6587_first-reps/toc_pdf/20109b01.pdf;fileType=application%2Fpdf>.

[2369] Parliament of Australia, *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020,* available at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6587>.

[2370] Parliament of Australia, *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 and the National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020,* available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/NationalCommissioner2020>.

[2371] Parliament of Australia, *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 and the National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020,* available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/NationalCommissioner2020>.

[2372] Returned & Services League of Australia (SA Branch), *Fact Sheet: National Commissioner for Defence and Veteran Suicide Prevention,* available at <http://rslsa.org.au/wp-content/uploads/2020/02/Fact-Sheet-National-Commissioner-for-Defence-and-Veteran-Suicide-Prevention.pdf>.

Question	Summary response
	broad stakeholder engagement and may invite stakeholders to make submissions. • The Commissioner has own-motion powers of inquiry, including the power to compel access to information during in inquiry. The Bill creates offences which are designed the facilitate the Commissioner's powers. • There are no express human rights or convention references in the Bill. However, some of the Commissioner's functions and powers may arguably be extended for the promotion of these rights (at least insofar as they relate to defence and veteran deaths by suicide). • The Commissioner is empowered to publicly track, review and report on the implementation of its recommendations. • It is unclear how much of the Commissioner's reporting will be made publicly available, due to the amount of personal and intelligence information that is expected to be included in these reports. • The annual reporting requirements of Commissioner are closely aligned with the GANHRI General Observations.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	• The Office of the National Commissioner will be part of the Attorney-General's portfolio.[2373] • The Commissioner has been described as an "*independent and permanent public accountability body.*"[2374]
Accountability arrangements What is the reporting line for the role? Who sets the budget?	• The Commissioner is an independent statutory office holder.[2375] • The Commissioner is to be appointed by the Governor-General by written instrument, provided that the person is suitable for appointment because of their qualifications, training or experience.[2376] The Commissioner must be appointed on a full-time basis,[2377] and holds office for a specified period, which must not exceed 5 years.[2378] The Governor-General's power of appointment is taken to also include a power of re-appointment.[2379]

[2373] Attorney-General's Department, *National Commissioner for Defence and Veteran Suicide Prevention* (Webpage) <https://www.ag.gov.au/about-us/national-commissioner-defence-and-veteran-suicide-prevention>.

[2374] Department of Veterans' Affairs, *National Commissioner for suicide prevention* (Webpage) <https://www.dva.gov.au/newsroom/vetaffairs/vetaffairs-vol-36-no1-autumn-2020/national-commissioner-suicide-prevention>.

[2375] House of Representatives (Christian Porter MP), *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020: Second Reading Speech,* available at <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/3b94a6bd-87fb-43ab-85ed-81ebdcb4940b/0028/hansard_frag.pdf;fileType=application%2Fpdf>.

[2376] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 16.

[2377] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 17(2).

[2378] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 17(1).

[2379] *Acts Interpretation Act 1901* (Cth) s 33AA.

Question	Summary response

	• Subject to the *Remuneration Tribunal Act 1973* (Cth),[2380] the Commissioner is entitled to be paid:
	  ○ remuneration determined by the Remuneration Tribunal[2381] or, if there is not such determination, then as prescribed by the rules;[2382] and
	  ○ allowances as prescribed by the rules.
	• The Commissioner holds office on the terms and conditions determined by the Governor-General,[2383] and may be dismissed by the Governor-General on specific grounds.[2384]
	• The Commissioner must give an annual report to the Prime Minister and the Minister.[2385]
	• The Commissioner may give the Prime Minister and the Minister a report in relation to any matter relating to, or arising in connection with, the exercise of its powers or functions.[2386]
	• The Minister must cause any report received from the Commissioner to be laid before each House of Parliament within 15 sitting days.[2387] The Commonwealth must respond to the report in writing and cause the response to be laid before each House of Parliament as soon as is reasonably practicable.[2388]
	• If the Commissioner considers that adequate and appropriate action has not been taken in response to a report, it may give another report to the Prime Minister and Minister, which must also be laid before each House of Parliament within 15 sitting days.[2389]
	• The Bill provides that the *Public Governance, Performance and Accountability Act 2013* (Cth)[2390] applies to the Commissioner as if they were an official of the Attorney-General's Department.[2391]
	• The staff assisting the Commissioner are to be Australian Public Service (**APS**) employees in the Attorney-General's Department or persons engaged by, or on behalf of, the Commonwealth as contractors. The staff's services are made available to the Commissioner by the Secretary of the Department.[2392]

Qualification and Experience	• The Commissioner is to be appointed by the Governor-General by written instrument, provided that the person is

[2380] Available at <https://www.legislation.gov.au/Details/C2019C00081>.

[2381] The Remuneration Tribunal is the independent statutory body that handles the remuneration of key Commonwealth offices.

[2382] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 18.

[2383] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 17(3).

[2384] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 22; the grounds for termination include 'misbehaviour' or if unable to perform duties for some incapacity; various financial difficulties, such as bankruptcy; if the Commissioner is absent without leave beyond specified periods; if the Commissioner engages with outside paid work without approval; or if the Commissioner fails to comply with the disclosure of interest requirements set out in the Bill.

[2385] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(1).

[2386] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(2).

[2387] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(3).

[2388] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 61.

[2389] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 62.

[2390] Available at <https://www.legislation.gov.au/Details/C2013A00123>.

[2391] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 13.

[2392] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 14.

Question	Summary response
What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	suitable for appointment because of their qualifications, training or experience.[2393] • The Commissioner holds office on the terms and conditions determined by the Governor-General.[2394]

Scope
 	
What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?
	• Section 9 of the Bill sets out the main functions of the Commissioner, which include:
	  ○ inquiring into the circumstances of defence and veteran deaths by suicide; and
	  ○ making findings and recommendations following such inquiries; and
	  ○ promoting understanding of suicide risks for defence members and veterans and improving the wellbeing of defence members and veterans.
	• Section 11 of the Bill sets out the broader functions of the Commissioner, which are:
	  ○ to inquire into the circumstances of defence and veteran deaths by suicide;
	  ○ to make findings and recommendations following such inquiries, including:
	  ▪ recommendations in relation to the wellbeing of defence members and veterans and defence and veteran suicide prevention strategies; and
	  ▪ recommendations in relation to any policy, legislative, administrative or structural reforms;
	  ○ to review action taken in response to any findings or recommendations made by the Commissioner;
	  ○ to work collaboratively with State or Territory Coroners to understand issues contributing to defence and veteran deaths by suicide;
	  ○ to maintain a record of defence and veteran deaths by suicide notified to the Commissioner;
	  ○ to promote understanding of suicide risks for defence members and veterans and factors that can improve the wellbeing of defence members and veterans;
	  ○ to consider any matter related to the above functions referred to the Commissioner by the Prime Minister or the Minister;
	  ○ to do anything incidental or conducive to the performance of any of the above functions.
	• The Commissioner expressly does not have functions to:[2395]
	  ○ make findings of civil or criminal wrongdoing; or
	  ○ make findings on the cause of death in relation to a defence and veteran death by suicide.

[2393] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 16.

[2394] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 17(3).

[2395] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(2).

Question	Summary response

	• In performing their functions, the Commissioner must have regard to the need to avoid prejudicing current or future criminal or civil proceedings or other contemporaneous inquiries (such as those under the *Defence Act 1903* (Cth)[2396]).[2397]
	• The Commissioner has the power do all things necessary or convenient to be done in connection with their functions.[2398]
	• In the exercise of their powers or functions, the Commissioner should:[2399]
	  ○ take a trauma-informed and restorative approach;
	  ○ recognise that families and others affected by defence and veteran deaths by suicide have a unique contribution to make to the Commissioner's functions; and
	  ○ recognise that those families and other affected persons may wish to be consulted.

Purpose What is the purpose and objective of the role?	• The main object of the Commissioner's role is to investigate all suspected veteran and Australian Defence Force (**ADF**) deaths by suicide, in order to support the prevention of future such deaths.[2400] • The Bill aims to establish a Commissioner to deliver genuine transparency, and uncover factors and root causes contributing to ADF member and veteran deaths by suicide.[2401] • The first objective of the Commissioner is to conduct an immediate, independent review of historical veteran suicide cases, focusing on the impact of military service and veterans' post service experience.[2402] The Commissioner will be required to deliver an interim report within 12 months.

Functions and Powers
What functions and powers does the role have, in particular those promoting systemic oversight and accountability?
Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament?
	While the functions and powers of the Commissioner are yet to be set out in legislation, the Bill sets out the proposed functions and powers of the role, which are summarised below.
	• ***Reporting:***
	  ○ The Commissioner must give an annual report to the Prime Minister.[2403]
	  ○ The Commissioner may give the Prime Minister and the Minister a report in relation to any matter relating to, or arising in connection with, the exercise of its powers or functions.[2404]

[2396] Available at <https://www.legislation.gov.au/Series/C1903A00020>.

[2397] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(3).

[2398] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(4).

[2399] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 12

[2400] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 3(1); Department of Defence, *Media Release: Powerful new body to tackle ADF and veteran suicides,* available at <https://www.minister.defence.gov.au/minister/lreynolds/media-releases/powerful-new-body-tackle-adf-and-veteran-suicides>.

[2401] House of Representatives (Christian Porter MP), *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020: Second Reading Speech,* available at <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/3b94a6bd-87fb-43ab-85ed-81ebdcb4940b/0028/hansard_frag.pdf;fileType=application%2Fpdf>.

[2402] Department of Defence, *Media Release: Powerful new body to tackle ADF and veteran suicides,* available at <https://www.minister.defence.gov.au/minister/lreynolds/media-releases/powerful-new-body-tackle-adf-and-veteran-suicides>.

[2403] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(1).

[2404] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(2).

Question	Summary response
Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	○ The Minister must cause any report received from the Commissioner to be laid before each House of Parliament within 15 sitting days.[2405] ○ The Commonwealth must respond to the report in writing and cause the response to be laid before each House of Parliament as soon as is reasonably practicable.[2406] ○ If the Commissioner considers that adequate and appropriate action has not been taken in response to a report, it may give another report to the Prime Minister and Minister, which must also be laid before each House of Parliament within 15 sitting days.[2407] • ***Promotion of human rights:*** there are no human rights or convention references in the Bill. However, the Commissioner has powers to make recommendations,[2408] and to promote the understanding of suicide risks for defence members and veterans.[2409] • ***Review of Laws:*** one of the main functions of the Commissioner is to make recommendations in relation to any policy, legislative, administrative or structural reforms.[2410] • ***Complaints handling:*** the Commissioner does not appear to have an express a complaints-handling power. ○ However, as part of the Commissioner's inquiry powers, the Commissioner may inquire into the quality and effectiveness of responses to any complaints made by the person (or their family, friends or associates) in relation to that person's health and wellbeing, or access to support services.[2411] ○ Furthermore, in exercising their functions, the Commissioner should recognise that persons affected by veteran deaths by suicide may wish to be consulted.[2412] This function could foreseeably provide an avenue for complaints about existing policies and procedures. ○ The Government also simultaneously announced the establishment of a Veteran Family Advocate (**VFA**) within the portfolio of the Department of Veteran Affairs.[2413] The VFA will be set up to undertake engagement, liaison and advocacy across the veterans' sector, drawing on the advice of veterans' families.[2414] • ***Inquiry and Reporting:*** one of the Commissioner's main functions is to inquire into the circumstances of defence and

[2405] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(3).

[2406] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 61.

[2407] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 62.

[2408] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b).

[2409] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(f).

[2410] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b)(ii).

[2411] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 26(1)(d).

[2412] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 12(3)(b).

[2413] Prime Minister of Australia, *Press conference – Announcement of a National Commissioner for Defence and Veteran Suicides,* available at <https://www.pm.gov.au/media/press-conference-announcement-national-commissioner-defence-and-veteran-suicides>.

[2414] Parliament of Australia, *Explanatory Memorandum: Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Bill 2020,* available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6537_ems_c91d76a0-879c-44c6-8148-b5ffc70a88d3/upload_pdf/737714.pdf;fileType=application%2Fpdf>.

Question	Summary response
	veteran deaths by suicide,[2415] and to make recommendations following such inquiries.[2416] ○ The Commissioner may perform inquiries on the Commissioner's own initiative.[2417] ○ When asked about the remit of these inquiry powers, the Prime Minister confirmed that the Commissioner will be able to look into "*all the factors that may have been contributing*", which could include other factors such as veterans' homelessness.[2418] ○ The Commissioner has a range of powers to obtain information, including holding hearings (including private hearings in certain circumstances),[2419] requiring the giving of information or the production of documents,[2420] and applying for search warrants.[2421] ○ Commonwealth, State and Territory bodies are expressly authorised to disclose information to the Commissioner for the purpose of assisting in the performance or exercise of the Commissioner's functions or powers.[2422] ○ The Bill also sets out a number of offences (with penalties of imprisonment) relating to:[2423] ▪ failing to attend a hearing, give information or a statement, or produce documents or things;[2424] ▪ refusing to swear an oath, make an affirmation or answer a question;[2425] ▪ witness protections (such as dismissal of a witness);[2426] ▪ contempt of the Commissioner;[2427] and ▪ unauthorised publication, use or disclosure of information.[2428] • ***Regard to human rights instruments:*** there are no human rights or convention references in the Bill.
Budget What is the annual budget for the role?	• When the role of the Commissioner was first announced, the Government stated that it would invest an initial $40 million to support the Commissioner's work and that this amount will be expanded to ensure the Commissioner has whatever resources it needs.[2429]

[2415] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(a).

[2416] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b).

[2417] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 26(2).

[2418] Prime Minister of Australia, *Press conference – Announcement of a National Commissioner for Defence and Veteran Suicides,* available at <https://www.pm.gov.au/media/press-conference-announcement-national-commissioner-defence-and-veteran-suicides>.

[2419] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 27, 28.

[2420] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 30, 32.

[2421] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 36, 37.

[2422] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 25, 40, 41.

[2423] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 44.

[2424] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 45.

[2425] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 46-50.

[2426] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 51.

[2427] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 52.

[2428] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 53-55.

[2429] Department of Defence, *Media Release: Powerful new body to tackle ADF and veteran suicides,* available at <https://www.minister.defence.gov.au/minister/lreynolds/media-releases/powerful-new-body-tackle-adf-and-veteran-suicides>.

Question	Summary response

	• However, the July 2020 Economic and Fiscal Update states that the Government will provide $31 million over five years from 2019-20 (including capital of $1.9 million over two years from 2019-20) to:
	  ○ establish the Commissioner role;
	  ○ allow the Commissioner to undertake an independent review of historical cases of Defence and Veteran deaths by suicide; and
	  ○ establish the VFA.[2430]
	• Furthermore, the Explanatory Memorandum for the Bill (and the Explanatory Memorandum for the *National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020* (Cth)[2431]) states that $42.7 million has been provided over five years to support the establishment and operation of the Commissioner's function.[2432] These costs also include:
	  ○ funding for a one-off review of historical ADF member and veteran deaths by suicide, to be led by the Commissioner; and
	  ○ funding for a dedicated legal financial assistance scheme.

Legislative Requirements
How is the role enshrined in legislation? Specify and link the applicable legislation.
	• The powers of the Commissioner will be set out in legislation, which is currently being developed. The relevant Bills are the:
	  ○ *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth), which establishes the role and outlines its functions; and
	  ○ *National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020* (Cth), which operates in conjunction with the Bill and amends various other legislation in order to enshrine the Commissioner's role and powers.
	• The Government has announced that an Interim National Commissioner will be appointed, pending the passage of legislation, to enable the independent review of past cases to commence. [2433]

Most recent annual report or equivalent document (link)	N/A

[2430] The Honourable Josh Frydenberg MP and Senator the Honourable Mathias Cormann, *Economic and Fiscal Update* (July 2020) 172 <https://budget.gov.au/2020-efu/downloads/JEFU2020.pdf>.

[2431] Available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6588_first-reps/toc_pdf/20108b01.pdf;fileType=application%2Fpdf>.

[2432] House of Representatives, *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020: Explanatory Memorandum* (page 4), available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6587_ems_8f4f6f18-1d81-479c-8f51-e038a1e734fa/upload_pdf/746506.pdf;fileType=application%2Fpdf>; House of Representatives, *National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020: Explanatory Memorandum* (page 2), available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6588_ems_2b2bbcd7-78cc-42df-af78-aea61086d668/upload_pdf/746507.pdf;fileType=application%2Fpdf>.

[2433] Attorney-General's Department, *National Commissioner for Defence and Veteran Suicide Prevention,* available at <https://www.ag.gov.au/about-us/national-commissioner-defence-and-veteran-suicide-prevention>.

B. National Commissioner for Defence and Veteran Suicide: Further analysis

1 Essential requirements of the Paris Principles

Note: As the proposed enacting legislation has not yet been released, the below analysis is necessarily limited. We have based our analysis on the Bill and the announcements regarding the role to date, however the analysis is subject to the passing of the enacting legislation.

4.1 The establishment of NHRIs[2434]

Summary: the Bill partially with the Paris Principles on the establishment of NHRIs.

Entrenched in law[2435]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[2436] The role of the Commissioner is set to be formally entrenched in law,[2437] pursuant to the Bill. The Bill broadly sets out the Commissioner's mechanisms of appointment and selection,[2438] and quasi-judicial competency.[2439]

However, the Bill does not comprehensively set out the terms and conditions of office, and states that the Commissioner holds office on the terms and conditions determined by the Governor-General.[2440]

Mandate and powers[2441]

The Bill broadly sets out the Commissioner's powers, including:[2442]

- to inquire into the circumstances of defence and veteran deaths by suicide;
- to make findings and recommendations following such inquiries, including:
    - recommendations in relation to the wellbeing of defence members and veterans and defence and veteran suicide prevention strategies; and
    - recommendations in relation to any policy, legislative, administrative or structural reforms;
- to review action taken in response to any findings or recommendations made by the Commissioner;
- to work collaboratively with State or Territory Coroners to understand issues contributing to defence and veteran deaths by suicide;
- to maintain a record of defence and veteran deaths by suicide notified to the Commissioner;

[2434] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[2435] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2436] GANHRI General Observations, G.O. 1.1.

[2437] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2438] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) Part 2, Division 3.

[2439] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 26.

[2440] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 17(3).

[2441] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2442] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11.

- to promote understanding of suicide risks for defence members and veterans and factors that can improve the wellbeing of defence members and veterans;
- to consider any matter related to the above functions referred to the Commissioner by the Prime Minister or the Minister;
- to do anything incidental or conducive to the performance of any of the above functions.

In performing their functions, the Commissioner must have regard to the need to avoid prejudicing current or future criminal or civil proceedings or other contemporaneous inquiries, [2443] such as inquiries under the *Defence Act 1903* (Cth).[2444]

The Commissioner has the power do all things necessary or convenient to be done in connection with their functions,[2445] and in the exercise of their powers or functions, the Commissioner should:[2446]

- take a trauma-informed and restorative approach;
- recognise that families and others affected by defence and veteran deaths by suicide have a unique contribution to make to the Commissioner's functions; and
- recognise that those families and other affected persons may wish to be consulted.

Appointment mechanisms[2447]

While the appointment mechanisms for the Commissioner are set out in the Bill,[2448] it is arguable that they are not sufficiently transparent. The only clear requirement is that the person is "*suitable for appointment*" because of their "*qualifications, training or experience".*[2449]

Quasi-judicial competency (complaints-handling)[2450]

The Commissioner does not appear to have an express a complaints-handling power under the Bill. However, the Commissioner does have some functions that could foreseeably provide an avenue for complaints about existing policies and procedures, for example:

- as part of the Commissioner's inquiry powers, the Commissioner may inquire into the quality and effectiveness of responses to any complaints made by the person (or their family, friends or associates) in relation to that person's health and wellbeing, or access to support services;[2451] and
- in exercising their functions, the Commissioner should recognise that persons affected by defence a veteran deaths by suicide may wish to be consulted.[2452]

Furthermore, at the time the Commissioner role was first announced, the Government also simultaneously announced the establishment of a Veteran Family Advocate (**VFA**) within the

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[2443] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(3).

[2444] Available at <https://www.legislation.gov.au/Series/C1903A00020>.

[2445] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(4).

[2446] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 12.

[2447] See GANHRI General Observations, G.O. 1.1.

[2448] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) Part 2, Division 3.

[2449] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 16(2).

[2450] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[2451] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 26(1)(d).

[2452] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 12(3)(b).

portfolio of the Department of Veteran Affairs.[2453] The Government has already introduced an amendment Bill to establish the VFA position as part of the existing Repatriation Commission and Military Rehabilitation and Compensation Commission.[2454]

The VFA will undertake engagement, liaison and advocacy across the veterans' sector, drawing on the advice of veterans' families.[2455] The Explanatory memorandum for the Bill describes the VFA position as "*an important aspect of the Prime Minister's announcement on 5 February 2020 regarding the establishment of a National Commissioner for Defence and Veteran Suicide Prevention*".[2456] While it remains to be seen how the Commissioner and VFA roles are expected to interact, it may be that the VFA will embody a more public-facing role than the Commissioner.

4.2 Human rights mandate[2457]

Summary: the Bill is largely compliant with the Paris Principles with respect to human rights mandate.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[2458] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[2459]

Competence and responsibilities[2460]

As is set out above, the proposed mandate for the Commissioner appears to be quite broad.[2461] The broad mandate would allow the Commissioner to involve themselves in a wide range of human rights issues, provided that those issues related to circumstances of defence and veteran deaths by suicide.

Powers of inquiry and investigation

One of the Commissioner's main functions is to inquire into the circumstances of defence and veteran deaths by suicide,[2462] and to make recommendations following such inquiries.[2463] These powers of inquiry are able to be exercised without a Ministerial recommendation (i.e. on the Commissioner's own initiative). [2464]

[2453] Prime Minister of Australia, *Press conference – Announcement of a National Commissioner for Defence and Veteran Suicides,* available at <https://www.pm.gov.au/media/press-conference-announcement-national-commissioner-defence-and-veteran-suicides>

[2454] Parliament of Australia, *Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Bill 2020,* available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6537_first-reps/toc_pdf/20055b01.pdf;fileType=application%2Fpdf>.

[2455] Parliament of Australia, *Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Bill 2020: Explanatory Memorandum,* available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6537_ems_c91d76a0-879c-44c6-8148-b5ffc70a88d3/upload_pdf/737714.pdf;fileType=application%2Fpdf>.

[2456] Parliament of Australia, *Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Bill 2020: Explanatory Memorandum,* available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6537_ems_c91d76a0-879c-44c6-8148-b5ffc70a88d3/upload_pdf/737714.pdf;fileType=application%2Fpdf>.

[2457] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

[2458] See Paris Principles, *Competence and responsibilities*; GANHRI General Observations, G.O. 2.6.

[2459] GAHNRI General Observations, G.O. 1.2.

[2460] See Paris Principles, *Competence and responsibilities,* principle 2; GANHRI General Observations, G.O. 2.6.

[2461] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11.

[2462] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(a).

[2463] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b).

[2464] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 26(2).

The Bill sets out broad circumstances that the Commissioner may inquire into (such as a person's ADF service, and any available support services), however the Bill also states that the Commissioner's inquiries are not limited to these circumstances.[2465] In fact, when asked about the remit of these inquiry powers, the Prime Minister confirmed that the Commissioner will be able to look into "*all the factors that may have been contributing*", which could include other factors such as veterans' homelessness.[2466]

The Commissioner's powers with respect to inquiries are broad. For example, the Commissioner may:

- hold a public hearing as the Commissioner sees fit, and in doing so, the Commissioner is not bound by the rules of evidence;[2467]
- hold a private hearing, provided that the Commissioner is satisfied that the information to be disclosed is personal and private or operationally sensitive;[2468]
- summon a person, by written notice, to attend a hearing in order to give notice or produce documents (including documents subject to legal professional privilege);[2469]
- require a witness to take an oath or make an affirmation;[2470]
- give written notice requiring a person to provide information or produce documents (including information or documents subject to legal professional privilege);[2471] and/or
- apply for search warrants (where the Commissioner believes on reasonable grounds that if a summons were issued, the document may be concealed, lost, mutilated or destroyed).[2472]

Witnesses appearing at hearings before the Commissioner may be paid a reasonable amount for the expenses of the witness' attendance.[2473] A person who complies with a summons or a notice requiring information or documents does not commit an offence under a secrecy provision by complying.[2474]

Furthermore, Commonwealth bodies and officers may disclose information for the purposes of assisting the Commissioner,[2475] and are authorised to do so despite anything in a law of a State or Territory or general law that prohibits disclosure.[2476] The same applies to a State body or officer, or Territory body or officer and a Coroner or a Coroner's court.[2477]

In the "Legislation Pack" released by the Australian Government, the Commissioner's powers are compared to the powers of a Royal Commission as follows:[2478]

[2465] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 26(1).

[2466] Prime Minister of Australia, *Press conference – Announcement of a National Commissioner for Defence and Veteran Suicides,* available at <https://www.pm.gov.au/media/press-conference-announcement-national-commissioner-defence-and-veteran-suicides>.

[2467] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 27.

[2468] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 28.

[2469] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 30.

[2470] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 31.

[2471] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 32.

[2472] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 36-37.

[2473] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 39.

[2474] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 58(1).

[2475] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 40.

[2476] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 40, 58(2).

[2477] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 41, 58(2).

[2478] Attorney General's Department, *The National Commissioner for Defence and Veteran Suicide Prevention* (August 2020) 2 <http://rarasa.org.au/wp-content/uploads/2020/08/Legislation-Pack-National-Commissioner-for-Defence-and-Veteran-Suicide....pdf>.

	National Commissioner	Royal Commission
Independent from Government	✓	✓
Makes findings and recommendations	✓	✓
Power to require documents and witness statements to be given	✓	✓
Power to summon witnesses and hold public hearings	✓	✓
Power to take evidence on oath or affirmation	✓	✓
May receive information and evidence in private	✓	✓
Power to protect evidence from publication if necessary	✓	✓
Power to refer potential breaches of the law to enforcement bodies	✓	✓
Established as a permanent body	✓	✗

The Bill also sets out a number of offences intended to promote the Commissioner's powers and functions,[2479] including for the following:

- Failure to attend a hearing after being summoned, or to give information or a statement, or produce documents or things after being so requested (punishable by two years' imprisonment).[2480] This offence does not apply if the person has a reasonable excuse,[2481] or if the information, statement or document is not relevant.[2482]
    - Legal professional privilege is not considered to be a "reasonable excuse",[2483] unless a court has found the information, statement or document to be privileged, or one of the other exceptions under section 48 applies.
    - An individual is not excused from giving information, evidence or a statement, or from producing a thing, on the ground that it might tend to incriminate the individual in relation to an offence (unless the individual has already been charged with that offence).[2484] However, any such thing that is produced is not admissible in evidence in most criminal proceedings (with few exceptions).[2485]
- Refusal to swear an oath, make an affirmation or answer a question after being so requested (punishable by two years' imprisonment).[2486]
- Dismissal, discipline or prejudice of a witness for (or on account of) that witness having appeared as a witness, given evidence or given information or a document to the Commissioner (punishable by 10 penalty units or one years' imprisonment).[2487]

[2479] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 44.
[2480] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 45.
[2481] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 45(3).
[2482] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 45(4).
[2483] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 49.
[2484] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 50.
[2485] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 50(3).
[2486] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 46.
[2487] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 51.

- Engaging in conduct that obstructs or hinders the Commissioner in the performance of their functions or powers (punishable by two penalty units or three months' imprisonment).[2488]

- Engaging in conduct that would constitute contempt of court if the Commissioner were a court of record (punishable by two penalty units or three months' imprisonment).[2489]

- Publishing information that the Commissioner has directed not be published, produced or disclosed (punishable by 3 years' imprisonment).[2490]

Functional immunity[2491]

The Bill provides that the Commissioner has, in the performance or exercise of their legislated functions and powers, the same protection and immunity as a Justice of the High Court.[2492]

Guarantee of tenure[2493]

The Bill sets out a specific duration for the Commissioner's mandate, which is the period specified in the instrument of appointment (not exceeding 5 years).[2494] While the Bill contains no express references to re-appointment, the Governor-General's power of appointment is taken to also include a power of re-appointment.[2495]

Furthermore, the Commissioner may only be dismissed by the Governor-General on the following specified grounds:[2496]

- for misbehaviour;

- if the Commissioner is unable to perform the duties of his or her office because of physical or mental incapacity;

- if the Commissioner becomes bankrupt, or applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, or compounds with his or her creditors, or makes an assignment of remuneration for the benefit of his or her creditors;

- if the Commissioner is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months;

- if the Commissioner engages in paid employment outside the duties of his or her office without the approval of the Minister; or

- if the Commissioner fails, without reasonable excuse, to comply with s 23 of the Bill (which requires the Commissioner to provide a disclosure under s 29 of the *Public Governance, Performance and Accountability Act 2013* (Cth)[2497]).

While this complies with the Paris Principles, the Bill itself does not expressly require the Governor-General to provide specific reasons for the dismissal, nor does the Bill expressly provide the Commissioner with an ability to contest any dismissal.

[2488] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 52(1).

[2489] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 52(2).

[2490] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 53-55.

[2491] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.3.

[2492] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 61(1).

[2493] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1.

[2494] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 17(1).

[2495] *Acts Interpretation Act 1901* (Cth) s 33AA.

[2496] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 22.

[2497] Available at <https://www.legislation.gov.au/Details/C2013A00123>.

4.3 Encouraging ratification or accession to international human rights instruments

Summary: the Bill is partially compliant with the Paris Principles in regards to encouraging ratification or accession to international human rights instruments, however actual compliance may be difficult to assess without assessing the Commissioner's activities in practice.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[2498] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[2499]

The Bill does not explicitly reference international human rights standards and/or instruments. However, the Commissioner is empowered to:

- inquire into the circumstances of defence and veteran deaths by suicide;[2500]
- make recommendations in relation to the wellbeing of defence members and veterans and defence and veteran suicide prevention strategies;[2501]
- make recommendations in relation to any policy, legislative, administrative or structural reforms;[2502]
- promote understanding of suicide risks for defence members and veterans and factors that can improve the wellbeing of defence members and veterans;[2503] and
- do anything incidental or conducive to the performance of any of the above functions.[2504]

Arguably, these functions could be used to promote discussion about any policies, legislation, administrative provisions or structural provisions that are inconsistent with the requirements of international human rights standards, particularly with respect to defence and veteran deaths by suicide. However, it remains to be seen how these powers are used in practice.

4.4 Interaction with the international human rights system

Summary: the Bill is partially compliant with the Paris Principles with respect to interaction with the international human rights system, however actual compliance may be difficult to assess without assessing the Commissioner's activities in practice.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[2505] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[2506]

While there are no human rights or convention references in the Act, the Commissioner will be empowered to:

[2498] GANHRI General Observations, G. O. 1.3.

[2499] GANHRI General Observations, G. O. 1.3.

[2500] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(a).

[2501] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b)(i).

[2502] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b)(ii).

[2503] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(f).

[2504] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(h).

[2505] GAHNRI General Observations, G.O. 1.4.

[2506] GAHNRI General Observations, G.O. 1.4.

- make recommendations in relation to the wellbeing of defence members and veterans and defence and veteran suicide prevention strategies;[2507]
- make recommendations in relation to any policy, legislative, administrative or structural reforms;[2508]
- promote understanding of suicide risks for defence members and veterans and factors that can improve the wellbeing of defence members and veterans;[2509] and
- do anything incidental or conducive to the performance of any of the above functions.[2510]

The Commissioner's powers to make recommendations and promote understanding could arguably be used to promote recommendations made by international human rights bodies,[2511] provided of course that such recommendations related in some way to the prevention of defence and veteran deaths by suicide.

4.5 Cooperation with other human rights bodies

Summary: the Bill is partially compliant with the Paris Principles with respect to cooperation with other human rights bodies, however actual compliance may be difficult to assess without assessing the Commissioner's activities in practice.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[2512] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[2513]

It remains to be seen whether the Commissioner will develop and maintain consultation with other bodies responsible for the promotion and protection of human rights.[2514]

However, based on the announcements to date, it appears that the Commissioner will at least be regularly and constructively engaging with relevant stakeholders.[2515] For example:

- in performing its functions, the Commissioner will work cooperatively with State and Territory Coroners to understand issues contributing to defence and veteran deaths by suicide;[2516]
- affected families will be engaged in the upcoming interim review of historical cases of Defence and Veteran deaths by suicide and will be given an opportunity to participate and tell their stories;[2517]

[2507] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b)(i).

[2508] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b)(ii).

[2509] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(f).

[2510] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(h).

[2511] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.4.

[2512] GAHNRI General Observations, G.O. 1.5.

[2513] GAHNRI General Observations, G.O. 1.5.

[2514] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[2515] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[2516] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(h); Department of Veterans' Affairs, *National Commissioner for suicide prevention* (August 2020) <https://www.dva.gov.au/newsroom/vetaffairs/vetaffairs-vol-36-no1-autumn-2020/national-commissioner-suicide-prevention>.

[2517] Department of Veterans' Affairs, *National Commissioner for suicide prevention,* available at <https://www.dva.gov.au/newsroom/vetaffairs/vetaffairs-vol-36-no1-autumn-2020/national-commissioner-suicide-prevention>.

- a National Coronial Centre for Defence and Veteran Suicides will be established in order to support the Commissioner in identifying broader system issues for further inquiry;[2518] and

- the Commissioner may have some interaction with the VFA. Although the exact relationship between the two roles remains unclear, it has been suggested that the VFA will work closely with the Commissioner so that the Commissioner's findings can be "*rapidly translated into action*".[2519]

The Commissioner's capacity for stakeholder engagement is corroborated by a historical job listing for various opportunities across the Commissioner's Office.[2520] The listing states that:

> "*Engagement with the Australian Defence Force member and veteran community, and their families, will be a strong focus for the Office of the National Commissioner. The contribution of families, veterans, advocacy groups, and other interested stakeholders will be of key importance to the work of the National Commissioner. Strong engagement will also be needed across a range of Australian Government agencies, State and Territory Governments, and Coroners, to ensure the effective operations of the National Commissioner*."

Furthermore, the listing includes the following as functions of the Office:

> "*Community engagement – including engaging with the public, answering phone calls from the public, responding to queries from the public, secretariat, and organising meetings, round tables, hearings and the like.*
>
> *[…]*
>
> *Counselling – including counselling and support for members of the public engaging with the National Commissioner, and wellbeing and vicarious trauma prevention and support activities for staff."*

4.6 Recommendations by NHRIs[2521]

Summary: the Bill largely complies with the Paris Principles on recommendations by NHRIs.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[2522] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[2523] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[2524]

The Commissioner's main functions include:

- inquiring into the circumstances of defence and veteran deaths by suicide;[2525]

[2518] Attorney-General for Australia, *Council of Attorneys-General (CAG) communiqué* (Webpage) <https://www.attorneygeneral.gov.au/media/media-releases/council-attorneys-general-cag-communique-27-july-2020>.

[2519] Attorney General's Department, *The National Commissioner for Defence and Veteran Suicide Prevention* (August 2020) 7 <http://rarasa.org.au/wp-content/uploads/2020/08/Legislation-Pack-National-Commissioner-for-Defence-and-Veteran-Suicide....pdf>.

[2520] Attorney-General's Department, *494675/ODVSP - Various Opportunities – Attorney-General's Department - Office of the National Commissioner for Defence and Veteran Suicide Prevention - APS Level 3 to Executive Level 2,* available at <https://webcache.googleusercontent.com/search?q=cache:W1Yd6iCuX1YJ:https://careers.pageuppeople.com/649/ci/en/job/494675/494675odvsp-various-opportunities-attorneygenerals-department-office-of-the-national-commissioner-for-defence-and-veteran-suicide-prevention-aps-level-3-to-executive-level-2+&cd=16&hl=en&ct=clnk&gl=au>.

[2521] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.6.

[2522] GAHNRI General Observations, G.O. 1.6.

[2523] GAHNRI General Observations, G.O. 1.6.

[2524] GAHNRI General Observations, G.O. 1.6.

[2525] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(a).

- making recommendations in relation to the wellbeing of defence members and veterans and defence and veteran suicide prevention strategies;[2526]
- making recommendations in relation to any policy, legislative, administrative or structural reforms;[2527] and
- reviewing action taken in response to any findings or recommendations made by the Commissioner.[2528]

When asked about the remit of the Commissioner's inquiry powers, the Prime Minister confirmed that the Commissioner will be able to look into "*all the factors that may have been contributing*", which could include other factors such as veterans' homelessness.[2529] This may suggest that human rights matters can be the subject of recommendations by the Commissioner, provided that such matters are a contributing factor to defence and veteran deaths by suicide.

The Commissioner is also empowered to give the Prime Minister and the Minister a report in relation to any matter relating to, or arising in connection with, the exercise of its powers or functions.[2530] Such reports would therefore include these recommendations (if any). The Minister must then cause the Commissioner's reports to be laid before each House of Parliament within 15 sitting days.[2531]

As an additional accountability measure, the Commonwealth must respond to the Commissioner's reports in writing and must cause the response to be laid before each House of Parliament as soon as is reasonably practicable.[2532]

Furthermore, if the Commissioner considers that adequate and appropriate action has not been taken in response to any of the Commissioner's reports, it may give another report to the Prime Minister and Minister, which must also be laid before each House of Parliament within 15 sitting days.[2533]

4.7 Ensuring pluralism of the NHRI[2534]

Summary: the Bill and the Commissioner partially comply with the Paris Principles with respect to ensuring pluralism of the NHRI.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[2535] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[2536]

Where the NHRI is a single-member, such as the Commissioner, it is important that the NHRI is representative of diverse segments of society.[2537] However, there are no clear requirements for

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[2526] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b)(i).

[2527] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(b)(ii).

[2528] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 11(1)(c).

[2529] Prime Minister of Australia, *Press conference – Announcement of a National Commissioner for Defence and Veteran Suicides,* available at https://www.pm.gov.au/media/press-conference-announcement-national-commissioner-defence-and-veteran-suicides

[2530] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(2).

[2531] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(3).

[2532] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 61.

[2533] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 62.

[2534] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[2535] GANHRI General Observations, G.O. 1.7.

[2536] GANHRI General Observations, G.O. 1.7.

[2537] GANHRI General Observations, G.O. 1.7.

the Commissioner's role under the Bill, other than that the person is "*suitable for appointment*" because of their "*qualifications, training or experience".*[2538]

There is no process which enables diverse societal groups (such as by gender, ethnicity and minority status) to be involved in the appointment of the Commissioner. At least, it is not expressly stated in the Bill.

Staff of the Commissioner

The staff assisting the Commissioner are to be Australian Public Service (**APS**) employees in the Attorney-General's Department or persons engaged by, or on behalf of, the Commonwealth as contractors. The staff's services are to be made available to the Commissioner by the Secretary of the Attorney-General's Department.[2539]

We note that one of the Australian Public Service (**APS**) Employment Principles which agency heads must uphold and promote[2540] is to recognise the diversity of the Australian community and foster diversity in the workplace.[2541]

We have located a historical job listing for various opportunities across the Office of the Commissioner.[2542] The job listing was open from 2 July 2020 to 19 July 2020. It noted:

- that staff of the Office will be employees of the Attorney-General's Department;
- that the range and nature of work within the Office requires a workforce that reflects Australia's diverse society; and
- that the Department is committed to providing a flexible, diverse and inclusive workplace.

The fact that staff will be employees of the Attorney-General's Department may undermine the principle of institutional independence set out in the Paris Principles.[2543] However, the Department's policies on diversity may go towards ensuring the requirement of pluralism in the Commissioner's office.[2544]

***Full-time members*[2545]**

The Commissioner is to be appointed by the Governor-General by written instrument,[2546] on a full-time basis.[2547] The Bill sets out a specific duration for the Commissioner's mandate, which is the period specified in the instrument of appointment (not exceeding 5 years).[2548] Although not express in the Bill, the Governor-General's power of appointment in respect of the Commissioner is taken to also include a power of re-appointment.[2549] The Bill does not appear to limit re-

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[2538] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 16(2).

[2539] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 14.

[2540] *Public Service Act 1999* (Cth) s 12, available at <https://www.legislation.gov.au/Details/C2019C00057>.

[2541] *Public Service Act 1999* (Cth) s 10A(g).

[2542] Attorney-General's Department, *494675/ODVSP - Various Opportunities – Attorney-General's Department - Office of the National Commissioner for Defence and Veteran Suicide Prevention - APS Level 3 to Executive Level 2,* available at <https://webcache.googleusercontent.com/search?q=cache:W1Yd6iCuX1YJ:https://careers.pageuppeople.com/649/ci/en/job/494675/494675odvsp-various-opportunities-attorneygenerals-department-office-of-the-national-commissioner-for-defence-and-veteran-suicide-prevention-aps-level-3-to-executive-level-2+&cd=16&hl=en&ct=clnk&gl=au>.

[2543] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

[2544] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.7.

[2545] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

[2546] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 16(1).

[2547] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 17(2).

[2548] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 17(1).

[2549] See *Acts Interpretation Act 1901* (Cth) s 33AA.

appointment in any way, which may not constitute appropriate mechanisms of pluralism, particularly given the Commissioner is a single-body NHRI.

The Bill states that the Commissioner is entitled to be paid remuneration, as determined by the Remuneration Tribunal or, in the absence of a determination, by the rules.[2550] The Remuneration Tribunal is the independent statutory body that handles the remuneration of key Commonwealth offices.

The Bill does not comprehensively set out the terms and conditions of office, and states that the Commissioner holds office on the terms and conditions determined by the Governor-General.[2551]

4.8 Selection and appointment of the decision-making body of NHRIs

Summary: the Bill is sparsely drafted and largely does not comply with the Paris Principles with respect to the selection and appointment of the decision-making body of NHRIs.

The GANHRI Observations emphasise the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that position is filled by an applicant who has undergone a fair and merit-based selection process.[2552]

The appointment of the Commissioner is to be made by the Governor-General.[2553] While the appointment mechanisms for the Commissioner are set out in the Bill,[2554] the only clear requirement is that the person the person is "*suitable for appointment*" because of their "*qualifications, training or experience".*[2555] The Bill does not provide further information on the procedures behind the appointment and we have been unable to locate any statutory or administrative material available as to how the Governor-General assesses this criteria, which raises concerns about whether the appointment process is sufficiently clear, transparent, and participatory.[2556]

However, we note that job vacancies within the Office of the Commissioner were publicly advertised on the Attorney-General's website.[2557] The job listing set out clear and publicly available criteria for the various roles, as well as referring applicants to a defined set of performance expectations.[2558] Nevertheless, as outlined above, the fact that the Attorney-General's Department was the hiring body for the Commissioner's staff may undermine the principle of institutional independence set out in the Paris Principles.[2559]

4.9 Political representatives on NHRIs

Summary: the Bill partially complies with the Paris Principles with respect to political representatives on NHRIs.

[2550] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 18(1).

[2551] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 17(3).

[2552] GANHRI General Observations, G.O. 1.8.

[2553] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 16(1).

[2554] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) Part 2, Division 3.

[2555] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 16(2).

[2556] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.8.

[2557] Attorney-General's Department, *494675/ODVSP - Various Opportunities – Attorney-General's Department - Office of the National Commissioner for Defence and Veteran Suicide Prevention - APS Level 3 to Executive Level 2,* available at <https://webcache.googleusercontent.com/search?q=cache:W1Yd6iCuX1YJ:https://careers.pageuppeople.com/649/ci/en/job/494675/494675odvsp-various-opportunities-attorneygenerals-department-office-of-the-national-commissioner-for-defence-and-veteran-suicide-prevention-aps-level-3-to-executive-level-2+&cd=16&hl=en&ct=clnk&gl=au>.

[2558] See Attorney-General's Department, *Performance expectations,* available at <https://www.ag.gov.au/about-us/careers/performance-expectations>.

[2559] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[2560]

As outlined above, there is a lack of transparency around the appointment and selection process for the Commissioner. However, the Bill does provide that the Commissioner must not engage in paid work outside the duties of his or her office without the approval of the Minister,[2561] and the Governor-General must terminate the Commissioner's appointment if the Commissioner fails to comply with this provision.[2562] These provisions might operate to prevent a member of parliament from holding the role of Commissioner at the same time.

Tenure[2563]

As is set out above, the Commissioner's grounds for dismissal are limited – the Governor-General may only terminate the Commissioner's employment on the following specified grounds:[2564]

- for misbehaviour;
- if the Commissioner is unable to perform the duties of his or her office because of physical or mental incapacity;
- if the Commissioner becomes bankrupt, or applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, or compounds with his or her creditors, or makes an assignment of remuneration for the benefit of his or her creditors;
- if the Commissioner is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months;
- if the Commissioner engages in paid employment outside the duties of his or her office without the approval of the Minister; or
- if the Commissioner fails, without reasonable excuse, to comply with s 23 of the Bill (which requires the Commissioner to provide a disclosure under s 29 of the *Public Governance, Performance and Accountability Act 2013* (Cth)[2565]).

While this complies with the Paris Principles, the Bill itself does not expressly require the Governor-General to provide specific reasons for the dismissal, nor does the Bill expressly provide the Commissioner with an ability to contest any dismissal.

Recruitment[2566]

The Commissioner is not in charge of hiring his or her own staff. In fact, as is set out above, the staff assisting the Commissioner are to be Australian Public Service (**APS**) employees in the Attorney-General's Department or persons engaged by, or on behalf of, the Commonwealth as contractors. The staff's services are to be made available to the Commissioner by the Secretary of the Attorney-General's Department.[2567]

[2560] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[2561] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 20.

[2562] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 22(2)(c).

[2563] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1.

[2564] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 22.

[2565] Available at <https://www.legislation.gov.au/Details/C2013A00123>.

[2566] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

[2567] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 14.

The fact that staff will be employees of the Attorney-General's Department and must be provided to the Commissioner by that Department, may undermine the principle of institutional independence set out in the Paris Principles.[2568]

4.10 Adequate funding of NHRIs

Summary: there is currently a lack of transparency around the funding available to the Commissioner. However, in practice, the Commissioner partially complies with the Paris Principles on adequate funding of NHRIs.

NHRIs must be provided with adequate funding in order to function effectively and independently.[2569]

Allocation for activities and accountability[2570]

The role of the Commissioner will be funded by the Australian Government.

When the role of the Commissioner was first announced, the Government stated that it would invest an initial $40 million to support the Commissioner's work and that this amount will be expanded to ensure the Commissioner has whatever resources it needs.[2571] However, the July 2020 Economic and Fiscal Update states that the Government will provide $31 million over five years from 2019-20 (including capital of $1.9 million over two years from 2019-20) to:

- establish the Commissioner role;
- allow the Commissioner to undertake an independent review of historical Defence and Veteran deaths by suicide; and
- establish the VFA.[2572]

Since then, the Explanatory Memorandum for the Bill and the Explanatory Memorandum for the accompanying *National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020* (Cth)[2573] both state that $42.7 million has been provided over five years to support the establishment and operation of the Commissioner's function.[2574] These costs also include:

- funding for a one-off review of historical ADF member and veteran deaths by suicide, to be led by the Commissioner; and
- funding for a dedicated legal financial assistance scheme.

While it remains to be seen whether this funding will be adequate, an allocation of $30-45 million for the first five years appears substantial when compared to other national Commissioners. For

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[2568] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

[2569] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[2570] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[2571] Department of Defence, *Media Release: Powerful new body to tackle ADF and veteran suicides* (Media Release, 5 February 2020) <https://www.minister.defence.gov.au/minister/lreynolds/media-releases/powerful-new-body-tackle-adf-and-veteran-suicides>.

[2572] The Honourable Josh Frydenberg MP and Senator the Honourable Mathias Cormann, *Economic and Fiscal Update* (July 2020) 172 <https://budget.gov.au/2020-efu/downloads/JEFU2020.pdf>.

[2573] Available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6588_first-reps/toc_pdf/20108b01.pdf;fileType=application%2Fpdf>.

[2574] House of Representatives, *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020: Explanatory Memorandum* (page 4), available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6587_ems_8f4f6f18-1d81-479c-8f51-e038a1e734fa/upload_pdf/746506.pdf;fileType=application%2Fpdf>; House of Representatives, *National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020: Explanatory Memorandum* (page 2), available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6588_ems_2b2bbcd7-78cc-42df-af78-aea61086d668/upload_pdf/746507.pdf;fileType=application%2Fpdf>.

example, the Government allocated only $3.5 million over 4 years to establish and fund the National Children's Commissioner.[2575]

The Bill provides that the *Public Governance, Performance and Accountability Act 2013* (Cth)[2576] applies to the Commissioner as if they were an official of the Attorney-General's Department.[2577]

NHRI staff and members[2578]

The Bill states that the Commissioner is entitled to be paid remuneration, as determined by the Remuneration Tribunal or, in the absence of a determination, by the rules.[2579] However, the exact remuneration for the Commissioner role remains to be established.

Accessibility and communications infrastructure[2580]

It is not yet clear whether the Commissioner's funding will provide for the establishment of a well-functioning communications system.

4.11 Annual reports of NHRIs[2581]

Summary: the Bill largely complies with the Paris Principles on annual reports of NHRIs.

The Commissioner is required to produce annual reports for the Prime Minister and the Minister,[2582] which the Minister must table to both Houses of Parliament within 15 sitting days.[2583] The Commissioner may also give the Prime Minister and the Minister a report in relation to any matter relating to, or arising in connection with, the exercise of its powers or functions.[2584] These additional reports must also be tabled to both Houses of Parliament within 15 sitting days.[2585]

As an additional accountability measure, the Commonwealth must respond to the Commissioner's reports in writing and must cause the response to be laid before each House of Parliament as soon as is reasonably practicable.[2586]

Furthermore, if the Commissioner considers that adequate and appropriate action has not been taken in response to any of the Commissioner's reports, it may give another report to the Prime Minister and Minister, which must also be laid before each House of Parliament within 15 sitting days.[2587]

It is not yet clear whether the Commissioner will be entitled to makes its reports publicly available by publishing them on the Commissioner's website (if the office has one). However, it is worth noting that, given the subject matter of the Commissioner's mandate, the reports are likely to contain personal information and may include intelligence information, so public reporting may be limited. For example, the Bill expressly sets out the entities to which the Commissioner is

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[2575] Parliament of Australia, *National Children's Commissioner Budget Review 2012-13 Index,* available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201213/ChildrensCommissioner

[2576] Available at <https://www.legislation.gov.au/Details/C2013A00123>.

[2577] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 13.

[2578] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[2579] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 18(1).

[2580] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.10.

[2581] See Paris Principles, *Competence and responsibilities,* principle 3; GANHRI General Observations, G.O. 1.11.

[2582] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(1).

[2583] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(3).

[2584] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(2).

[2585] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 60(3).

[2586] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 61.

[2587] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 62.

authorised to disclose personal information and intelligence information,[2588] including the Commissioner of Police and he Chief Executive Officer of the Australian Crime Commission.

2 Any criticisms made publicly about this role?

Since the announcement of the Commissioner's role, reception has been largely positive.[2589]

However, we note that both the Attorney-General and the Senate Foreign Affairs, Defence and Trade Legislation Committee have only recently opened the Bill up to public consultation.[2590] Submissions to the Attorney-General close on 24 September 2020, while submissions to the Senate Committee close on 9 October 2020.[2591]

The Senate Committee's inquiry report is expected by 30 November 2020.[2592] It is anticipated that this report will summarise some of the concerns around the Commissioner's role (if any), which are to be received by the Senate Committee during the submissions process.

4.12 Criticisms prior to the introduction of the Bill

Until the Bill was introduced, the main criticisms of the role related to the delay in releasing any enacting legislation.

During the Second Reading of the *Appropriation Bill (No. 3) 2019-2020* and *Appropriation Bill (No. 4) 2019-2020* on 2 March 2020, the Member for Blair[2593] noted increasing concern that the Commissioner role is "*not better than a royal commission".*[2594] The Member urged the

[2588] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) ss 56-57..

[2589] See, eg, Suicide Prevention Australia, *Veteran and Service People Suicide Prevention Policy Position March 2020,* available at <https://www.suicidepreventionaust.org/wp-content/uploads/2020/03/DRAFT-Veteran-Suicide-Prevention-Position-Statement_Final.pdf>; Defence Force Welfare Association, *Media Release - Support For National Commissioner For Defence And Veteran Suicide Prevention,* available at <https://dfwa.org.au/media-release-support-national-commissioner-defence-and-veteran-suicide-prevention>.

[2590] Attorney-General's Department, *National Commissioner for Defence and Veteran Suicide Prevention – Public Consultation on the Bills,* available at <https://www.ag.gov.au/about-us/consultations/national-commissioner-defence-and-veteran-suicide-prevention-public-consultation-bills>; Parliament of Australia, *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 and the National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020,* available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/NationalCommissioner2020>.

[2591] Attorney-General's Department, *National Commissioner for Defence and Veteran Suicide Prevention – Public Consultation on the Bills,* available at <https://www.ag.gov.au/about-us/consultations/national-commissioner-defence-and-veteran-suicide-prevention-public-consultation-bills>; Parliament of Australia, *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 and the National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020,* available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/NationalCommissioner2020>.

[2592] Parliament of Australia, *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 and the National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020,* available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/NationalCommissioner2020>.

[2593] The Honourable Shayne Kenneth Neumann of the Australian Labor Party. See Parliament of Australia, *Biography for Neumann, the Hon. Shayne Kenneth,* available at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22handbook%2FallMps%2FHVO%22;querytype=;rec=0 >.

[2594] Parliament of Australia, *Second Reading: Appropriation Bill (No. 3) 2019-2020, Appropriation Bill (No. 4) 2019-2020,* available at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/summary/summary.w3p;query=AuthorId%3AHVO%7CReporterId%3AHVO%7CSpeakerId%3AHVO>.

Government to release the enabling legislation and the terms for reference as soon as possible and to consult widely on the role.

The Member for Burt[2595] raised similar concerns on 18 June 2020. During the debate following the second reading of the *Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and their Families) Bill 2020,* the Member moved to include an amendment to note that:

> "*…the House criticises the Government for failing to:*
>
> *(1) appropriately address the serious issue of veteran suicide, including its stubborn refusal to enact a full Royal Commission into veteran suicide and its insistence on instead establishing a National Commissioner for Defence and Veteran Suicide Prevention; and*
>
> *(2) introduce enabling legislation to establish a National Commissioner for Defence and Veteran Suicide Prevention".*[2596]

On 19 June 2020, Katter's Australian Party released a statement about the Commission, saying that it *"must be made up of former soldiers, not high ranking officers."*[2597]

3 What are the best features of this role?

- The Commissioner will have broad own-motion inquiry powers, including powers to compel access to information during these inquiries.[2598]
- The Act also creates a number of offences designed to facilitate the performance of the Commissioner's functions and powers.[2599]
- The Commissioner's reporting powers are set to include additional accountability measures, such as:
    - the Government will be required to report to the Parliament on the implementation of the Commissioner's recommendations;[2600] and
    - the Commissioner may provide reports to the Prime Minister and the Minister where it considers that adequate and appropriate action has not been taken in response to its reports.[2601] These follow-up reports must also be laid before each House of Parliament.[2602]
- It appears as though the Commissioner will maintain a high level of stakeholder engagement.[2603]
- While it remains to be seen whether the funding allocated to the Commissioner is adequate, an allocation of $30-45 million for the first five years appears substantial when compared to

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[2595] See Parliament of Australia, *Biography of Mr Matt Keogh MP,* available at <https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=249147>.

[2596] Parliament of Australia, *Draft House Minutes No. 62* (item 15), available at <https://www.aph.gov.au/parliamentary_business/chamber_documents/live_minutes>.

[2597] Katter's Australian Party, *National Commission for Defence and Veteran Suicide Prevention must be made up of former soldiers, not high ranking officers"*, available at <https://www.kap.org.au/national-commission-for-defence-and-veteran-suicide-prevention-must-be-made-up-of-former-soldiers-not-high-ranking-officers/>.

[2598] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) Part 3; Paris Principles, *Competence and responsibilities*; GANHRI General Observations, G.O. 2.6.

[2599] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) Part 4.

[2600] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 61; Attorney-General's Department, *National Commissioner for Defence and Veteran Suicide Prevention,* available at <https://www.ag.gov.au/about-us/national-commissioner-defence-and-veteran-suicide-prevention>.

[2601] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 62.

[2602] *National Commissioner for Defence and Veteran Suicide Prevention Bill 2020* (Cth) s 62(4).

[2603] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

other national Commissioners. For example, the Government allocated only $3.5 million over 4 years to establish and fund the National Children's Commissioner.[2604]

[2604] Parliament of Australia, *National Children's Commissioner Budget Review 2012-13 Index* (Webpage) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201213/ChildrensCommissioner>.

C. Impacts of the National Commissioner for Defence and Veteran Suicide

The impacts of the National Commissioner for Defence and Veteran Suicide are yet to be assessed. However, the first objective of the Commissioner is to conduct an immediate, independent review of historical veteran suicide cases, focusing on the impact of military service and veterans' post service experience.[2605] The Commissioner will be required to deliver an interim report within 12 months.

[2605] Department of Defence, *Media Release: Powerful new body to tackle ADF and veteran suicides,* available at <https://www.minister.defence.gov.au/minister/lreynolds/media-releases/powerful-new-body-tackle-adf-and-veteran-suicides>.

21 Australian eSafety Commissioner

A. Australian eSafety Commissioner: Summary table

Question	Summary response
Country/State/Territory	Australia
Commissioner entity name	eSafety Commissioner
Date established	July 2015
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	Partial. While the Commissioner's role is enshrined in legislation, the fact that the appointment process is opaque, staff supporting the Commissioner are employees of ACMA, the Minister can issue directions to the Commissioner which they are required to follow and the funding of the Commissioner comes from ACMA all limit the independence of this role.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	Independent statutory office, however other than the Commissioner, all staff employed are staff of the Australian Communications and Media Authority (ACMA). However, the Commissioner is not subject to direction from ACMA or ACMA staff (s60 *Enhancing Online Safety Act 2015*). The Minister may give directions to the Commissioner about the performance of their functions or exercise of their powers. **Relationships:** 1. Supported by ACMA.
Accountability arrangements What is the reporting line for the role? Who sets the budget?	**Reporting:** The Commissioner must give an annual report on the operations of the Commissioner to the Minister for presentation to Parliament (s 66). Further, ACMA is required to provide an annual report on APS employee remuneration and employment-related costs and expense + any other costs, expense and other obligations incurred by the Commonwealth in connection with the eSafety Commissioner's functions or the exercise of their powers (s57(aa) *Australian Communications and Media Authority Act 2005* (Cth)). **Who sets the budget:** ACMA **Remuneration:** The Commissioner remuneration is set in accordance with the *Remuneration Tribunal Act 1973* (s 53).
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	The Commissioner does not need to be an Aboriginal or Torres Strait Islander person. **Appointment process:** appointed for up to 5 years by the Minister under a written instrument and may be reappointed (see sections 50-51). **Qualifications** (s 50)**:** Minister must be satisfied that the person has a) substantial experience or knowledge; and b) significant standing;

Question	Summary response
	in at least one of the following fields: c) the operation of social media services; d) the operation of the internet industry; e) public engagement on issues relating to online safety; f) public policy in relation to the communications sector; g) child welfare or child wellbeing.
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	The eSafety Commissioner operates on a National level, as it is situated in a Federal government department and reports to the Federal Government. However, the Commissioner engages in initiatives with state based agencies (i.e. NSW Police).
Purpose What is the purpose and objective of the role?	To help safeguard Australians at risk from online harm and to promote safer, more positive online experiences.
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	**Under the *Enhancing Online Safety Act 2015*:** 1. Functions: the Commissioner has a broad range of functions under section 15 of the Act, including: a. Granting financial assistance to a State, Territory or other person; b. Promoting online safety for Australians; c. Publish reports and papers relating to line safety; d. Give reports and advice to Ministers about online safety; e. Formulating guidelines and statements for resolving incidents of cyber-bullying + recommend best practices for online safety (and promote their guidelines/statements); f. Monitor + promote compliance with the Act; g. Support, encourage, conduct, accredit and evaluate educational, promotional and community awareness programs; and h. Collect, analyse, interpret and disseminate information relating to online safety 2. Powers: a. Commissioner has the power to do all things necessary or covenant to be done in connection with the performance of their function (s 15); and b. Supplementary powers include power to enter into contracts on behalf of Commonwealth (s 60). **Under other legislation:** The Commissioner also has powers and functions under: • The Commissioner under schedules 5 of 7 of the Broadcasting Services Act 1992 (Cth): 1) administers the Online Content Scheme (investigating valid complaints about online content and taking action on prohibited/potentially prohibited material, including child sexual abuse material); 2) has a reserve power to make an industry standard where

Question	Summary response
	industry codes do not exist or are deficient; and 3) may make determinations regulating certain content/hosting service providers • Commissioner may give written directions to a carrier/service provider in connection with the Commissioner's functions/powers under section 581 (2A) of the Telecommunications Act 1997 (Cth) • section 5 of the Enhancing Online Safety (Protecting Australians from Terrorist or Violent Criminal Material) Legislative Rule 2019 • sections 474.35 and 474.36 of the Criminal Code Act 1995. **Reporting:** The Commissioner must give an annual report on the operations of the Commissioner to the Minister for presentation to Parliament.
Budget What is the annual budget for the role?	**Commissioner:** $376,728 **Office (2019-20):** $25,090,000 (closer to $22m/year in budget) See here for more information on budget, employees and remuneration.
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	Enhancing Online Safety Act 2015
Most recent annual report or equivalent document (link)	2018-19 Annual Report

B. Australia eSafety Commissioner: Further analysis

1 Essential requirements of the Paris Principles

4.13 The establishment of NHRIs[2606]

Summary: the Act is partially complaint, as legislatively enshrined but lacking transparency around the appointment process.

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[2607]

Entrench in law

While the Commissioner's role is legislatively enshrined in the Act, along with their roles, functions, powers, accountability and the process for appointment.[2608] However, contrary to General Observation 1.1, the Commissioner's funding is not enshrined, as this it appears that this is largely determined by ACMA.

Mandated and powers

The Act sets out detailed powers held by the Commissioner, along more general powers designed to facilitate the performance of these specific powers (such as: doing 'anything incidental to or conducive to the performance of any of the above functions').[2609]

Appointment mechanisms

The appointment process for the Commissioner is not transparent. The Act empowers the Minister to appointment the Commissioner and it is unclear what considerations, other than those qualifications and requirements listed in the Act, the Minister may take into account or whether they may act on the recommendation of others (i.e. ACMA).[2610]

Quasi-judicial competency (complaints-handling)

The Commissioner may receive and investigate complaints.[2611] Further, decisions made by the Commissioner may be reviewed by the Administrative Appeals Tribunal.[2612]

4.14 Human rights mandate[2613]

Summary: the Act is substantially compliant, as holding a broad mandate with investigation powers

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[2614] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[2615]

[2606] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[2607] GANHRI General Observations, G.O. 1.1.

[2608] See *Enhancing Online Safety Act 2015*.

[2609] See *Enhancing Online Safety Act 2015* s 15.

[2610] See *Enhancing Online Safety Act 2015* s 50.

[2611] See *Enhancing Online Safety Act 2015* s 19, s 19C.

[2612] See *Enhancing Online Safety Act 2015* s 88.

[2613] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

[2614] GAHNRI General Observations, G.O. 1.2.

[2615] GAHNRI General Observations, G.O. 1.2.

Further, the Act provides that the Commissioner '*holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.*'[2616] These terms and conditions are not outlined in the Act. As such, in practice, the terms and conditions of the Commissioner's employment will be determined on a discretionary basis by the Minister. This does not provide independence or autonomy from Government as required under the Paris Principles.

Competence and responsibilities:

The Commissioner can exercise their investigative powers without Ministerial recommendation. Further, the Commissioner has broad power to exercise these powers as they set fit and to 'obtain information from such persons and make such inquiries' they see fit.[2617]

Powers of investigation and inquiry

The Office of the eSafety Commissioner outlined the following case studies in submissions to the Parliamentary inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying:

- "*A video of a female teenager being filmed having sexual intercourse (pictured from her shoulders up only) was posted on a social media platform. The video had not been removed, despite reports to that platform. The Commissioner assessed the video as serious cyberbullying. Following a complaint to the Commissioner, informal action was taken by the Commissioner to alert the platform of the existence of the video. The material was removed within 30 minutes of the Commissioner's notification to the platform. The Commissioner also provided the female teenage with resources and online counselling support.*"

- "*A 13 year-old male posted anti-Semitic images and highly abusive taunts on a social media platform targeting a fellow student. The parents of the targeted student lodged a complaint with the Commissioner after speaking to the parents of the perpetrator abuser, as they were not satisfied with the outcome of that conversation.*

  The Commissioner contacted Instagram and the offending material was removed within 24 hours. The Commissioner also contacted the perpetrator 13 year-old student's school about the complaint. The matter was considered by the school and it was decided to place the student on conditional enrolment with any further infractions incurring immediate expulsion. The school also mandated six counselling sessions for that student to reflect on the impact of his poor choices, and to reinforce the school's zero-tolerance policy to cyberbullying."

Functional immunity

The Act expressly provides that the Commissioner has the privileges and immunities of the Crown and is protected from civil proceedings, liability from damages and criminal proceedings for actions undertaken in good faith.[2618] This provides functional immunity, protecting the Commissioner from criminal and civil liability for actions undertaken.[2619]

4.15 Encouraging ratification or accession to international human rights instruments

Summary: the Act is partially compliant, as requiring observance of international rights instruments, but not their further ratification.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[2620] Other functions may include monitoring developments in international

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[2616] See *Enhancing Online Safety Act 2015* s 59.

[2617] See *Enhancing Online Safety Act 2015* ss 19, 19C.

[2618] See *Enhancing Online Safety Act 2015* ss 62, 89, 90, 91.

[2619] GANHRI General Observations, G.O. 2.3.

[2620] GANHRI General Observations, G.O. 1.3.

human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[2621]

The Act expressly requires that '*the Commissioner must, as appropriate have regard to Convention on the Rights of the Child in the performance of functions*' conferred by/under the Act and in relation to Australian Children.[2622] This express requirement to consider the Convention on the Rights of the Child promotes Australia implementation of international human rights instruments. Further to this point, the Commissioner is required to give the Minister reports about and advise on online safety for Australia and provide guidelines, statements and recommendations on best practice. The express requirement that the Commissioner account for the Convention on the Rights of the Child in undertaking these functions would have a flow on effect in further promoting the implementation of this particular human rights instrument.

Other than the Convention on the Rights of the Child, the Act does not reference international human rights standards and/or instruments. However, given the broad nature of the Commissioner's power to give the Minister reports about and advise on online safety for Australia and provide guidelines, statements and recommendations on best practice.

4.16 Interaction with the international human rights system

Summary: the Act is partially compliant, as only requiring observance of international norms, rather than direct engagement.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[2623] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[2624]

As noted in section 1.3, the Act expressly requires that '*the Commissioner must, as appropriate have regard to Convention on the Rights of the Child in the performance of functions*' conferred by/under the Act and in relation to Australian Children.[2625]

4.17 Cooperation with other human rights bodies

Summary: the Act is partially compliant, as requiring some engagement with human rights bodies.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[2626] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[2627]

There is limited public information available on the cooperation between the eSafety Commissioner and other human rights bodies. However, there appears to be some interaction with the various Commissioner roles under the Australian Human Rights Commission. In particular, the Sex Discrimination Commissioner's role overlaps with the eSafety Women and Women in Tech Space initiatives run by the eSafety Commissioner, while the cyberbullying initiative will likely overlap with the various Children's Commissioner roles around the country. This is reflected in the interest that the Sex Discrimination Commissioner has taken in advising

[2621] GANHRI General Observations, G. O. 1.3.
[2622] See *Enhancing Online Safety Act 2015* s 12.
[2623] GAHNRI General Observations, G.O. 1.4.
[2624] GAHNRI General Observations, G.O. 1.4.
[2625] See *Enhancing Online Safety Act 2015* s 12.
[2626] GAHNRI General Observations, G.O. 1.5.
[2627] GAHNRI General Observations, G.O. 1.5.

on the reform priorities for the eSafety Commissioners role as well as the various comments made in inquiries by the Australian Human Rights Commission.[2628]

4.18 Recommendations by NHRIs

Summary: the Act is compliant, as holding relevant recommendation powers.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[2629] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[2630] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[2631]

While the eSafety Commissioner is not explicitly tasked with "submit[ing] to the Government, Parliament and any other competent body, […] recommendations […] on any matters concerning the promotion and protection of human rights", the Commissioner is tasked with:

1. giving the Minister reports and advice about online safety for Australia,
2. coordinating activities of Commonwealth Departments, authorities and agencies relating to online safety for children,
3. formulating, in writing, guidelines or statements recommending best practices for persons/bodies involved in online safety for Australians and to promote these materials, and
4. consulting and cooperating with persons, organisations and governments on online safety for Australians.[2632]

Given that the Commissioner is expressly required to 'have regard to the Convention on the Rights of the Child in the performance of [these] functions'[2633], the above functions must all consistent with the promotion of the rights of children.

The Commissioner does not have a broader role in promoting human rights, excepts to the extent that these overlap with areas of eSafety (for example, areas of sexual discrimination online, etc).

4.19 Ensuring pluralism of the NHRI[2634]

Summary: *the Commissioner is partially compliant, as demonstrating pluralist hiring policies.*

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[2635] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism

Given that staff of the eSafety Commissioner are employees of ACMA, Government recruitment policies and commitments to pluralism are applicable as are the various ACMA specific diversity

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[2628] Sex Discrimination Commissioner, Submission to the Australian Human Rights Commission, *Re: Consultation on a new Online Safety Act* (21 February 2020) <https://www.communications.gov.au/sites/default/files/submissions/consultation_on_a_new_online_safety_act_-_submission_-_sex_discrimination_commissioner.pdf>; Australian Human Rights Commissioner <https://humanrights.gov.au/our-work/legal/submission/inquiry-harm-being-done-australian-children-through-access-pornography>.

[2629] GAHNRI General Observations, G.O. 1.6.

[2630] GAHNRI General Observations, G.O. 1.6.

[2631] GAHNRI General Observations, G.O. 1.6.

[2632] See *Enhancing Online Safety Act 2015* s 15.

[2633] See *Enhancing Online Safety Act 2015* s 12.

[2634] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[2635] GANHRI General Observations, G.O. 1.7.

policies (i.e. the ACMA Workplace Diversity Plan 2014–18 and ACMA Gender Equality Action Plan 2017-2020).[2636]

There is some risk to pluralism posed by the fact that the Commissioner can be reappointed for multiple terms of up to 5 years and that there is no limitation on the number of reappointments that can be made.

Full-time members

The Act sets out a specific duration for the Commissioner's appointment (the period specified in the instrument of appointment, not exceeding 5 years) and the Commissioner if eligible for reappointment.[2637] The Commissioner must serve on a full-time basis and their remuneration is set by the Remuneration Tribunal.[2638]

The Act provides that the Commissioner holds office "*on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.*"[2639] These terms and conditions are not outlined in the Act and therefore the Minister has strong discretion is setting these terms and conditions.

4.20 Selection and appointment of the decision-making body of NHRIs

Summary: the Act is not compliant with this requirement, as it lacks any decision-making body.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[2640]

There is no decision-making body established under the eSafety Commissioner structure.

4.21 Political representatives on NHRIs

Summary: the Act is not compliant in this respect.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[2641] An NHRI should also be independent from government.

The Act does not explicitly restrict participation of government representatives or members of parliament in the decision-making of the Commission. Further, the Minister is entitled to give directions, by legislative instrument, to the Commissioner about the performance of the Commissioner's functions and exercise of their powers.[2642] While the Act states that such directions 'must be of a general nature only', it also provides that the Commissioner must comply with any such direction.[2643] As the Minister's role in giving such directions is not restricted to an advisory capacity only, this appears to be contrary to the Paris Principles and General Observations.[2644] Further, the Minister may give directions to ACMA

As noted in section 1.10 below, the Office of the eSafety Commissioner is staffed by employees of ACMA. Therefore, while the Commissioner position may be independent of government, functionally the broader institution has little independence.

Tenure

[2636] See, eg, ACMA, *Workplace diversity and inclusion* (Webpage) <https://www.acma.gov.au/workplace-diversity-and-inclusion>.

[2637] See *Enhancing Online Safety Act 2015* s 51.

[2638] See *Enhancing Online Safety Act 2015* ss 28, 50(3).

[2639] See *Enhancing Online Safety Act 2015* s 59.

[2640] GAHNRI General Observations, G.O. 1.8.

[2641] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[2642] See *Enhancing Online Safety Act 2015* s 70(1).

[2643] See *Enhancing Online Safety Act 2015* ss 70(2), 70(4).

[2644] See General Observation 1.9.

The Act provides that the Commissioner shall be appointed for a period of 5 years and are eligible for reappointment.[2645] While technically consistent with the Paris Principles, this period may be too short. Further, the Act allows for termination of the Commissioner's appointment by the Minister on a range of grounds.[2646] While a number of grounds maintain a degree of objectivity, the Commissioner's appointment can be terminated "*for misbehaviour*".[2647]

'Misbehaviour' is not defined under the Act and therefore appears to give the Minister a broad removal power (i.e. could be exercised subjectively; could account for misbehaviour outside not in the course of their role as Commissioner). Further, the Commissioner's appointment may be terminated if they take 14 consecutive days (or 28 days in another 12 month period) absence (other than leave of absence), however the Minister has the power to determine the terms and conditions (including remuneration) on which any leave of absence are to be granted.[2648]

Recruitment

The recruitment of staff for the Commission is undertaken by ACMA, with the exceptions of the Commissioner and directly recruited contract staff (i.e. Consultants).[2649] The 54 employees who staff the Office of the eSafety Commissioner are employed by ACMA and '*are covered by ACMA entitles, protections and obligations.*'[2650]

4.22 Adequate funding of NHRIs

Summary: the Act appears compliant in this respect, being substantially resourced.

NHRIs must be provided with adequate funding in order to function effectively and independently.[2651]

The Office of the eSafety Commissioner is staffed by ACMA employees (54 employees at 30 June 2019).[2652] Further, infringement notices can be issued for specific civil penalty provisions under the Act, however the Commissioner is limited in their discretion to authorise people to act as Infringement Officers in that they are restricted to selecting ACMA staff.[2653]

The budget of the Commissioner and Office of the eSafety Commissioner in 2019-20 was as follows:

- **Commissioner:** $376,728[2654]
- **Office of the eSafety Commissioner:** $25,090,000 (closer to $22m/year in budget over forward estimates)[2655]

4.23 Annual reports of NHRIs

Summary: the Act is compliant in this respect.

[2645] See *Enhancing Online Safety Act 2015* s 51.

[2646] See *Enhancing Online Safety Act 2015* s 58.

[2647] See *Enhancing Online Safety Act 2015* s 58(1)(i).

[2648] See *Enhancing Online Safety Act 2015* ss 58(2)(b), 54(2).

[2649] See *Enhancing Online Safety Act 2015* ss 60, 69; Officer of the eSafety Commissioner, *Annual Reports 2018-19* (Report, 2019) 89 <https://www.esafety.gov.au/sites/default/files/2019-10/ACMA_and_eSafety_annual_reports_2018_19.pdf>.

[2650] Officer of the eSafety Commissioner, *Annual Reports 2018-19* (Report, 2019) 89 <https://www.esafety.gov.au/sites/default/files/2019-10/ACMA_and_eSafety_annual_reports_2018_19.pdf>.

[2651] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[2652] Officer of the eSafety Commissioner, *Annual Reports 2018-19* (Report, 2019) 77 <https://www.esafety.gov.au/sites/default/files/2019-10/ACMA_and_eSafety_annual_reports_2018_19.pdf>.

[2653] See *Enhancing Online Safety Act 2015* s 46A.

[2654] Officer of the eSafety Commissioner, *Annual Reports 2018-19* (Report, 2019) 106 <https://www.esafety.gov.au/sites/default/files/2019-10/ACMA_and_eSafety_annual_reports_2018_19.pdf>.

[2655] Department of Infrastructure, Transport, Regional Development and Communication, *Portfolio Budget Statements 2019–20 Budget Related Paper No. 1.3 Communications and the Arts Portfolio* (Webpage) <https://www.communications.gov.au/documents/communications-and-arts-portfolio-full-budget-document-2019-20>.

The Commissioner must, as soon as practicable after the end of each financial year, prepare and give to the Minister, for presentation to the Parliament, a report on the operations of the Commissioner during that year.[2656]

2 Any criticisms made publicly about this role?

4.24 There has been no direct public criticism of the eSafety Commissioner, instead, the role has been generally welcomed and praised publicly. Criticism has been levelled at certain legislative amendments under which the Commissioner has been given power, in particular the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019*. However, this criticism appeared to relate more to the content of the legislation rather than the role of the Commissioner (i.e. see here).

3 What are the best features of this role?

4.25 The following features of the eSafety Commissioner role are most relevant given the criteria provided by SNAICC:

- The broad powers and functions of the eSafety Commissioner under various pieces legislation, including educative and regulatory powers and functions, allow the Commissioner to identify areas of concern, direct resources to addressing these areas (through education, public reporting, reporting to the Minister and the issuing of best practice guidelines) and support these campaigns with coercive force over key stakeholders (including the issuing of civil penalties, industry codes/standards and enforceable directives). As outlined below, this mix of powers has been considered successful in addressing a wide variety of eSafety issues.

[2656] See *Enhancing Online Safety Act 2015* s 66.

D. eSafety Commissioner: Impacts

4 Impact of the eSafety Commissioner?

(Any material evidencing the impacts that the particular commissioner has had. This could include things like the adoption and implementation of recommendations, reforms made subsequent to inquiries or investigations, or the successful resolution of complaints or investigations.)

In 2018 the Government conducted an independent review of the legislation under which the eSafety Commissioner is established, the Enhancing Online Safety Act 2015, and Broadcasting Services Act 1992.[2657] A focal point for the review was whether the Commissioner had sufficient functions and powers to perform their role effective, whether the governance structure provided by ACMA was fit for purpose and whether legislative change was needed.[2658] The review accepted submission and relevantly found the following:

- "The current eSafety Commissioner…. *has been instrumental in driving change and raising the profile of online safety with industry and the wider Australian and international community*. She has been very successful in the role and has built on the success of the inaugural Children's eSafety Commissioner, Alastair MacGibbon.

  However, *there are a number of constraints which limit her effectiveness, principal among these being the governance arrangements surrounding her work*. As part of possible transition arrangements towards a standalone online safety entity, *I have proposed that the eSafety Commissioner and her Office be moved out of the Australian Communications and Media Authority and into the Department of Communications and the Arts*, where the Department and the eSafety Commissioner could jointly work on policy, strategy and relationships. This will free the eSafety Commissioner up to work with industry to develop and implement the proposed new arrangements and should enable her to give sharper focus to priority areas of online safety, such as more effective planning, education, research, prevention and behavioural change arrangements."[2659]

- "Community stakeholders believe the eSafety Commissioner should do more to compel industry to deliver on their responsibilities (e.g. through industry standards and codes of practice)."[2660]

- "Industry and the eSafety Commissioner should take a more proactive approach and invest more in AI and machine learning to prevent illegal or anti-social content rather than relying on the community to report it."[2661]

- "Nevertheless, the eSafety Commissioner and the ACMA and ABA before it, have had considerable success as a safety net in getting illegal content taken down by Australian industry hosts within 24 hours. I am pleased to report that there has been total

[2657] Department of Infrastructure, Transport, Regional Development and Communication, *Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme* (Webpage) <https://www.communications.gov.au/have-your-say/reviews-enhancing-online-safety-act-2015-and-online-content-scheme>.

[2658] Department of Infrastructure, Transport, Regional Development and Communication, *Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme* (Webpage) <https://www.communications.gov.au/have-your-say/reviews-enhancing-online-safety-act-2015-and-online-content-scheme>.

[2659] Department of Infrastructure, Transport, Regional Development and Communication, *Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme* (Webpage) <https://www.communications.gov.au/have-your-say/reviews-enhancing-online-safety-act-2015-and-online-content-scheme>.

[2660] Department of Infrastructure, Transport, Regional Development and Communication, *Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme* (Webpage) <https://www.communications.gov.au/have-your-say/reviews-enhancing-online-safety-act-2015-and-online-content-scheme>.

[2661] Department of Infrastructure, Transport, Regional Development and Communication, *Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme* (Webpage) <https://www.communications.gov.au/have-your-say/reviews-enhancing-online-safety-act-2015-and-online-content-scheme>.

compliance with all Australian take-down notices issued since the online content scheme was introduced."[2662]

Senate Inquiry

In March 2018 the Senate Standing Committee on Legal and Constitutional Affairs handed down its final report for its inquiry into the 'Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying'. In their submission to the inquiry One of the recommendations made by this inquiry was that the government 'ensure that the Office of the eSafety Commissioner is adequately resourced to fulfil all its functions, taking into account the volume of complaints it considers.'[2663]

Media reports:

- "While there has been an increase in reports, the eSafety Commissioner has a 90 per cent success rate for getting images and videos off websites."[2664]
- The Government plans to introduce a new Online Safety Act to Parliament later this year which will include an Adult Cyber Abuse scheme.[2665]
- "Over 99 per cent of investigations into CSAM items were completed within two business days and notified to the AFP and/or the INHOPE network. Over 90 per cent of all online content complaints received were actioned within two business days. Over 99 per cent of all investigations about online content were completed within 20 business days."[2666]
- "A national online safety campaign targeting predators who gain access to children through popular apps, media sites and games, has been launched [by Crime Stoppers and the eSafety Commissioner] to combat sexual assault and unwanted internet contact. … It follows a successful pilot in New South Wales last year [run by Crime Stoppers, NSW Police and the eSafety Commissioner] which contributed towards a 62 per cent increase in complaints about child sexual abuse material to eSafety."[2667]
- The eSafety Commissioners online safety hub website has received awards for being world-leading in innovation and creativity.[2668]

[2662] Department of Infrastructure, Transport, Regional Development and Communication, *Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme* (Webpage) <https://www.communications.gov.au/have-your-say/reviews-enhancing-online-safety-act-2015-and-online-content-scheme>.

[2663] Parliament of Australia, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (Webpage) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Cyberbullying>, final report issued in March 2018, page viii.

[2664] Claudia Long, 'Coronavirus shutdown prompts spike in reports of sextortion to eSafety Commissioner' *ABC News* (online, 3 June 2020) <https://www.abc.net.au/news/2020-06-03/spike-reports-esafety-commissioner-coronavirus-shutdown/12314442>; ACMA Office of the eSafety Commissioner, *Annual Reports 2018-19* (Report, 2019) 196 <https://www.esafety.gov.au/sites/default/files/2019-10/ACMA_and_eSafety_annual_reports_2018_19.pdf>.

[2665] Claudia Long, 'Coronavirus shutdown prompts spike in reports of sextortion to eSafety Commissioner' *ABC News* (online, 3 June 2020) <https://www.abc.net.au/news/2020-06-03/spike-reports-esafety-commissioner-coronavirus-shutdown/12314442>

[2666] ACMA Office of the eSafety Commissioner, *Annual Reports 2018-19* (Report, 2019) 211 <https://www.esafety.gov.au/sites/default/files/2019-10/ACMA_and_eSafety_annual_reports_2018_19.pdf>.

[2667] Patrick James, 'Online child safety campaign launched' *The Canberra Times* (online, 30 March 2020) <https://www.canberratimes.com.au/story/6702687/online-child-safety-campaign-launched/?cs=14231>.

[2668] Shannon Jenkins, 'eSafety Commissioner wins global award for government innovation' *The Mandarin* (online, 20 May 2020) <https://www.themandarin.com.au/133917-esafety-commissioner-wins-global-award-for-government-innovation/>.

22 National Rural Health Commissioner

A. National Rural Health Commissioner: Summary table

Question	Summary response
Country/State/Territory	Australia
Commissioner entity name	National Rural Health Commissioner (**Commissioner**)
Date established	November 2017 – formed under Part VA of the *Health Insurance Act 1973* (Cth) (**Act**). The new Commissioner was appointed pursuant to the *Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Act 2020* (Cth).
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The Commissioner role is partially compliant, however there are quite a few significant gaps including: • there are no express investigative powers and functions associated with the role. The functions and powers are quite limited to what the Minister responsible for rural health (**Minister**) requires; • no function to review existing or proposed legislation, law or policy. The role is more tailored to implementing existing government strategy; • the maximum period of the role is unduly short, being a maximum of two years; • there are no express human rights or convention references in the Act; and • the funding of the role and office is not transparent or easy to locate.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The Commissioner is part of a stand-alone office. The Commissioner works closely with the Minister and provides regular advice.
Accountability arrangements What is the reporting line for the role? Who sets the budget?	The Commissioner reports directly to the Minister.
Qualification and Experience	The only eligibility requirement under the Act is that the Commissioner has experience in rural health.[2669]

[2669] *Health Insurance Act 1973* (Cth) s 79AF(3).

Question	Summary response
What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	The Commissioner is appointed by the Minister by written instrument.[2670] The appointed Commissioner is to hold office for a period specified in the instrument of appointment, and that period must not exceed 2 years.[2671] The Commissioner may be reappointed but there are no specified terms associated with the process for reappointment.[2672]
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	The extent of the Commissioner's scope of power is to take into account the needs of communities, families and individuals in rural areas when strengthening and promoting regionally based, patient-centred approaches to the delivery of health services.[2673]
Purpose What is the purpose and objective of the role?	To assist in improving health outcomes in rural, regional and remote areas, particularly in relation to improving the quality and sustainability of, and access to, health services in those areas.[2674]

Functions and Powers
 	
What functions and powers does the role have, in particular those promoting systemic oversight and accountability?
 	
Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament?
 	
Promotion of human rights: promote discussion and awareness of matters relating to the human rights?
 	
Review of laws?
 	
Complaints handling: powers to receive, investigate and determine complaints?
 	
Inquiry and reporting: the power to investigate and report publicly on particular issues,
	Functions
	
	Functions of the role include:[2675]
	• Providing advice to the Minister including in relation to:
	  • Developing, aligning and implementing Commonwealth strategies, priorities or measures to improve health outcomes;
	  • Identifying opportunities to strengthen and align health workforce training in rural areas;
	  • Strengthening and promoting regionally based, patient centred approaches to the delivery of health services; and
	  • Developing and promoting innovative and integrated approaches to the delivery of health services in rural areas to improve the quality and access to health services in those rural areas.
	• Undertaking projects or inquiring into and reporting on matters specified by the Minister;
	• Consulting with relevant stakeholders; and
	• Undertaking research and collecting, analysing and sharing information about approaches for improving the quality and sustainability of and access to health services in rural areas.
	
	Powers
	
	The Act does not specify any powers of the Commissioner, only its functions.

[2670] *Health Insurance Act 1973* (Cth) s 79AF(1).
[2671] *Health Insurance Act 1973* (Cth) s 79AF(2).
[2672] *Health Insurance Act 1973* (Cth) s 79AF(1).
[2673] *Health Insurance Act 1973* (Cth) s 79AD(a).
[2674] *Health Insurance Act 1973* (Cth) s 79AA.
[2675] *Health Insurance Act 1973* (Cth) s 79AD.

Question	Summary response
including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	**Reporting** The Commissioner is to prepare an annual report to the Minister, to be presented to Parliament.[2676] **Human Rights** The Commissioner, through key functions aims to improve the right of access for rural communities to a variety of health services, programs and conditions necessary to attain a higher standard of health.[2677] There are no specific UN human rights instruments which the role must consider. **Power to investigate** There is no general power to investigate matters or initiate own-motion inquiries or reports. The powers are limited to those prescribed or functions requested by the Minister.
Budget What is the annual budget for the role?	The Office of the Commissioner received funding of $4.4 million over four years until July 2020.[2678] The Explanatory Memorandum for the *Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Act 2020* (Cth)notes that the "financial impact of extending the Office is cost neutral, funding from existing program funding".[2679] However this amount of the existing program funding is not specified.
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	Established under Pt VA of the *Health Insurance Act 1973* (Cth).But note recent amendments under the *Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Act 2020* (Cth).
Most recent annual report or equivalent document (link)	Link We note that the 2019 Annual Report is not available on the website.

[2676] *Health Insurance Act 1973* (Cth) s 79AP.

[2677] Explanatory Memorandum, *Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Bill 2020*, 4-5 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6565_ems_1325749f-ef2d-40bc-966b-96327ed880ff/upload_pdf/739678.pdf;fileType=application%2Fpdf>.

[2678] National Rural Health Commissioner, *Annual Report* (Report, 2018) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/2922D6D8BBCE122FCA2581D30076D09A/$File/Annual%20Report%202018%20-%20National%20Rural%20Health%20Commissioner.pdf>.

[2679] Explanatory Memorandum, *Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Bill 2020*, 3 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6565_ems_1325749f-ef2d-40bc-966b-96327ed880ff/upload_pdf/739678.pdf;fileType=application%2Fpdf>.

B. National Rural Health Commissioner: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs[2680]

Summary: the Act partially complies with the Paris Principles with respect to the establishment of NHRIs.

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[2681]

Entrenched in law

The role of the National Rural Health Commissioner (**Commissioner**) has been established under Part VA of the *Health Insurance Act 1973* (Cth) (**Act**). With the recent appointment of a new Commissioner, the legislation has very recently been amended by the *Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Act 2020* (Cth). These recent amendments to the Act have broadened the scope of the Commissioner's functions.

Mandate and powers

The Commissioner's functions are clearly set out in s 79AD of the Act. It appears that the functions of the Commissioner are linked to the requests by the Minister.

Appointment mechanisms

The Act specifies the general terms of appointment in ss 79AF – 79AN. All other terms and conditions of appointment (not specified in the Act) and the role are determined by the Minister. The only clear criteria of appointment is that the Commissioner has experience in rural health.[2682] There is no clear appointment process other than that the Minister is to appoint the Commissioner by written instrument.[2683]

Funding

The funding of the Commissioner is also not clear in the legislation and any information was only gathered from the 2018 Annual Report and explanatory memorandum for the Act.[2684]

Quasi-judicial competency (complaints handling)

In relation to General Observation 2.9, the Commissioner does not have express power to deal with, investigate or settle complaints.

[2680] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[2681] GANHRI General Observations, G.O. 1.1.

[2682] *Health Insurance Act 1973* (Cth)(Cth) s 79AF(3).

[2683] *Health Insurance Act 1973* (Cth) (Cth) s 79AF(1).

[2684] Explanatory Memorandum, *Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Bill 2020*, 3 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6565_ems_1325749f-ef2d-40bc-966b-96327ed880ff/upload_pdf/739678.pdf;fileType=application%2Fpdf>; see also, National Rural Health Commissioner, *Annual Report* (Report, 2018) 5 <https://www1.health.gov.au/internet/main/publishing.nsf/Content/2922D6D8BBCE122FCA2581D30076D09A/$File/Annual%20Report%202018%20-%20National%20Rural%20Health%20Commissioner.pdf>.

1.2 Human rights mandate[2685]

Summary: the Act is largely non-compliant with the Paris Principles with respect to human rights mandate.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[2686] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[2687]

The Commissioner does not have any legislative human rights mandate in the Main Act or the Act. The objective of the Commissioner's role does have human rights implications and the indirect consequences of the Commissioner's functions would enhance the right of access to rural health.

In the Statement of Compatibility with Human Rights in the Explanatory Memorandum it is stated that:

> The Office, through its key functions will improve the right of access for rural communities to a variety of health services, programs and conditions necessary for the highest attainable standard of health. A key function will involve identifying opportunities to strengthen health workforce training in rural, regional and remote areas, contributing to strengthening Australia's rural training pipeline.[2688]

In relation to General Observation 2.3, there is no protection from criminal and civil liability for official actions and decisions made by the Commissioner in the Act. However, given the Commissioner is a statutory officer, it is likely that the personal duty or liability of the Commissioner is governed by specific affecting commonwealth employees, such as *the Public Governance, Performance and Accountability Act 2013* (Cth).

In relation to General Observation 2.8, the Commissioner does not have specific monitoring powers or oversight of domestic agencies.

Powers of investigation and inquiry

The Office of the Commissioner does not get involved in individual cases or advocate for individual people or groups.[2689] The Commissioner does have the ability to inquire into and report on matters, however it can only do so on matters specified by the Rural Health Commissioner.[2690]

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Act is not compliant with the Paris Principles in regards to encouraging ratification or accession to international human rights instruments.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[2691] Other functions may include monitoring developments in international

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[2685] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

[2686] GAHNRI General Observations, G.O. 1.2.

[2687] GAHNRI General Observations, G.O. 1.2.

[2688] Explanatory Memorandum, *Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Bill 2020*, 5 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6565_ems_1325749f-ef2d-40bc-966b-96327ed880ff/upload_pdf/739678.pdf;fileType=application%2Fpdf>.

[2689] Department of Health, *National Rural Health Commissioner* (Webpage) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/National-Rural-Health-Commissioner>.

[2690] *Health Insurance Act 1973* (Cth) s 79AD(1)(c).

[2691] GANHRI General Observations, G.O. 1.3.

human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[2692]

The role of the Commissioner is very much focused on guiding the Minister on strategy and implementation of priorities to improve health outcomes in rural areas. It does not have functions or powers to comply with General Observation 1.3, specifically to review or investigate existing or proposed legislation to ensure compliance with domestic and international human rights obligations.

1.4 Interaction with the international human rights system

Summary: the Act is not compliant with the Paris Principles with respect to interaction with the international human rights system.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[2693] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[2694]

The Act does not specify a mechanism for the Commissioner to engage with or interact with the international human rights system.

1.5 Cooperation with other human rights bodies

Summary: in practice, the Commissioner largely complies with the Paris Principles on the cooperation with other human rights bodies.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[2695] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[2696]

The Commissioner is required to regularly engage with relevant stakeholders essential to effectively fulfil its mandate (i.e. stakeholders in the regional, rural and remote health sector) including:[2697]

- Health professionals;
- State and Territory government bodies;
- Industry, non-profit and other community groups; and
- Other health stakeholders.

1.6 Recommendations by NHRIs

Summary: the Act does not comply with the Paris Principles on recommendations by NHRIs.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[2698] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of

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[2692] GANHRI General Observations, G. O. 1.3.
[2693] GAHNRI General Observations, G.O. 1.4.
[2694] GAHNRI General Observations, G.O. 1.4.
[2695] GAHNRI General Observations, G.O. 1.5.
[2696] GAHNRI General Observations, G.O. 1.5.
[2697] *Health Insurance Act 1973* (Cth) s 79AD(1)(f).
[2698] GAHNRI General Observations, G.O. 1.6.

human rights violations, or human rights matters in general.[2699] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[2700]

The ability for the Commissioner to comply with General Observation 1.6 is limited as a result of the Commissioner being unable to initiate its own-motion inquiries and reports, and much of its functions are at the behest of the Minister (i.e. providing specific advice or commencing specific inquiries or projects at the request of the Minister).

1.7 Ensuring pluralism of the NHRI[2701]

Summary: the Act and the Commissioner partially comply with the Paris Principles with respect to ensuring pluralism of the NHRI.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[2702] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

The Frequently Asked Questions section of the National Rural Health Commissioner webpage notes that the appointment process of the Commissioner role is "as per the appointment process set out in the Cabinet Handbook issued by the Department of the Prime Minister and Cabinet."[2703]

The current Cabinet Handbook requires the Minister to prepare appointment proposals for the Prime Minister's consideration, and should confirm (among others) that:

- the person being proposed is appropriately qualified and has relevant experience; and
- has due regard to gender balance and geographical balance in appointments.[2704]

There are no other diversity requirements specified for the Minister to consider when proposing appointments.

Full time members

In relation to General Observation 2.2, the Commissioner is to be appointed either on a full time or part time basis. The term of appointment is not framed in terms of 'minimum term' but rather there is a maximum term of 2 years (therefore not compliant with the appropriate minimum term of 3 years). However, the Commissioner may be reappointed after this period.[2705]

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: the Act is sparsely drafted and only partially compliant with the Paris Principles with respect to the selection and appointment of the decision-making body of NHRIs.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[2706]

The appointment process of the Commissioner is unclear in the Act, other than to specify that the Minister is to appoint the Commissioner by written instrument. As noted above, the Frequently

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[2699] GAHNRI General Observations, G.O. 1.6.

[2700] GAHNRI General Observations, G.O. 1.6.

[2701] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[2702] GANHRI General Observations, G.O. 1.7.

[2703] Department of Health, *Frequently* (Webpage) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/National-Rural-Health-Commissioner-frequently-asked-questions#1.3>.

[2704] Department of the Prime Minister and Cabinet, *Cabinet Handbook* (2019) 23-24 <https://www.pmc.gov.au/sites/default/files/publications/cabinet-handbook-13th-edition_1.pdf>.

[2705] *Health Insurance Act 1973* (Cth) s 79AF.

[2706] GAHNRI General Observations, G.O. 1.8.

Asked Questions section of the National Rural Health Commissioner webpage, notes that the appointment process of the Commissioner role is "as per the appointment process set out in the Cabinet Handbook issued by the Department of the Prime Minister and Cabinet."[2707] This Cabinet Handbook sets out the requirement for proposing appointments to the Prime Minister which is to be followed by the Minister.[2708]

1.9 Political representatives on NHRIs

Summary: the Act does not strictly comply with the Paris Principles with respect to political representatives on NHRIs.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[2709] An NHRI should also be independent from government.

The Act specifies that the Commissioner must perform its functions in an independent and impartial manner.[2710] The Commissioner is a statutory officer holder and not a member of parliament or government representative. The functions of the Commissioner is limited to mainly a research and advisory role for the Minister.

Tenure

The termination of appointment provisions in the Act are clearly defined and appropriately confined to actions which adversely impact on the capacity of the Commissioner to fulfil its mandate.[2711] Dismissal is not allowed solely based on the discretion of the Minister.

Recruitment

The Act provides that the Commissioner may obtain assistance from APS employees in the Department, by entering into an arrangement with the Secretary of the Department.[2712] The Act does not provide specific recruitment powers to the Commissioner and is therefore otherwise limited by the arrangements it makes with the Secretary of the Department. It is also worth noting that with recent extension of the Office of the Commissioner, the media release and explanatory memorandum notes that the Commissioner will be supported by two Deputy Commissioners to specifically look after allied health, nursing and Indigenous health.[2713] The appointment mechanisms and criteria of these Deputy Commissioners is yet to be confirmed.

1.10 Adequate funding of NHRIs

Summary: there is a lack of transparency around the funding of the Commissioner (under the Act and general resources available on the National Rural Health Commissioner's website). The inability to locate the funding source within the Federal budget and general searches suggests the Commissioner does not comply with the Paris Principles on adequate funding of NHRIs.

NHRIs must be provided with adequate funding in order to function effectively and independently.[2714]

The funding stream of the Office of the Commissioner is unclear. The most currently available Annual Report notes that the Office of the Commissioner receives funding of $4.4 million over

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[2707] Department of Health, *Frequently* (Webpage) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/National-Rural-Health-Commissioner-frequently-asked-questions#1.3>.

[2708] Department of the Prime Minister and Cabinet, *Cabinet Handbook* (2019) 23-24 <https://www.pmc.gov.au/sites/default/files/publications/cabinet-handbook-13th-edition_1.pdf>.

[2709] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[2710] *Health Insurance Act 1973* (Cth) s 79AD(2).

[2711] *Health Insurance Act 1973* (Cth) s 79AM.

[2712] *Health Insurance Act 1973* (Cth) s 79AR.

[2713] Mark Coulton 'Government appoints new National Rural Health Commissioner' (Media Release, Department of Health, 3 July 2020) <https://www.health.gov.au/ministers/the-hon-mark-coulton-mp/media/government-appoints-new-national-rural-health-commissioner>; see also, Department of Health, *National Rural Health Commissioner* (Webpage) 1-2 <https://www1.health.gov.au/internet/main/publishing.nsf/Content/National-Rural-Health-Commissioner>.

[2714] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

four years until July 2020.[2715] For the period beyond July 2020, the Explanatory Memorandum for the Act notes that the "financial impact of extending the Office is cost neutral, funding from existing program funding".[2716] However this amount of the existing program funding is not specified.

1.11 Annual reports of NHRIs

Summary: the Act largely complies with the Paris Principles on annual reports of NHRIs.

The Commissioner is required to prepare an annual report for the Minister, for presentation to the Parliament.[2717] The report must specify the activities of the Commissioner during the previous financial year including and any other matters the Minister has directed the Commissioner to include.[2718] The annual reports are publicly available on the Department of Health website which increases the transparency and public accountability of the Commissioner.

2 Any criticisms made publicly about this role?

No public criticisms about this role have been found.

3 What are the best features of this role?

There are no best features of this role which should be recommended. As noted above, this role sparingly complies with the Paris Principles and there are significant gaps in the role, function, powers and administration.

[2715] National Rural Health Commissioner, *Annual Report* (Report, 2018) 3 <https://www1.health.gov.au/internet/main/publishing.nsf/Content/2922D6D8BBCE122FCA2581D30076D09A/$File/Annual%20Report%202018%20-%20National%20Rural%20Health%20Commissioner.pdf>.

[2716] Explanatory Memorandum, *Health Insurance Amendment (Continuing the Office of the National Rural Health Commissioner) Bill 2020*, 3 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6565_ems_1325749f-ef2d-40bc-966b-96327ed880ff/upload_pdf/739678.pdf;fileType=application%2Fpdf>.

[2717] *Health Insurance Act 1973* (Cth) s 79AP(1).

[2718] *Health Insurance Act 1973* (Cth) ss 79AP(2), 79AQ .

4 Impacts of the National Rural Health Commissioner

- In 2018, the Commissioner brought together senior representatives from two General Practice Colleges to develop an agreed definition of what it means to be a Rural Generalist and to establish a collaborative approach to the development of a framework for the National Pathway. The definition formulated by the group in the Collingrove Agreement provides the sector with common knowledge to describe the scope of practice of a Rural Generalist and the training they require. The Collingrove Agreement has been endorsed by members of the Rural Health Stakeholder Roundtable and has been adopted as part of ongoing discussions in many parts of the rural and remote heath sector.[2719]

- Also in 2018, the Commissioner together with The National Rural Generalist Taskforce produced an advice for government which included a comprehensive analysis of the current gaps in rural workforce training opportunities and service provision in each jurisdiction and created principles for a recommended Pathway framework.[2720] The Minister has accepted this work and has directed the Commissioner to carry out consequential work as well as requested the Department of Health to take carriage of the recommendations for a National Pathway.[2721]

[2719] National Rural Health Commissioner, *Annual Report* (Report, 2018) 3 <https://www1.health.gov.au/internet/main/publishing.nsf/Content/2922D6D8BBCE122FCA2581D30076D09A/$File/Annual%20Report%202018%20-%20National%20Rural%20Health%20Commissioner.pdf>.

[2720] National Rural Health Commissioner, *Annual Report* (Report, 2018) 7 <https://www1.health.gov.au/internet/main/publishing.nsf/Content/2922D6D8BBCE122FCA2581D30076D09A/$File/Annual%20Report%202018%20-%20National%20Rural%20Health%20Commissioner.pdf>; National Rural Generalist Taskforce – Advice to the National Rural Health Commissioner on the Development of the National Rural Generalist Pathway (December 2018) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/2922D6D8BBCE122FCA2581D30076D09A/$File/Advice-to-the-National-Rural-Health-Commissioner-on-the-Development-of-the-National-Rural-Generalist-Pathway.pdf=<,

[2721] National Rural Health Commissioner, *Annual Report* (Report, 2018) 7 <https://www1.health.gov.au/internet/main/publishing.nsf/Content/2922D6D8BBCE122FCA2581D30076D09A/$File/Annual%20Report%202018%20-%20National%20Rural%20Health%20Commissioner.pdf>.

23 Australian National Data Commissioner

A. Australian National Data Commissioner: Summary table

Question	Summary response
Country/State/Territory	Australia
Commissioner entity name	National Data Commissioner ('**NDC**')
Date established	**Interim role:** Office of National Data Commissioner ('**ONDC**') formed July 2018, Interim Commissioner appointed 8 August 2018. **Statutory role:** legislation forthcoming (*Data Availability and Transparency Act*)
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	No – the ONDC does not advocate for human rights and is likely not best conceptualised as a national human rights institution. Whilst the ONDC does promote privacy, this is a part of its broader mandate to promote and regulate the sharing, release and use of public sector data.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	Currently sits within Department of Prime Minister and Cabinet, however forthcoming legislation will establish an independent statutory role. A National Data Advisory Council will advise the National Data Commissioner on ethical data use, community engagement, technical best practice, as well as industry and international developments.[2722] **Relationships:** 1. Works with the Australia Information Commissioner and Privacy Commissioner (Office of the Australia Information Commissioner), to: • ensure that Australia's data sharing framework is underpinned by a strong foundation of transparency, privacy and security, and • strengthen the integrity, management and use of public sector data. 2. Australia Bureau of Statistics provides technical advice to the ONDC. 3. National Data Advisory Council (NDAC) advises the NDC on ethical data use, community engagement, technical best practice, as well as industry and international developments. NDAC includes academics, business leaders, the Australia Statistician, 4. ACCC
Accountability arrangements What is the reporting line for the role?	Decisions of the ONDC will be subject to a range of accountability mechanisms, including:[2723]

[2722] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 14 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2723] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 14 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

Question	Summary response
Who sets the budget?	- Complaints; - Merits review; and - Judicial review.
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	There is little available information as to the requisite qualifications or experience for the role. The current interim NDC is Ms Deborah Anton, former director-general of IP Australia's policy and corporate division. It appears implicit from the nature of the role that a background in technology, data and information technology systems would be preferred, however the specifics are unclear.
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	The ONDC operates on a national level to promote the sharing, release and use of public sector data. It does not advocate for human rights per se, although the ONDC is required to uphold individuals' privacy in managing the data sharing system.
Purpose What is the purpose and objective of the role?	The primary purpose of the ONDC is to develop, promote and regulate a national Data Sharing and Release system, whereby public sector entities are encouraged to release and share data where appropriate. This system is designed to support public policy and research, with secondary benefits to private sector entities. The objectives of the Data Sharing and Release legislation will be to:[2724] • consistently safeguard public sector data sharing and release • enhance the integrity of the data system • build trust in use of public sector data • establish institutional arrangements • promote better sharing of public sector data • apply the Data Availability and Transparency legislation in a consistent and effective manner.
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be	- Manage data sharing and release under the Data Sharing and Release framework. The NDC will build trust in the system by accrediting users and data service providers. The Commissioner will also support best practice through guidance and education, aimed at voluntary compliance with the legislation, and will escalate to a graduated enforcement model when necessary to protect public sector data;[2725]

[2724] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 14 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2725] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 15 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

Question	Summary response
tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	- Issue non-binding guidance describing best practice in sharing and releasing data;[2726] - Advocating for proper management and greater use, reuse and release of public sector data;[2727] - Accreditation and enforcement to support the public sector data sharing system;[2728] - Advising the Minister and relevant entities on the operation of the data sharing system;[2729] - Handling complaints from Accredited Users, Accredited Data Service Providers and Data Custodians about the Data Sharing and Release system;[2730] - Monitor compliance with the Data Sharing and Release legislation, including conducting assessments and investigations;[2731] and - Determining breaches of the Data Sharing and Release legislation, enforcing the legislation and imposing penalties.[2732]
Budget What is the annual budget for the role?	The 2018–19 Budget provided a total of $65.1 million over 2018–2022 for new data sharing and release arrangements. Department of Prime Minister and Cabinet received $20.5 million of this funding, and agencies within the Treasury received $44.6 million. This funding includes the budget for the ONDC, however the specific amount is allocated to the ONDC is unclear.[2733]
Legislative Requirements	Public draft legislation is not yet available. Further information available via Data Sharing and Release Legislative Reforms discussion paper

[2726] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 15 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2727] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 41 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>. .

[2728] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 41 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>. .

[2729] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 41 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2730] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 50 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2731] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 50 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2732] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 50 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2733] Parliament of Australia, Nicholas Horne and Philip Hamilton, *Budget Review 2018-19 Index* (Webpage) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201819/DataSharing>.

Question	Summary response
How is the role enshrined in legislation? Specify and link the applicable legislation.	(September 2019), and the Data Sharing and Release legislation issues paper (July 2018).
Most recent annual report or equivalent document (link)	N/A

B. National Data Commissioner: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs[2734]

Summary: without an independent statutory framework, this Commissioner does not comply with the requirements.

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[2735]

Entrenched in law[2736]

The ONDC will be formed as an independent statutory authority, however, there is no draft legislation presently available.

The ONDC will be advised by the National Data Advisory Council (**NDAC**) on ethical data use, community expectations, technical best practice, industry and international developments and issues relating to the broader data environment.[2737] The NDAC comprises nine members from the Australian government, business and industry, civil society groups and academia. Government representatives include the Australian Statistician, the Australian Information and Privacy Commissioner and the Australian Chief Scientist.

Mandate and powers[2738]

The ONDC will primarily be empowered to promote compliance with the Data Sharing and Release legislation, which aims to create systems to safely share public sector data between trusted users for specified purposes.[2739] These powers are broad, and include:

[2734] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[2735] GANHRI General Observations, G.O. 1.1.

[2736] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2737] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 14 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2738] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2739] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 1 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

- Promoting the use and reuse of public sector data;
- Maintaining the integrity of the Data Sharing and Release system;
- Engaging with the community on the use of public sector data;[2740]
- Advising government agencies on how to safely release public sector data, to mitigate the risks of both sharing and releasing data;[2741]
- Advising the Minister and relevant entities on the operation of the Data Sharing and Release system, including on legislative proposals;[2742]
- Maintain a public register of all Data Sharing Agreements, being agreements setting out who is sharing or releasing data, the data in question, and who is receiving the data;[2743]
- Issuing annual reports on the effectiveness of the Data Sharing and Release system, including the public register of Data Sharing Agreement;[2744] and
- Providing regulatory oversight of the data sharing system, predominately via accreditation and enforcement. Accreditation is of entities that may either disseminate or receive public data, whilst enforcement is of those entities operating in the data sharing system.[2745]

Appointment mechanisms[2746]

We were unable to find publicly available guidance on the appointment mechanisms for this role.

Ms Deborah Anton was appointed as the Interim National Data Commissioner on 9 August 2018.

Quasi-judicial competency (complaints-handling)[2747]

The ONDC will be empowered to monitor compliance with the Data Sharing and Release legislation, determine breaches and impose penalties.[2748] The relevant penalties are still being determined via the consultation process, however initial assurances have been provided that penalties will be proportionate and comparable to the penalties available under the *Privacy Act 1988* and the *My Health Records Act 2012*.

[2740] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 39 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>..

[2741] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 18 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>..

[2742] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 41 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2743] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 36 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>..

[2744] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 37 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2745] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 28 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2746] See GANHRI General Observations, G.O. 1.1.

[2747] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[2748] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 50 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

The ONDC will also be empowered to hear individual complaints and notifications of breaches of the data sharing laws.[2749]

1.2 Human rights mandate[2750]

Summary: the Commissioner is not compliant in this respect, noting that human rights promotion is not its primary function.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[2751] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[2752]

The ONDC does not have an explicit human rights mandate, as it focuses upon promoting the dissemination and effective use of public sector data in a way that does not comprise the privacy of individuals.[2753] Insofar as the role protects individuals' privacy it may be said to hold a human rights mandate. However, it appears that the protection of individuals' privacy is a necessary component of the ONDC's mandate, rather than its focus.

Of note, the ONDC is required to ensure that accredited entities have the skills and capabilities to uphold privacy standards in sharing, releasing and accessing public sector data.[2754] The ONDC also commissioned a Privacy Impact Statement, released 28 June 2019, that listed eight recommendations designed to build privacy protections into any draft legislation.[2755] These primarily dealt with limiting data use to generally low risk activities, limiting certain commercial access and preventing law enforcement or national security related data use. It appears that these principles have been incorporated into the subsequent discussion paper, although until draft legislation is released any specific privacy protection measures are unclear.

Functional immunity[2756]

There is no relevant guidance on whether the NDC or ONDC staff will hold any functional immunity in their roles. There are a number of offences dealing with data and privacy breaches, that the NDC and ONDC may theoretically accidentally be involved in given their substantial involvement in facilitating data exchange.

Competence and responsibilities[2757]

The purpose of the Data Sharing and Release legislation is to promote the using of public sector data to better inform policy development and research.[2758] This also includes the release of data,

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[2749] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 51 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2750] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

[2751] GAHNRI General Observations, G.O. 1.2.

[2752] GAHNRI General Observations, G.O. 1.2.

[2753] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 29 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2754] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 29 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2755] Galexia, *Privacy Impact Assessment on the Proposed Data Sharing and Release (DS&R) Bill and Related Regulatory Framework* (28 June 2019) 9.

[2756] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1 & 2.3.

[2757] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 2.6.

[2758] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 23 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

which may be used by the private sector.[2759] Whilst this captures most public sector data, it does not include data sharing for:[2760]

- compliance activities (determining whether a person is compliant with their legal obligations);
- assurance activities (determining eligibility, entitlement or liability for government programs or services); or
- national security or law enforcement purposes, including investigations, monitoring and taking action targeted at individuals and organisations.

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Commissioner is not compliant with this requirement.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[2761] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[2762]

The ONDC does not appeal to hold any specific mandate to promote the ratification of, or accession to, international human rights instruments.

1.4 Interaction with the international human rights system

Summary: the Commissioner is not compliant with this requirement.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[2763] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[2764]

The ONDC does not appear to engage with the broader international human rights system.

1.5 Cooperation with other human rights bodies

Summary: the Commissioner is partially compliant with this requirement, with prospective cooperation with entities operating in the same area.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[2765] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[2766]

The ONDC will work alongside the national privacy regulator, the Office of the Australian Information Commissioner, to ensure that Australia's data sharing and release framework is underpinned by a strong foundation of privacy and security. The ONDC will also work with the Office of the Australian Information Commissioner on a range of key topics including data

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[2759] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 26 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>..

[2760] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 23 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2761] GANHRI General Observations, G. O. 1.3.

[2762] GANHRI General Observations, G. O. 1.3.

[2763] GAHNRI General Observations, G.O. 1.4.

[2764] GAHNRI General Observations, G.O. 1.4.

[2765] GAHNRI General Observations, G.O. 1.5.

[2766] GAHNRI General Observations, G.O. 1.5.

management, de-identification, data security, data breaches, the general handling of personal information and information management.[2767]

1.6 Recommendations by NHRIs

Summary: the Commissioner is partially compliant with this requirement, with recommendation powers that are limited in scope and lacking effective follow up powers.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[2768] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[2769] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[2770]

The ONDC is empowered to advise the Minister and relevant entities on the operation of the Data Sharing and Release system. The ONDC may also provide advice on legislation where that legislation does or may impact upon the Data Sharing and Release system.[2771] These recommendations do not appear to be binding and there are no clear follow up mechanisms.

1.7 Ensuring pluralism of the NHRI[2772]

Summary: the Commissioner is not compliant with this requirement.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[2773] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

There is no relevant guidance on the staffing makeup of the ONDC.

Generally, appointments to the Australian Public Service must be on a merits basis, whilst agency heads are permitted to take affirmative measures to restrict job eligibility to Aboriginal and Torres Strait Islander people or people with a disability or certain type of disability.[2774]

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: the Commissioner appears substantially compliant with this requirement, with a decision-making body comprised on individuals from representative backgrounds.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[2775]

The ONDC will be advised by the NDAC, formed by nine members drawn from the Australian government, business and industry, civil society groups and academia which includes the Australian Statistician, the Australian Information and Privacy Commissioner and the Australian

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[2767] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 21 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2768] GAHNRI General Observations, G.O. 1.6.

[2769] GAHNRI General Observations, G.O. 1.6.

[2770] GAHNRI General Observations, G.O. 1.6.

[2771] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 41 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

[2772] Consider also: GANHRI General Observations, G.O. 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[2773] GANHRI General Observations, G.O. 1.7.

[2774] Australian Public Service Commission, *Recruitment: Guidelines* (Webpage) <https://www.apsc.gov.au/recruitment-guidelines>.

[2775] GAHNRI General Observations, G.O. 1.8

Chief Scientist.[2776] The members of the NDAC were appointed by government for an initial two-year term.[2777]

Government members of the NDAC attend in the capacity of the position they hold. Non-government members attend in their individual capacities, being paid sitting fees and costs of meeting attendances.

1.9 Political representatives on NHRIs

Summary: the Commissioner does not comply with this requirement, with little transparency or structural independence.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[2778] An NHRI should also be independent from government.

The members of the NDAC, both government and private sector, were appointed by government for an initial two-year term. It is unclear from the available material whether this practice will continue after these initial appointments, or whether the NDC or the NDAC itself will have greater say over future members of the NDAC. Currently, there is considerable prospect for political considerations to play a part in determining the makeup of the NDAC, given appointments are made by government and absent of any clear, publicly available criteria.

1.10 Adequate funding of NHRIs

Summary: the Commissioner is partially compliant with this requirement, as, whilst apparently in receipt of significant funding, the allocation and use of this funding is unclear.

NHRIs must be provided with adequate funding in order to function effectively and independently.[2779]

The 2018–19 Budget provided a total of $65.1 million over 2018–2022 for new data sharing and release arrangements. This funding was distributed between the Department of Prime Minister and Cabinet (receiving $20.5 million) and the Treasury (receiving $44.6 million). This funding includes the budget for the ONDC, however the specific amount is allocated to the ONDC is unclear.[2780]

1.11 Annual reports of NHRIs

Summary: the Commissioner is compliant with this requirement.

The ONDC will be required to release an annual report on the performance of the Data Sharing and Release system and detailing the public registers of entities both sharing and receiving data.[2781]

[2776] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 14 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>..

[2777] Office of the National Data Commissioner, *National Data Advisory Council* (Webpage) <https://www.datacommissioner.gov.au/about/advisory-council#:~:text=The%20National%20Data%20Advisory%20Council,and%20industry%20and%20international%20developments.&text=During%20its%20first%20year%2C%20the,Data%20Sharing%20and%20Release%20legislation.>.

[2778] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[2779] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[2780] Parliament of Australia, Nicholas Horne and Philip Hamilton, *Data sharing and release* (Webpage) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201819/DataSharing>.

[2781] Department of the Prime Minister and Cabinet, *Data Sharing and Release* (Discussion Paper, September 2019) 18 < https://www.datacommissioner.gov.au/sites/default/files/2019-09/Data%20Sharing%20and%20Release%20Legislative%20Reforms%20Discussion%20Paper%20-%20Accessibility.pdf>.

2 Any criticisms made publicly about this role?

An article by Katharine Kemp and David Vaile published in The Conversation on 1 May 2018 criticised the proposed Data Sharing and Release system as not providing adequate privacy protections. Criticisms were levelled at Australia's data security and privacy legislation more broadly, with the authors suggesting that developments in big data processing, combined with lax data protection and privacy laws, render individuals increasingly vulnerable to manipulation. This article characterised the sharing and release practices championed by the ONDC as being tantamount to an irrevocable transfer of personal data to unknown third-parties, who may store, use and pass on this data as they see fit.

3 What are the best features of this role?

- The ONDC holds an effective mandate to regulate significant aspects of the proposed data sharing and release system. This includes providing input and recommendations on legislation, accrediting data sharing entities, educating entities on best practice, monitoring compliance with the system and enforcing breaches. These powers provide an "end-to-end" supervisory mandate for the ONDC.

24 New Zealand Children's Commissioner

A. New Zealand Children's Commissioner: Summary table

Question	Summary response
Country/State/Territory	New Zealand
Commissioner entity name	Office of the Children's Commissioner
Date established	1989[2782]
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	Partial – generally compliant, but noting the following departures discussed in detail below: • Selection and appointment process; • Dismissal process; and • Funding.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The position of Children's Commissioner was established under the *Children, Young Persons and Their Families Act 1989* as a separate body from the executive and administrative arms of government.[2783] Its independence was reinforced when it was given its own statute, the *Children's Commissioner Act 2003*, and the status of an independent Crown entity.[2784] The Office includes the Children's Commissioner, the Strategy Rights and Advice team, the Development, Monitoring and Investigations team, the Corporate team and a Communications team.[2785] The Children's Commissioner can make referrals of matters to other statutory officers, including: • the Chief Commissioner under the *Human Rights Act 1993;* • the chief executive of the department responsible for the administration of the *Oranga Tamariki Act 1989;* • the Commissioner of Police; • the Health and Disability Commissioner; • the Chief Ombudsman under the Ombudsmen Act 1975; • the Independent Police Conduct Authority; and • the Privacy Commissioner.[2786]
Accountability arrangements What is the reporting line for the role? Who sets the budget?	The Commissioner meets regularly with the Responsible Minister, the Minister for Social Development, and provides briefings on issues relating to the interests, rights and welfare of children, and keeps all other relevant Ministers informed of its work.[2787]

[2782] Children's Commissioner, *About Us* (Webpage) <https://www.occ.org.nz/about-us/>.
[2783] Children's Commissioner, *About Us* (Webpage) <https://www.occ.org.nz/about-us/>.
[2784] *Children's Commissioner Act 2003* (NZ) s 6(2).
[2785] Children's Commissioner, *About Us* (Webpage) <https://www.occ.org.nz/about-us/>.
[2786] *Children's Commissioner Act 2003* (NZ) s 19(4).
[2787] Children's Commissioner, *Our Role and Purpose* (Webpage) <https://www.occ.org.nz/about-us/our-role-and-purpose/>.

Question	Summary response
	The budget is set by the Minister for Social Development under the "Vote Social Development" appropriations, which are set annually.[2788] The Commissioner's yearly expenses (e.g. for travel, conferences and meals) are all publicly disclosed and itemised.[2789]
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	The Minister for Social Development will recommend the appointment of a Commissioner under section 28(1)(b) of the *Crown Entities Act 2004.* The Minister for Social Development must: • notify the vacancy or prospective vacancy in a way that is sufficient to enable suitably qualified individuals to apply for appointment; and • consider consulting any organisations or persons that, in the opinion of the Minister, have a special interest in the functions of the Commissioner, including organisations representing children and children themselves.[2790] A Judge can be appointed as Commissioner, and this does not affect the Judge's tenure or the Judge's rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as a Judge (including in relation to superannuation) and, for all purposes, the Judge's service as Commissioner is service as a Judge.[2791] The person does not need to be an Aboriginal or Torres Strait Islander/Maori person.
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	Advocacy for all persons under the age of 18 years in New Zealand.
Purpose What is the purpose and objective of the role?	The Commissioner's primary role is as an advocate for children, and to give better effect in New Zealand to the United Nations Convention on the Rights of the Child ("**the Convention**") and have regard to the Convention when carrying out its functions and powers.[2792]
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be	The general functions of the Commissioner include the following: • to investigate any decision or recommendation made, or any act done or omitted, in respect of any child in that child's personal capacity; and • to promote the establishment of accessible and effective complaints mechanisms for children and to monitor the nature and level of complaints;

[2788] Minister for Social Development, The Estimates of Appropriations 2020/21 - Social Services and Community Sector, available at <https://treasury.govt.nz/sites/default/files/2020-05/est20-v10-socdev_1.pdf>.

[2789] See, eg, Children's Commissioner, *Children's Commissioner's Expenses Ending 30 June 2019* (30 June 2019) <https://www.occ.org.nz/publications/corporate-documents/childrens-commissioners-expenses-ending-30-june-2019/>.

[2790] *Children's Commissioner Act 2003* (NZ) s 7(3).

[2791] *Children's Commissioner Act 2003* (NZ) s 7(5).

[2792] *Children's Commissioner Act 2003* (NZ) s 3.

Question	Summary response
tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	• to raise awareness and understanding of children's interests, rights, and welfare; • to raise awareness and understanding of the UN Convention; • to undertake and promote research into any matter that relates to the welfare of children; • to act as an advocate for children's interests, rights, and welfare generally (except before any court or tribunal), and, in that regard, to advance and monitor the application of the UN Convention by State departments and Crown bodies; • if there are issues in proceedings before any court or tribunal that relate to the UN Convention or to the interests, rights, or welfare of children generally, to present reports on such issues to the court or tribunal, at the request of the court or tribunal or counsel in the proceedings; • to receive and invite representations from members of the public on any matter that relates to the welfare of children; • to increase public awareness of matters that relate to the welfare of children; • to promote the participation of children in decisions that affect the lives of children, and to take an approach to children's views that, in each case, gives due weight to those views in accordance with the age and maturity of the relevant child; • to report, with or without request, to the Prime Minister on matters affecting the rights of children; and • to inquire generally into, and report on, any matter, including any enactment or law, or any practice or procedure, that relates to the welfare of children.[2793] The Commissioner also has certain mandates in relation to the *Oranga Tamariki Act 1989,* which provides for the care and protection of children and youth justice. The mandates relate to reviewing decisions or recommendations made, and policies and practices of government departments in relation to that Act.[2794] In performing or exercising the Commissioner's functions or powers, the Commissioner must have regard to: • the Convention; • the principle that the Commissioner should give serious consideration to the views of children and take those views into account; • the principle that the Commissioner should recognise the diversity of children in New Zealand; and • the principles stated in sections 4A and 5 of the *Oranga Tamariki Act 1989*, so far as they are applicable and with all necessary modifications.[2795]

[2793] *Children's Commissioner Act 2003* (NZ) s 12(1).

[2794] *Children's Commissioner Act 2003* (NZ) s 13(1).

[2795] *Children's Commissioner Act 2003* (NZ) s 11.

Question	Summary response
	The Commissioner is required to act independently in performing their statutory functions and duties and exercising their statutory powers.[2796] The Commissioner is required to develop means of consulting with children from time to time for the purpose of ensuring the views of children are taken into account in the exercise or performance of the Commissioner's functions and must consult with them where practicable before making significant recommendations.[2797] In conducting an investigation, the Commissioner must have regard to the question of whether the rights or the welfare and interests of 1 or more children have been prejudiced.[2798] The Commissioner has powers to require that a person provides information or documents to the Commissioner it if it is reasonably necessary for an investigation, a person does not provide it after being requested to, and it is not reasonably practicable to obtain the information or document from another source, or it is necessary to verify or refute information from another source.[2799] If the person does not comply or knowingly or recklessly provides false or misleading information, they could be liable to a $2,000 fine.[2800] The Commissioner can also apply to the court to access court records if it believes on reasonable grounds this is required for an investigation.[2801] The Commissioner must not in any report or statement made under this Act, make any comment that is adverse to a person if the Commissioner has not given the person an opportunity to be heard.[2802]
Budget What is the annual budget for the role?	The 2019/20 annual budget was $3,157,000. The 2020/21 annual budget is $4,157,000.[2803]
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	The role is established under the *Children's Commissioner Act 2003* and is subject to the *Crown Entities Act 2004.*
Most recent annual report or equivalent document (link)	Children's Commissioner's priorities,[2804] an annual Statement of Performance Expectations,[2805] and an Annual Report that is tabled in Parliament.[2806]

[2796] *Children's Commissioner Act 2003* (NZ) s 12(2).

[2797] *Children's Commissioner Act 2003* (NZ) s 14.

[2798] *Children's Commissioner Act 2003* (NZ) s 17.

[2799] *Children's Commissioner Act 200* (NZ) s 20.

[2800] *Children's Commissioner Act 2003* (NZ) s 21.

[2801] *Children's Commissioner Act 2003* (NZ) s 24.

[2802] *Children's Commissioner Act 2003* (NZ) s 25.

[2803] Minister for Social Development, *Vote Social Development* (Report, 2020) 201 <https://treasury.govt.nz/sites/default/files/2020-05/est20-v10-socdev_1.pdf>.

[2804] See eg, Children's Commissioner, *Children's Commissioner's Top Priorities* (Webpage) <https://www.occ.org.nz/publications/corporate-documents/commissioner-priorities/>.

[2805] See eg, Children's Commissioner, *Statement of Performance Expectations* (Webpage) <https://www.occ.org.nz/publications/corporate-documents/statement-of-performance-expectations-3/>.

[2806] See eg, Office of the Children's Commissioner, *2018-19 Annual Report* (Report, 2019) <https://www.occ.org.nz/assets/Uploads/AnnualReport-FINAL-web.pdf>.

B. New Zealand Children's Commissioner: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs[2807]

*Summary: The office of the New Zealand Children's Commissioner ("**Commissioner**") is generally compliant with the following requirements under the Paris Principles.*

Entrenched in law[2808]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[2809]

The Commissioner is established by the *Children's Commissioner Act 2003*, which is a legislative text. The *Crown Entities Act 2004* establishes the Commissioner as an independent Crown entity, which is independent of government.[2810]

Mandate and powers[2811]

The *Children's Commissioner Act 2003* is a detailed document, providing a clear mandate to the Commissioner and setting out its role, functions and powers.[2812] The Act does not set out any mechanism for funding, which is determined yearly by the Minister for Social Development. The Children's Commissioner is accountable to the responsible Ministers, which appear to be the Minister for Finance and the Minister for Social Development.

Appointment mechanisms[2813]

Appointments are made by the Governor-General by recommendation from the Minister for Social Development, which may detract from the Commissioner's independence.[2814] The term of office is 5-years or any shorter period stated in a notice of appointment.[2815]

1.2 Human rights mandate[2816]

Summary: The Commissioner holds a broad mandate, augmented by an effective investigations power coupled with fines for non-compliance. This substantially complies with the relevant requirements.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[2817] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[2818]

Competence and responsibilities[2819]

[2807] See especially: General Observation 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[2808] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2809] GANHRI General Observations, G.O. 1.1.

[2810] *Children's Commissioner Act 2003* (NZ) s 6(2).

[2811] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2812] *Children's Commissioner Act 2003*, ss 3, 11.

[2813] See GANHRI General Observations, G.O. 1.1.

[2814] *Children's Commissioner Act 2003* (NZ) s 28(1)(b).

[2815] *Crown Entities Act 2004* (NZ) s 32(1)(b).

[2816] Consider also: GANHRI General Observations, G.O. 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

[2817] GAHNRI General Observations, G.O. 1.2.

[2818] GAHNRI General Observations, G.O. 1.2.

[2819] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 2.6.

The Commissioner is legislatively mandated with specific functions to both promote and protect human rights. The Commissioner's key functions include raising awareness and understanding of children's interests, rights, and welfare, raising awareness and understanding of the Convention, and to undertake and promote research into any matter that relates to the welfare of children, and to act as an advocate for children's interests, rights, and welfare generally (except before any court or tribunal), and, in that regard, to advance and monitor the application of the Convention by State departments and Crown bodies.[2820]

Powers of inquiry and investigation

The Commissioner can inquire generally into, and report on, any matter, including any enactment or law, or any practice or procedure, that relates to the welfare of children, and one of its key functions is to promote the establishment of accessible and effective complaints mechanisms for children and to monitor the nature and level of complaints.[2821] In conducting an investigation, the Commissioner must have regard to the question of whether the rights or the welfare and interests of 1 or more children have been prejudiced.[2822]

The Commissioner has the power to obtain statements or documents in order to assess situations raising human rights issues, as it has powers to require that a person provides information or documents to the Commissioner it if it is reasonably necessary for an investigation, a person does not provide it after being requested to, and it is not reasonably practicable to obtain the information or document from another source, or it is necessary to verify or refute information from another source.[2823] If the person does not comply or knowingly or recklessly provides false or misleading information, they could be liable to a $2,000 fine.[2824] The Commissioner can also apply to the court to access court records if it believes on reasonable grounds this is required for an investigation.[2825]

Oranga Tamariki is the Ministry for Children government department that provides services to approximately 30,000 children and young people each day. Around 6000 of those children and young people are in the care or custody of Oranga Tamariki, and at any one time, approximately 200 young people are placed in Oranga Tamariki residences.[2826] Specifically with regard to Oranga Tamariki, the Commissioner has the mandate to review decisions or recommendations made, and policies and practices of government departments in relation to Oranga Tamariki and its governing Act.[2827] The Commissioner will investigate any concerns on a case by case basis and can also monitor Oranga Tamariki's investigation and resolution of any complaint.

An example of the Commissioner using its powers in this regard is in relation to the 2018 case of a teenager, Sonny Marks, who died in state care from what appeared to be a suicide attempt in circumstances where the caregiver was unaware of his mental health issues and his risk of suicide.[2828] In addition, his mother was not informed by Oranga Tamariki that her son was admitted to hospital and the Ministry waited hours after he died the following day before notifying her of his death.[2829] The current Commissioner, Judge Becroft, has publicly expressed that this case would warrant his attention and is awaiting the outcome of the coronial inquest the

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[2820] *Children's Commissioner Act 2003* (NZ) s 12(1).

[2821] *Children's Commissioner Act 2003* (NZ) s 12(1).

[2822] *Children's Commissioner Act 2003* (NZ) s 17.

[2823] *Children's Commissioner Act 2003* (NZ) s 20.

[2824] *Children's Commissioner Act 2003* (NZ) s 21.

[2825] *Children's Commissioner Act 2003* (NZ) s 24.

[2826] Children's Commissioner, *Why We Monitor* (Webpage) <https://www.occ.org.nz/our-work/monitoring/monitoring-work/why-we-monitor/>.

[2827] Children's Commissioner Act 2003 (NZ) s 13(1).

[2828] Leigh-Marama McLachlan, 'Case of suicide in case warrants further investigation – Children's Commissioner' *RNZ* (online, 2 April 2020) <https://www.rnz.co.nz/news/national/413272/case-of-suicide-in-care-warrants-further-investigation-children-s-commissioner>.

[2829] Leigh-Marama McLachlan, 'Case of suicide in case warrants further investigation – Children's Commissioner' *RNZ* (online, 2 April 2020) <https://www.rnz.co.nz/news/national/413272/case-of-suicide-in-care-warrants-further-investigation-children-s-commissioner>.

recommendations under it before making a decision on next steps.[2830]The Commissioner's powers extend to the acts and omissions of both the public and private sectors, and the Commissioner has the competence to freely address public opinion by receiving and inviting representations from members of the public on any matter that relates to the welfare of children and raising public awareness on matters that relate to the welfare of children, the Convention and children's interests, rights, and welfare.[2831]

Functional immunity:[2832]

The *Children's Commissioner Act 2003* provides protection from criminal and civil liability for acts or omissions undertaken in good faith by the Commissioner or its employees, which is consistent with the Paris Principles. No civil or criminal proceedings may be brought against any Commissioner or against a person who is or has been an employee of a Commissioner for anything done or that was not done when exercising the functions under the *Children's Commissioner Act 2003* unless it is shown that the person concerned acted in bad faith.

A Commissioner or any person who is or has been an employee of a Commissioner cannot be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything that comes to the knowledge of the person concerned in the exercise of functions or powers under the *Children's Commissioner Act 2003*.

1.3 Encouraging ratification or accession to international human rights instruments

Summary: The Commissioner is specifically required to promote compliance with international human rights instruments, engages in public reporting and facilitates national working groups and is substantially compliant with the relevant requirements.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[2833] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[2834]

The Commissioner has a clear role to play in the effective implementation of the Convention and the UN Convention against Cruel, Inhuman or Degrading Treatment or Punishment in relation to Oranga Tamariki residences, both of which New Zealand is a party to, which is consistent with the Paris Principles.

A key part of the Commissioner's functions includes raising awareness and understanding of the Convention.[2835] If there are issues in proceedings before any court or tribunal that relate to the UN Convention or to the interests, rights, or welfare of children generally, one of the Commissioner's functions is to present reports on such issues to the court or tribunal, at the request of the court or tribunal or counsel in the proceedings.[2836] In performing or exercising the Commissioner's functions or powers, the Commissioner must have regard to the Convention.[2837]

The Commissioner co-ordinates the Children's Convention Monitoring Group ("**Group**"), which monitors the New Zealand Government's implementation of the UN Convention, its Optional Protocols and the Government's response to recommendations from the United Nations

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[2830] Leigh-Marama McLachlan, 'Case of suicide in case warrants further investigation – Children's Commissioner' *RNZ* (online, 2 April 2020) <https://www.rnz.co.nz/news/national/413272/case-of-suicide-in-care-warrants-further-investigation-children-s-commissioner>.

[2831] *Children's Commissioner Act 2003* (NZ) s 12(1).

[2832] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1 & 2.3.

[2833] GANHRI General Observations, G. O. 1.3.

[2834] GANHRI General Observations, G. O. 1.3.

[2835] *Children's Commissioner Act 2003* (NZ) s 12(1).

[2836] *Children's Commissioner Act 2003* (NZ) s 12(1).

[2837] *Children's Commissioner Act 2003* (NZ) s 11.

Committee on the Rights of the Child.[2838] Its members include representatives from the Human Rights Commission, UNICEF New Zealand, Action for Children and Youth Aotearoa and Save the Children New Zealand.[2839] The Group meets regularly to monitor and review the progress made on implementing the UN Convention in New Zealand.[2840] The Group also meets twice a year with the UN Convention Deputy Chief Executives Group who are the permanent coordinating mechanism for the Convention to discuss how the Government is advancing the rights of children in line with the Convention.[2841]

The Group has a public reporting function through its publication of the "Getting it Right" series of reports, which focus on legal and policy developments for children and young people in New Zealand and how those developments align with the UN Convention, and thereby promotes and encourages the harmonisation of national legislation, regulations and practices with the Convention in accordance with the Paris Principles.[2842] The reports highlight progress related to children's rights and identify where New Zealand can improve its compliance with the Convention's requirements.[2843]The Commissioner is also a designated "National Preventive Mechanism" responsible for monitoring New Zealand's compliance with the United Nations Convention against Cruel, Inhuman or Degrading Treatment or Punishment in relation to Oranga Tamariki residences.[2844]

To this end, the Commissioner issues annual "State of Care" reports, which is an annual summary from our independent monitoring of the policies, practices and services of Oranga Tamariki. It includes feedback from children and young people about their experiences in the system.

1.4 Interaction with the international human rights system

Summary: *The Commissioner has some reporting obligations to relevant international entities and is partially compliant with the relevant requirements.*

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[2845] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[2846]

The Commissioner is involved in monitoring compliance with the UN Convention and engaging with the UN Committee on the Rights of the Child ("**UN Committee**"), which is responsible for ensuring compliance with the UN Convention, which is consistent with the Paris Principles.

The Commissioner has the opportunity to report to the UN Committee from time to time and attend UN Committee sessions. For example, during the Fifth Periodic Report in 2016, the Commissioner attended the 73rd session of the UN Committee and reported on outcomes for

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[2838] Children's Commissioner, *Our Role in the Children's Convention* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/>.

[2839] Children's Commissioner, *Our Role in the Children's Convention* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/>.

[2840] Children's Commissioner, *Our Role in the Children's Convention* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/>.

[2841] Children's Commissioner, *Our Role in the Children's Convention* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/>.

[2842] Children's Commissioner, *Our Role in the Children's Convention* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/>.

[2843] Children's Commissioner, *Our Role in the Children's Convention* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-role/>.

[2844] Children's Commissioner, *Why We Monitor* (Webpage) <https://www.occ.org.nz/our-work/monitoring/monitoring-work/why-we-monitor/>.

[2845] GAHNRI General Observations, G.O. 1.4.

[2846] GAHNRI General Observations, G.O. 1.4.

children in New Zealand,[2847] and issued a Supplementary Report from the Commissioner to the UN Committee on the Rights of the Child in 2016.[2848] This is in addition to and separate from government reporting which is carried out by the Minister for Social Development,[2849] which ensures that the Commissioner's independence is maintained, and that it is able to provide information to the UN Committee in its own right.

1.5 Cooperation with other human rights bodies

Summary: The Commissioner engages in broad-based consultation with sub-national groups and is substantially compliant with the relevant requirements.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[2850] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[2851]

The Commissioner regularly engages with relevant stakeholders and maintains working relationships with other institutions in New Zealand and the region that have been established for the promotion and protection of human rights, which is consistent with the Paris Principles.[2852] For example:

- the Commissioner works closely with a diverse range of community organisations, groups and individuals involved in aspects of improving the well-being of children;[2853]
- the Commissioner has a statutory responsibility to monitor and assess the policies and practices provided under the Oranga Tamariki Act 1989 by Oranga Tamariki and other organisations contracted by Oranga Tamariki to provide care services for children, young people and their families;[2854]
- The Commissioner can make referrals of matters to other statutory officers, including:
    - the Chief Commissioner under the Human Rights Act 1993;
    - the chief executive of the department responsible for the administration of the Oranga Tamariki Act 1989;
    - the Commissioner of Police;
    - the Health and Disability Commissioner;
    - the Chief Ombudsman under the Ombudsmen Act 1975;
    - the Independent Police Conduct Authority; and
    - the Privacy Commissioner;[2855] and
- the Commissioner attends biannual members meetings of the Australia and New Zealand Children's Commissioners and Guardians (**ANZCCG**), which aims to promote

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[2847] Children's Commissioner, *The Children's Convention Reporting Cycle* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-reporting/>.

[2848] Children's Commissioner, *Supplementary report from the New Zealand Children's Commissioner* (Report, August 2016) <http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NZL/INT_CRC_IFN_NZL_24881_E.pdf>.

[2849] Children's Commissioner, *The Children's Convention Reporting Cycle* (Webpage) <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/uncroc-reporting/>.

[2850] GAHNRI General Observations, G.O. 1.5.

[2851] GAHNRI General Observations, G.O. 1.5.

[2852] See Paris Principles, *Methods of operation,* principles (f) and (g); GANHRI General Observations, G.O. 1.5.

[2853] Children's Commissioner, *Advocacy* (Webpage) <https://www.occ.org.nz/about-us/our-role-and-purpose/advocacy/>.

[2854] Children's Commissioner, *Monitoring* (Webpage) <https://www.occ.org.nz/our-work/monitoring/>.

[2855] *Children's Commissioner Act 2003* (NZ) s 19(4).

and protect the safety, wellbeing and rights of children and young people in Australia and New Zealand.[2856]

1.6 Recommendations by NHRIs

Summary: The Commissioner is substantially compliant with the relevant requirements, with broad recommendation powers and follow up provisions.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[2857] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[2858] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[2859]

The Commissioner issues a number of annual, special and thematic reports to highlight key concerns about the rights and welfare of children in New Zealand and that include recommendations to, and monitoring of respect for, human rights by public authorities, which is consistent with the Paris Principles.

In addition to the "Getting it Right" and "State of Care" report series discussed above, some other reporting that includes actionable recommendations includes:

- The Waitangi Tribunal Submission issued on 30 July 2020, which was an urgent inquiry into the significant and consistent disparity between the number of Māori and non-Māori children being taken into state care by Oranga Tamariki and its predecessors, the extent to which the legislative, policy and practice changes introduced since 2017, and currently being implemented, change this disparity for the better, and what (if any) additional changes to Crown legislation, policy or practice might be required in order to secure outcomes consistent with the Waitangi Treaty and its principles;[2860] and

- The "Education Matters to Me" series of reports published in 2018, which draws out key insights from children's' experiences to form a starting point for the Statement of National Education Learning Priorities.[2861]

The Commissioner also undertakes reporting on the follow up action taken on recommendations contained in these reports, including detailed information on the measures taken or not taken by public authorities in implementing specific recommendations or decisions that has been published by the Commissioner.

For example, the "Getting It Right: Are We Listening?" report issued on 24 June 2019, which orts on how well the government is implementing the UN Convention in respect of children's participation rights.[2862] It includes a comment on the New Zealand government's response to the recommendation that consultation with children and young people be embedded as part of the Government's standard process for developing the Statement of National Education and Learning Priorities (NELP).[2863]

[2856] Australian Human Rights Commission, *Australian and New Zealand Children's Commissioners and Guardians Communique 15-16 May 2018* (Report, 4 July 2018) <https://humanrights.gov.au/our-work/childrens-rights/publications/australian-and-new-zealand-childrens-commissioners-and>.

[2857] GAHNRI General Observations, G.O. 1.6.

[2858] GAHNRI General Observations, G.O. 1.6.

[2859] GAHNRI General Observations, G.O. 1.6.

[2860] Children's Commissioner, *Waitangi Tribunal Submission* (Report, 30 July 2020) <https://www.occ.org.nz/publications/reports/waitangi-tribunal-submission/>.

[2861] See, eg, Children's Commissioner, *Education Matters to Me: Emotional Wellbeing* (Report, 14 March 2018) <https://www.occ.org.nz/publications/reports/education-matters-to-me-emotional-wellbeing/>.

[2862] Children's Commissioner, *Getting it Right: Are We Listening?* (Report, 24 June 2019) <https://www.occ.org.nz/publications/reports/getting-it-right-are-we-listening/>.

[2863] Children's Commissioner, *Getting it Right: Are We Listening?* (Report, 24 June 2019) 23 <https://www.occ.org.nz/publications/reports/getting-it-right-are-we-listening/>.

1.7 Ensuring pluralism of the NHRI[2864]

Summary: The Commissioner is compliant with the relevant requirements, whilst being a single-body NHRI, as in appointing the Commissioner diverse voices must be considered.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[2865] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[2866]

The Commissioner's office demonstrates pluralism through its broader representation of national society, which is consistent with the Paris Principles. The Commissioner seeks to achieve pluralism through its appointment procedures, as in appointing a candidate, the Minister for Social Development must consider consulting any organisations or persons that, in the opinion of the Minister, have a special interest in the functions of the Commissioner, including organisations representing children and children themselves.[2867]

The Commissioner also achieves pluralism through procedures enabling effective cooperation with diverse societal groups. It works with a diverse range of organisations, groups and individuals who have responsibilities and powers relating to children, as well as children and youth themselves, to ensure children have access to services and support. The Commissioner works across the education, advocacy, youth, health and social services sectors, with government, non-government and community organisations.[2868]

Full-time members[2869]

The Commissioner role is a full time, remunerated position that is appointed for a minimum term of 5 years,[2870] which promotes the independence of the Commissioner and ensures the continuity of its programs and services. It is not clear whether the terms and conditions of the Commissioner's service can be modified to their detriment during their period of appointment, which would be a departure from the Paris Principles.

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: *The appointment process is not sufficiently transparent and therefore partially compliant with the relevant requirements.*

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[2871]

The process for selection and appointment of the Commissioner is set out in the *Childrens' Commissioner Act 2003.* The appointment process is participatory and merits-based, but not transparent, which is a departure from the Paris Principles.

The Minister for Social Development will recommend the appointment of a Commissioner under section 28(1)(b) of the *Crown Entities Act 2004.* The Minister for Social Development must notify the vacancy or prospective vacancy in a way that is sufficient to enable suitably qualified

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[2864] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[2865] GANHRI General Observations, G.O. 1.7.

[2866] GANHRI General Observations, G.O. 1.7.

[2867] *Children's Commissioner Act 2003* (NZ) s 7(3).

[2868] Children's Commissioner, *How We Work* (Webpage) <https://www.occ.org.nz/about-us/how-we-work/>.

[2869] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

[2870] *Crown Entities Act 2004* (NZ) s 32(1)(b).

[2871] GAHNRI General Observations, G.O. 1.8

individuals to apply for appointment and consider consulting any organisations or persons that, in the opinion of the Minister, have a special interest in the functions of the Commissioner, including organisations representing children and children themselves.[2872]

However, there do not appear to be pre-determined, objective and publicly available criteria for assessment of applications, and a clear intention that members serve in their own individual capacity rather than on behalf of the organization they represent, which is a departure from the Paris Principles.

1.9 Political representatives on NHRIs

Summary: While the Commissioner's appointment process appears to be largely independent of government, the removal of a Commissioner is still heavily reliant on government discretion, which compromises the security of tenure of the Commissioner, as well as the independence of, and public confidence in, the Commissioner. The Commissioner is therefore partially compliant.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[2873] An NHRI should also be independent from government.

The Act does not explicitly restrict the participation of government representatives or members of parliament in the decision-making of the Commissioner, which is a departure from the Paris Principles.[2874] However, Members of Parliament are disqualified from taking up the role of Commissioner.[2875] In addition, the responsible Minister for the Commissioner, may not direct the Commissioner to have regard to, or to give effect to, a government policy.[2876]

Tenure[2877]

The Commissioner does not appear to have an independent and objective dismissal process, which is a departure from the requirements of the Paris Principles.

The Governor-General may, at any time for just cause, follow the advice of the Minister for Social Development which is given after consultation with the Attorney-General to remove the Commissioner from office. The removal must be made by written notice to the Commissioner. The notice must state the date on which the removal takes effect which must not be earlier than the date on which the notice is received and state the reasons for the removal. The Minister for Social Development must notify the removal in the Gazette as soon as practicable after the notice is given.[2878]

While there is a notice requirement, the grounds for dismissal are not clearly defined and are not confined to only those actions which impact adversely on the capacity of the Commissioner to fulfil their functions and mandate. The decision is not made by an independent body with appropriate jurisdiction, but rather, is allowed based solely on the discretion of the appointing authorities.

Recruitment[2879]

[2872] *Children's Commissioner Act 2003* (NZ) s 7(3).

[2873] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[2874] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 1; GANHRI General Observations, G.O. 1.9.

[2875] *Crown Entities Act 2004* (NZ) s 30(2)(f).

[2876] *Crown Entities Act 2004* (NZ) s 105.

[2877] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1.

[2878] *Crown Entities Act 2004* (NZ) s 29.

[2879] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

The Commissioner has stated its commitment to providing equal opportunities and is a member of the Equal Employment Opportunities Trust.[2880] While there does not appear to be a clear open and transparent selection process for the Commissioner's staff, the selection process is merit-based and when a vacancy exists, the Commissioner focuses on finding the best skilled candidate for the position. As at 30 June 2019, the Commissioner had 30 employees, not including the Commissioner himself. 31% were Maori, 7% were Pacific Islander and 62% were European in ethnicity,[2881] which reflects some degree of pluralism enhancing the independence and effectiveness of, and public confidence in, the Commissioner.

1.10 Adequate funding of NHRIs

Summary: The Commissioner is partially compliant with this requirement, as being in receipt of limited but increasing funding.

NHRIs must be provided with adequate funding in order to function effectively and independently.[2882]

The Commissioner has the power to allocate funding according to its priorities, which is in accordance with the Paris Principles. The funding it receives has increased over time to reflect the gradual and progressive realisation of the improvement of the Commissioner's operations and the fulfilment of its mandate. The 2019/20 annual budget was $3,157,000. The 2020/21 annual budget is $4,157,000, representing an increase of $1 million that reflects cost pressures and the Commissioner's need for additional capacity.[2883] The Commissioner has also been allocated a total of $250,000 on a capital injection. The Commissioner considers that there are no conditions attached to the government funding it receives.[2884] However, funding is at the discretion of the Minister for Social Development, which may be seen to be a departure from the Paris Principles.

1.11 Annual reports of NHRIs

Summary: the Act largely complies with the Paris Principles on annual reports of NHRIs.

The Commissioner is obliged to publish a Statement of Intent, Statement of Performance Expectations and Annual Report each year, and provide these to the Minister for Social Development to present in the House of Representatives.[2885] This is a departure from the Paris Principles, which ideally require NHRI's to have an explicit power to table reports directly in the legislature rather than through the executive and, in so doing, to promote action on them.

2 Any criticisms made publicly about this role?

A 2017 article by the then deputy opposition leader Jacinda Ardern stated that more funding and more independence is required for the Commissioner to function more effectively in the best interests of children in New Zealand in state care.[2886] She was particularly critical of the fact that while state run residences need better oversight due to issues with bullying and violence, the Commissioner was only able to visit every 18 months, which was not seen to be sufficient. She stated that it was the policy of the Labour party in New Zealand to boost funding to the

[2880] Office of the Children's Commissioner, *2018-19 Annual Report* (Report, 2019) 4 <https://www.occ.org.nz/assets/Uploads/AnnualReport-FINAL-web.pdf>.

[2881] Office of the Children's Commissioner, *2018-19 Annual Report* (Report, 2019) 5 <https://www.occ.org.nz/assets/Uploads/AnnualReport-FINAL-web.pdf>.

[2882] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[2883] Minister for Social Development, *Vote Social Development* (Report, 2020) 201 <https://treasury.govt.nz/sites/default/files/2020-05/est20-v10-socdev_1.pdf>.

[2884] Office of the Children's Commissioner, *2018-19 Annual Report* (Report, 2019) 5 <https://www.occ.org.nz/assets/Uploads/AnnualReport-FINAL-web.pdf>.

[2885] *Crown Entities Act 2004* (NZ) ss 149, 149L, 150.

[2886] Jacinda Ardern, *More oversight by Children's Commissioner needed* (Press Release, New Zealand Labour Party, 15 May 2017) <https://www.scoop.co.nz/stories/PA1705/S00310/more-oversight-by-childrens-commissioner-needed.htm>.

Commissioner because the Commissioner had not been sufficiently resourced to perform its role and ensure the safety of children in state care, which "puts them in a very tough situation".

There have also been growing calls to establish a Māori Children's Commissioner, most recently in the New Zealand media in 2019, as Māori children remain over-represented in state care, state abuse and youth detention.[2887] The current Commissioner, Judge Andrew Becroft, supports the idea and said there were gaps in the current structure of the commission, as it does not embed a Māori voice, a Māori worldview or a Māori approach in legislation. However, other commentators have noted that investment should be directed at the families themselves, and that the issues lie with the Oranga Tamariki department and their approach to overseeing state care.

The Commissioner appointed a Chief Māori Advisor in 2019, responsible for supporting the Commissioner to advocate for improved outcomes for Māori children, as well as undertaking a project development role and scoping exercise for an Assistant Māori Children's Commissioner.[2888] The Commissioner has also stated his commitment to appointing an Assistant Māori Commissioner for Children, as:

- it is crucial that the leadership structure of the Office contains and presents a clear Māori voice;
- Māori children are disproportionately overrepresented in care and protection, and so are in greater need of advocacy and support for their welfare, rights and interests; and
- it ensures the Commissioner's staff includes a leader who can support the Commissioner and his Māori staff in encouraging Oranga Tamariki to discharge their duty to Maori children, and to ensure a specific additional culturally appropriate focus on Māori children.[2889]

3 What are the best features of this role?

- Its structure as an independent Crown entity;
- The Commissioner's security of tenure (being a 5 year tenure);
- The wide mandate of the Commissioner and its extensive reporting and investigative powers;
- The amount of funding available to the Commissioner; and
- The potential introduction of the Assistant Māori Children's Commissioner and the Commissioner's responsiveness to criticism and community concern.

[2887] Leigh-Marama McLachlan, 'Calls for a Maori Children's Commissioner to give voice and advocacy tamariki' *RNZ* (online, 8 April 2019) <https://www.rnz.co.nz/news/te-manu-korihi/386581/calls-for-a-maori-children-s-commissioner-to-give-voice-and-advocacy-tamariki>.

[2888] Children's Commissioner, *Position Description* (Webpage) <https://www.occ.org.nz/assets/Uploads/Chief-Maori-Advisor-JD.pdf>.

[2889] Office of the Children's Commissioner, *2018-19 Annual Report* (Report, 2019) <https://www.occ.org.nz/assets/Uploads/AnnualReport-FINAL-web.pdf>.

4 Impacts of the New Zealand Children's Commissioner

In addition to the Commissioner's role in supporting the appointment of an Assistant Māori Children's Commissioner as discussed above, the following other examples are of note.

4.1 State of Care 2017 Report and expanded mandate

One example of a direct impact of the Commissioner's recommendations leading to tangible change is as a result of the State of Care report issued by the Commissioner in May 2017, which focuses exclusively on the state of New Zealand's youth justice and care and protection residences, because the centres house the country's "most vulnerable children and young people".[2890] In this report, the Commissioner made a number of recommendations, including the following:

- The NZ Ministry for Children (Oranga Tamariki) should articulate a clear vision for the purpose of both youth justice and care and protection residences, supported by a national strategy for their operation that is consistently implemented across all residences;
- Oranga Tamariki should develop and implement a clear national strategy for meeting the needs of Māori children, and ensures that all residences have easy access to cultural advice and support;
- The Government should commit to increased independent monitoring of Oranga Tamariki residences, particularly during this period of change; and
- Oranga Tamariki creates an external, independent Advisory/Reference Group to provide advice on best practice in residences.[2891]

In respect of the third recommendation, the Commissioner noted that conditions within a residence can change quickly, and that residences should be independently monitored more frequently, being at least once every six months, with the flexibility to monitor more frequently if necessary, but that increased funding will be required to do this and that current funding of the Commissioner does not allow monitoring that is sufficiently regular or detailed.[2892]

In response, on 2 July 2020, the Commissioner was given additional responsibility by the Minister of Justice which extended its role as the independent monitor of the conditions and treatment of children and young people in secure detention centres.[2893] The Commissioner now has sole designation over care and protection and youth justice facilities and has designation over community-based remand care homes and youth forensic units, and child and adolescent mental health units.

The current Commissioner Andrew Beecroft commented that "the extended responsibility will mean the Commission's specialist youth focused monitoring group can visit virtually all places of child detention and keep an overview of conditions", demonstrating the tangible impact and improved outcomes for youth in detention as a result of the Commissioner's reporting and recommendations on the issues in the State of Care report.[2894] This corresponds with the

[2890] Office of the Children's Commissioner, *State of Care 2017 – A focus on Oranga Tamariki's secure residences* (Report, May 2017) <https://www.occ.org.nz/assets/State-of-Care.pdf>.

[2891] Office of the Children's Commissioner, *State of Care 2017 – A focus on Oranga Tamariki's secure residences* (Report, May 2017) 7 <https://www.occ.org.nz/assets/State-of-Care.pdf>.

[2892] Office of the Children's Commissioner, *State of Care 2017 – A focus on Oranga Tamariki's secure residences* (Report, May 2017) 7 <https://www.occ.org.nz/assets/State-of-Care.pdf>.

[2893] Children's Commissioner, *Safeguarding the rights of children in secure detention centres* (Media Release, 3 July 2020) <https://www.occ.org.nz/publications/news/safeguarding-the-rights-of-children-in-secure-detention-centres/>.

[2894] Children's Commissioner, *Safeguarding the rights of children in secure detention centres* (Media Release, 3 July 2020) <https://www.occ.org.nz/publications/news/safeguarding-the-rights-of-children-in-secure-detention-centres/>.

increased funding provided to the Commissioner for the 2020-21 financial year, as discussed above.

4.2 2019 Annual Report – Impacts

Two other examples raised in the Annual Report for 2019 include the following:

- In 2012, the Commissioner published its first Solutions to Child Poverty in New Zealand report. As a result of the Commissioner's ongoing fight to reduce child poverty, New Zealand's first Child Poverty Reduction Act was introduced in 2018, based on the suggested draft Bill in the Commissioner's report.

- The Commissioner also successfully advocated for a ban on smoking in cars carrying children, which led to the government changing the relevant legislation.2895

[2895] Office of the Children's Commissioner, *2018-19 Annual Report* (Report, 2019) <https://www.occ.org.nz/assets/Uploads/AnnualReport-FINAL-web.pdf>.

25 Children's Commissioner for England

A. Children's Commissioner for England: Summary table

Question	Summary response
Country/State/Territory	England
Commissioner entity name	Office of the Children's Commissioner for England (**Children's Commissioner**)
Date established	2004[2896]
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The Children's Commissioner is largely compliant with the Paris Principles. However, there are a couple of gaps in compliance, including: • Transparent appointment process: see **part 1.8** below. • Security of tenure: see **part 1.7** below.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The Children's Commissioner is a stand-alone office with independence from the Crown.[2897]
Accountability arrangements What is the reporting line for the role? Who sets the budget?	The terms and conditions of appointment are determined by the Secretary of State.[2898] The Secretary of State may remove the Children's Commissioner from office if satisfied the Commissioner is unfit.[2899] The Secretary of State must pay the Children's Commissioner remuneration as provided under the terms of appointment.[2900]
Qualification and Experience What qualifications and experiences are required for the role?	The Children's Commission is appointed by the Secretary of State.[2901] The Secretary sets the terms and conditions of appointment.[2902] The Secretary of State must take reasonable steps to involve children in the appointment.[2903]

[2896] See *Children Act 2004* (UK) Part 1.
[2897] *Children Act 2004* (UK) Sch 1 s 1.
[2898] *Children Act 2004* (UK) Sch 1 s 3(3).
[2899] *Children Act 2004* (UK) Sch 1 s 3(7).
[2900] *Children Act 2004* (UK) Sch 1 s 4.
[2901] *Children Act 2004* (UK) Sch 1 s 3(1).
[2902] *Children Act 2004* (UK) Sch 1 s 3(3).
[2903] *Children Act 2004* (UK) Sch 1 s 3(2).

Question	Summary response
Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	A person may only hold office as the Children's Commissioner for 6 years and may not be reappointed.[2904]
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	The Children's Commissioner operates across England. Similar bodies exist in Scotland, Wales and Northern Ireland.[2905]
Purpose What is the purpose and objective of the role?	The Children's Commissioner's primary function is "promoting and protecting the rights of children in England".[2906] This includes promoting awareness of the views and interests of children in England.[2907]
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing	**Systemic oversight and accountability** The Children's Commissioner has the power to: • advise persons exercising functions or engaged in activities affecting children on how to act compatibly with the rights of children; • encourage such persons to take account of the views and interests of children; • advise the Secretary of State on the rights, views and interests of children; • consider the potential effect on the rights of children of government policy proposals and government proposals for legislation; • bring any matter to the attention of either House of Parliament.[2908] **Promotion of human rights** The Children's Commissioner has the power to: • monitor the implementation in England of the United Nations Convention on the Rights of the Child; and • publish a report. [2909] **Inquiry and reporting** The Children's Commissioner has the power to:

[2904] *Children Act 2004* (UK) Sch 1 s 3(4).
[2905] See *Children Act 2004* (UK) ss 5–7.
[2906] *Children Act 2004* (UK) s 2(1).
[2907] *Children Act 2004* (UK) s 2(2).
[2908] *Children Act 2004* (UK) s 2(3).
[2909] *Children Act 2004* (UK) s 2(3).

Question	Summary response
their functions or exercising their powers?	• investigate the availability and effectiveness of complaints procedures so far as relating to children; • investigate the availability and effectiveness of advocacy services for children; • investigate any other matter relating to the rights or interests of children; and • publish a report.[2910] **Information gathering** The Children's Commissioner has the power to: • at any reasonable time enter any premises other than a private dwelling for the purpose of interviewing a child or for the purpose of observing the standard of care provided to children accommodated or otherwise cared for there or for the purpose of interviewing any person present on the premises who works there.[2911] • Reasonably request information relating to the Commissioner's function from any person exercising functions of a public nature.[2912] **Complaints handling** The Children's Commissioner may not conduct an investigation of the case of an individual child in the discharge of its primary function.[2913] However: • the Children's Commissioner may provide advice and assistance to any child who lives away from home or receives social care;[2914] and • when the Children's Commissioner considers that the case of individual child in England raises issues of public policy relevant to other children, he or she may hold an inquiry into that case for the purpose of investigating and making recommendations about those issues.[2915] **Regard to UN Convention on the Rights of the Child** The Children's Commissioner must have regard to the UN Convention on the Rights of the Child in considering what constitutes the rights and interests of children.[2916] **Regard to children's voices**

[2910] *Children Act 2004* (UK) s 2(3).
[2911] *Children Act 2004* (UK) s 2E(2), (4).
[2912] *Children Act 2004* (UK) s 2F(1).
[2913] *Children Act 2004* (UK) s 2(5).
[2914] *Children Act 2004* (UK) s 2D(1).
[2915] *Children Act 2004* (UK) s 3(1).
[2916] *Children Act 2004* (UK) s 2A(1).

Question	Summary response
	The Children's Commissioner must take reasonable steps to involve children in the discharge of its primary function.[2917] In particular, the Children's Commissioner must take reasonable steps to: • ensure that children are aware of the Commissioner's primary function and how they may communicate with him or her, and • consult children, and organisations working with children, on the matters the Commissioner proposes to consider or investigate in the discharge of the primary function.[2918]
Budget What is the annual budget for the role?	In the 2019-20 financial year, the budget was £2.764m.[2919]
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	The Children's Commissioner was established under and is governed by the *Children Act 2004* (UK).[2920]
Most recent annual report or equivalent document (link)	Annual report 2019-20 Business plan 2020-21

[2917] *Children Act 2004* (UK) s 2B(1).

[2918] *Children Act 2004* (UK) s 2B(2).

[2919] Children's Commissioner for England, *Annual Report 2019-20* (Report, 2020) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/07/occ-annual-report-and-accounts-2019-20.pdf>.

[2920] Note: the *Children Act 2004* (UK) was amended by the *Children and Families Act 2014* (UK), which strengthened the powers and independence of the Children's Commissioner.

B. Children's Commissioner for England: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs[2921]

Summary: the Children's Commissioner largely complies with the Paris Principles on the establishment of NHRIs, except in relation to the appointment mechanism.

Entrenched in law[2922]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[2923] The Children's Commissioner is entrenched in law as it was established under and is governed by the *Children Act 2004 (UK)* (**Act**).[2924]

Mandate and powers[2925]

The Act provides the Children's Commissioner with a clear mandate (see below).[2926] This mandate is broad, allowing the Children Commissioner considerable autonomy. For example, the Act states that the Children's Commissioner "may do anything which appears to him to be necessary or expedient for the purpose of, or in connection with, the exercise of his functions".[2927]

Appointment mechanism[2928]

The appointment process is only partly transparent. The Act merely provides that:

(i) The Children's Commission is appointed by the Secretary of State;[2929] and

(ii) The Secretary of State must take reasonable steps to involve children in the appointment.[2930]

For a further discussion of the appointment mechanism, see **part 1.8** below.

Term of office[2931]

The Act provides that the maximum term is six years.[2932]

Quasi-judicial competency (complaints-handling)[2933]

The Children's Commissioner does not have the power to receive, consider or resolve individual complaints alleging violations of human rights.[2934] In the explanatory notes to the Act, the stated rationale for this is that it will "allow him to concentrate on the broader issues that affect children".[2935]

However:

[2921] See GANHRI General Observations, G.O. 1.1, 2.9, 2.7.

[2922] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2923] GANHRI General Observations, G.O. 1.1.

[2924] *Children Act 2004* (UK) Sch 1 s 1(1).

[2925] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[2926] *Children Act 2004* (UK) Part 1.

[2927] *Children Act 2004* (UK) Sch 1 s 2(1).

[2928] See GANHRI General Observations, G.O. 1.1.

[2929] *Children Act 2004* (UK) Sch 1 s 3(1).

[2930] *Children Act 2004* (UK) Sch 1 s 3(2).

[2931] See GANHRI General Observations, G.O. 1.1.

[2932] *Children Act 2004* (UK) Sch 1 s 3(4).

[2933] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[2934] *Children Act 2004* (UK) s 2(5).

[2935] Explanatory Notes to the *Children Act 2004* (UK) s 2, [30].

(iii) the Children's Commissioner may provide advice and assistance to any child who lives away from home or receives social care;[2936] and

(iv) when the Children's Commissioner considers that the case of individual child in England raises issues of public policy relevant to other children, he or she may hold an inquiry into that case for the purpose of investigating and making recommendations about those issues.[2937]

1.2 Human rights mandate[2938]

Summary: the Children's Commissioner is fully compliant with the Paris Principles in respect of the Commissioner's human rights mandate.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[2939] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[2940]

Nature and breadth of mandate[2941]

The Children's Commissioner's has a clear and broad mandate to promote and protect human rights.

(v) The mandate extends to the acts and omissions of both the public and private sectors. Specifically, the Children's Commissioner has the power to:

(a) advise persons exercising functions or engaged in activities affecting children on how to act compatibly with the rights of children;

(b) encourage such persons to take account of the views and interests of children;

(c) advise the Secretary of State on the rights, views and interests of children;

(d) consider the potential effect on the rights of children of government policy proposals and government proposals for legislation;

(e) bring any matter to the attention of either House of Parliament; and

(f) monitor the implementation in England of the United Nations Convention on the Rights of the Child.[2942]

(vi) The mandate allows the Children's Commission to address public opinion through the publishing of reports.[2943]

(vii) The Act states that the Children's Commissioner "may do anything which appears to him to be necessary or expedient for the purpose of, or in connection with, the exercise of his functions".[2944]

Powers of investigation and inquiry[2945]

The Children's Commissioner has the power to:

[2936] *Children Act 2004* (UK) s 2D(1).

[2937] *Children Act 2004* (UK) s 3(1).

[2938] See GANHRI General Observations, G.O. 1.2, 2.3, 2.6, 2.8.

[2939] GAHNRI General Observations, G.O. 1.2.

[2940] GAHNRI General Observations, G.O. 1.2.

[2941] See GANHRI General Observations, G.O. 1.2.

[2942] *Children Act 2004* (UK) s 2(3).

[2943] *Children Act 2004* (UK) s 2(3).

[2944] *Children Act 2004* (UK) Sch 1 s 2(1).

[2945] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1 & 2.3.

(viii) at any reasonable time enter any premises other than a private dwelling for the purpose of interviewing a child or for the purpose of observing the standard of care provided to children accommodated or otherwise cared for there or for the purpose of interviewing any person present on the premises who works there.[2946]

(ix) Reasonably request information relating to the Commissioner's function from any person exercising functions of a public nature.[2947]

There has not been any specific consideration of when a request for information, or entry onto premises, is "reasonable". The Explanatory Note makes clear that it excludes, at minimum, a requirement to comply with a request if that request is inconsistent with other legislation. For example, if a public entity holds confidential information that is not able to be legally disclosed, it would not be reasonable for the Children's Commissioner to request access to such information.[2948]

Many of the reports published by the Children's Commissioner rely largely on publicly available data. However, the Children's Commissioner regularly supplements this data through the exercise of its powers of investigation and inquiry. For example, in putting together a report on children in custody in May 2019:

(x) The Children's Commissioner used data published by the Ministry of Justice, Department of Education, NHS and Local Authorities to conclude that at least 1,465 children in England were officially securely detained in March 2018.

(xi) However, the Children's Commissioner also undertook its own investigations to supplement this number. The Children's Commissioner requested information from English courts to find out how many other children were informally or insecurely detained in 2018 and discovered that at least a further 211 children met this description.[2949]

Duty to consult

Above and beyond the Paris Principles, the Children's Commissioner must take reasonable steps to involve children in the discharge of their primary function.[2950] In particular, the Children's Commissioner must:

(xii) Take reasonable steps to ensure that children are aware of the Commissioner's primary function and how to communicate with the Commissioner; and

(xiii) Consult children and organisations working with children on the matters the Commissioner proposes to consider or investigate in the discharge of the primary function.[2951]

The Explanatory Notes to the Act explain that, "It is for the Commissioner to decide how best to make children aware…and to put in place arrangements that allow children to contact the Commissioner and comment on his or her proposed work programme".[2952]

In practice, to ensure this duty is met, the Children's Commissioner:

(xiv) Has formed a children and young people's advisory group called "Amplify" who assists in preparing the annual Business Plan (see **part 1.6** Below);

[2946] *Children Act 2004* (UK) ss 2E(2), (4).

[2947] *Children Act 2004* (UK) s 2F(1).

[2948] Explanatory Notes to the *Children and Families Act 2014* (UK) s 110.

[2949] Children's Commissioner for England, *Who are they? Where are they?: Children locked up* (Report, May 2019) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/05/cco-who-are-they-where-are-they-may-2019.pdf>.

[2950] *Children Act 2004* (UK) s 2B(1).

[2951] *Children Act 2004* (UK) s 2B(2).

[2952] Explanatory Notes to the *Children and Families Act 2014* (UK) s 107.

(xv) Works with individual and groups of children and young people with lived experience of the issues being investigated;

(xvi) Funds research;

(xvii) Raises the positive profile of children and young people by, for example, obtaining the participation of over 40,000 children and young people in the annual Children's Commissioner's Takeover Day; and

(xviii) Directly speaks to key vulnerable groups identified by the UN Committee.[2953]

1.3 Encouraging ratification or accession to international human rights instruments

Summary: the Children's Commissioner is fully compliant with the Paris Principles in regards to encouraging ratification or accession to international human rights instruments.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[2954] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[2955]

The Children's Commissioner must have regard to the UN Convention on the Rights of the Child (**UN Convention**) in considering what constitutes the rights and interests of children in fulfilling its mandate.[2956] This means the work done by the Children's Commissioner is necessarily linked to the implementation and promotion of the UN Convention.

Furthermore, and as discussed above, the Children's Commissioner has the following powers as recommended under the Paris Principles:

(xix) To monitor the implementation in England of the UN Convention.[2957]

(xx) To encourage the effective implementation of the UN Convention by:

(a) advising persons exercising functions or engaged in activities affecting children on how to act compatibly with the rights of children; and

(b) advising the Secretary of State on the rights, views and interests of children.[2958]

(xxi) To conduct an assessment of the potential effect on the rights of children of government policy proposals and government proposals for legislation, to publish reports, and to bring any matter to the attention of either House of Parliament.[2959]

1.4 Interaction with the international human rights system

Summary: the Children's Commissioner largely complies with the Paris Principles with respect to interaction with the international human rights system.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[2960] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[2961]

[2953] See, eg, Children's Commissioner for England, *Business Plan 2011-12*, 21.

[2954] GANHRI General Observations, G. O. 1.3.

[2955] GANHRI General Observations, G. O. 1.3.

[2956] *Children Act 2004* (UK) s 2A(1).

[2957] *Children Act 2004* (UK) s 2(3).

[2958] *Children Act 2004* (UK) s 2(3).

[2959] *Children Act 2004* (UK) s 2(3).

[2960] GAHNRI General Observations, G.O. 1.4.

[2961] GAHNRI General Observations, G.O. 1.4.

As stated above, the Children's Commissioner must have regard to the UN Convention in exercising its functions.[2962]

The Children's Commissioner also actively engages with the Committee on the Rights of the Child.

(xxii) The Children's Commissioner engages in advocacy work, including issuing a joint report to the UN Committee on the Rights of the Child with the Commissioners for Scotland, Wales and Northern Ireland, calling for information of the UN Convention into domestic legislation.

(xxiii) Every five years, the UN Committee on the Rights of the Child reviews the UK's progress in terms of compliance every five years. The Children's Commissioner, again in partnership with the Commissioners for Scotland, Wales and Northern Ireland, keeps track of the UK's progress and publishes mid-term reviews in the middle of each review cycle.[2963]

1.5 Cooperation with other human rights bodies

Summary: the Children's Commissioner is compliant with the Paris Principles on the cooperation with other human rights bodies.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[2964] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[2965]

The Children's Commissioner works closely with the Children's Commissioners for Scotland, Wales and Northern Ireland (together, the **Commissioners**).

(xxiv) As indicated above, the Commissioners work together in monitoring and reporting to the UN Committee on the Rights of the Child on compliance with the UN Convention.[2966]

(xxv) The Commissioners engage in collective advocacy work. For example, in 2014, they united to make a call for a national debate on fatherhood.[2967]

However, the relationship between the Commissioners is not defined by statute or otherwise formalised. It is a working relationship open to negotiation year-on-year.

1.6 Recommendations by NHRIs

Summary: the Children's Commissioner is fully compliant with the Paris Principles on recommendations by NHRIs.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[2968] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of

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[2962] *Children Act 2004* (UK) s 2A(1).

[2963] See, eg, *UK Children's Commissioners' UNCRC mid-term review* (Report, November 2019) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/11/cco-uk-childrens-commissioners-uncrc-mid-term-review.pdf>.

[2964] GAHNRI General Observations, G.O. 1.5.

[2965] GAHNRI General Observations, G.O. 1.5.

[2966] See *UK Children's Commissioners' UNCRC mid-term review* (Report, November 2019) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/11/cco-uk-childrens-commissioners-uncrc-mid-term-review.pdf>.

[2967] Fatherhood institute (Webpage, archived from the original, 2 January 2014) available at <https://web.archive.org/web/20140103143655/http://www.fatherhoodinstitute.org/

[2968] GAHNRI General Observations, G.O. 1.6.

human rights violations, or human rights matters in general.[2969] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[2970]

In addition to making ad hoc recommendations and reports, the Act obliges the Children's Commissioner to publish annual Business Plans at the start of each financial year that highlight key national human rights concerns and provide recommendations.[2971] For example:

(xxvi) The 2020/21 Business Plan identifies that children in lower-socio economic areas of England feel themselves to be vulnerable to public disorder, ranging from knife attacks to speeding cars, and that children in these areas do not trust the police to keep them safe. The Children's Commissioner recommends that action needs to be taken to build trust between police and this generation of children in lower-socio economic areas.[2972]

The Children's Commissioner does more than merely publicise these concerns and recommendations. The Business Plans set forward fully elucidated steps as to how the Children's Commissioner will engage and follow up with public authorities to promote and advocate for the implementation of its recommendations. For example:

(xxvii) In relation to the issue of children feeling vulnerable to public disorder, the Business Plan states that the Children's Commissioner will:

(a) continue campaigning for additional police officers to be linked into schools in an effort to rebuild trust between the police and this generation of children; and

(b) work with the National Police Chiefs Council to ensure that its new child-centred policing strategy addresses the concerns of children as raised by research conducted by the Office of the Children's Commissioner.[2973]

Separate to the requirement of the Paris Principles, the Children's Commissioner is required to take reasonable steps to consult children before publishing a Business Plan.[2974]

The Act further obliges the Children's Commissioner to publish Annual Reports at the end of each financial year.[2975] In these Annual Reports, the Children's Commissioner must report on the way and extent to which they discharged their functions and what they found in the course of exercising their functions during the year.[2976] The Annual Reports must be laid before Parliament and then must be published.[2977]

1.7 Ensuring pluralism of the NHRI[2978]

Summary: the Children's Commissioner is partially compliant with the Paris Principles with respect to ensuring pluralism of the NHRI.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[2979] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

[2969] GAHNRI General Observations, G.O. 1.6.

[2970] GAHNRI General Observations, G.O. 1.6.

[2971] *Children Act 2004* (UK) s 7B; see, eg, Children's Commissioner for England, *Business Plan 2020-21* (Report, 2020) 12 <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/03/cco-business-plan-2020-21.pdf>.

[2972] See, eg, Children's Commissioner for England, *Business Plan 2020-21* (Report, 2020) 12 <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/03/cco-business-plan-2020-21.pdf>.

[2973] See, eg, Children's Commissioner for England, *Business Plan 2020-21* (Report, 2020) 12 <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/03/cco-business-plan-2020-21.pdf>.

[2974] *Children Act 2004* (UK) s 7B(4)(a).

[2975] *Children Act 2004* (UK) s 8(1).

[2976] *Children Act 2004* (UK) ss 8(1), 8(2).

[2977] *Children Act 2004* (UK) ss 8(3), 8(4).

[2978] GANHRI General Observations, G.O. 1.7, 2.1, 2.2, 2.4.

[2979] GANHRI General Observations, G.O. 1.7.

Pluralism[2980]

Given that the Children's Commissioner is a single-person decision-making body, pluralism within this body is difficult. However, the Act obliges the Children's Commissioner to appoint an advisory board to provide advice and assistance relating to the discharge of the Children's Commissioner's functions.[2981] Pluralism is achieved through the appointment of this body. The Act states that the advisory board must consist of persons who (taken together) represent a broad range of interests which are relevant to the Children's Commissioner's functions.[2982]

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: the Children's Commissioner is partially compliant with the Paris Principles with respect to the selection and appointment of the decision-making body of NHRIs.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[2983]

Children's Commissioner

The Children's Commissioner is the relevant decision-making body. The appointment process for the Commissioner is clear and transparent in practice, but not in law.

The Act states, with no further detail given, that:

(xxviii) The Children's Commission is appointed by the Secretary of State;[2984] and

(xxix) The Secretary of State must take reasonable steps to involve children in the appointment.[2985]

In practice, the last Commissioner was appointed as follows:

(xxx) The Secretary wrote to the Education Committee within the House of Commons that Anne Longfield was the Government's preferred candidate;

(xxxi) The Secretary's letter to the Education Committee stated that the recruitment process involved two rounds of interviews and meetings between short-listed candidates and a panel of children and young people whose views were taken into account;

(xxxii) The Secretary's letter attached the job description, selection criteria, details of how the post was advertised, the selection panel, the process for sifting applications, and the candidate's CV;

(xxxiii) The Secretary invited the Committee to hold a pre-appointment hearing with the candidate; and

(xxxiv) The Committee held a hearing and, prior to the hearing, invited members of the public to suggest priorities for the incoming Children's Commissioner.[2986]

Advisory Council

As stated above, the Act obliges the Children's Commissioner to appoint an advisory board to provide advice and assistance relating to the discharge of the Children's Commissioner's

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[2980] GANHRI General Observations, G.O. 1.7.

[2981] *Children Act 2004* (UK) s 7A(1).

[2982] *Children Act 2004* (UK) s 7A(2).

[2983] GAHNRI General Observations, G.O. 1.8

[2984] *Children Act 2004* (UK) Sch 1 s 3(1).

[2985] *Children Act 2004* (UK) Sch 1 s 3(2).

[2986] Education Committee, *Appointment of the Children's Commissioner for England, Third Report of Session 2014-15* (Report, 11 November 2014) 3–8.

functions.[2987] The appointment process for the advisory council is largely transparent in that the Act states that:

(xxxv) The advisory board must consist of persons who (taken together) represent a broad range of interests which are relevant to the Children's Commissioner's functions;[2988] and

(xxxvi) The Children's Commissioner must from time to time publish a report on the procedure followed and the criteria used when making appointments to the advisory board.[2989]

The process could be made more transparent by enshrining the appointment procedure and criteria in the Act. This would overcome any potential concerns about the adequacy of the Children's Commissioner's reports as to the appointment process.

1.9 Political representatives on NHRIs

Summary: the Children's Commissioner is fully compliant with the Paris Principles with respect to political representatives on NHRIs and independence from the executive.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[2990] An NHRI should also be independent from government.

Independence

The independence of the Commissioner from the executive and legislature is enshrined in law:

(xxxvii) The Act states that the Children's Commissioner is "not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown".[2991]

(xxxviii) Furthermore, the *House of Commons Disqualification Act 1975* expressly prohibits a person who is the Children's Commissioner or a member of staff of the Children's Commissioner from being a member of parliament.[2992]

A framework agreement also exists between the Children's Commissioner and the UK Department of Education that is purposed to protect the Children's Commissioner's independence.[2993] This agreement provides that:

(xxxix) It is for the Children's Commissioner to determine what activities to undertake in carrying out his or her primary function.[2994]

The Children's Commissioner has "freedom to determine their own priorities, and activities, and should be subject to as few constraints as possible in deciding how to carry out their business within their statutory remit".[2995]

Tenure[2996]

The grounds for dismissal of the Children's Commissioner are limited in that the Secretary may only remove the Children's Commissioner from office if satisfied that the Commissioner has

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[2987] *Children Act 2004* (UK) s 7A(1).

[2988] *Children Act 2004* (UK) s 7A(2).

[2989] *Children Act 2004* (UK) s 7A(3).

[2990] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[2991] *Children Act 2004* (UK) Sch 1 s 1(2).

[2992] *House of Commons Disqualification Act 1975* (UK) Sch 1 Pt 3. See also, *Children Act 2004* (UK) Sch 1 s 12.

[2993] *Department of Education Framework Agreement*.

[2994] *Department of Education Framework Agreement* [2.3]. See also *Children Act 2004* (UK) s 2.

[2995] *Department of Education Framework Agreement* [3.1].

[2996] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1.

become unfit or unable to property discharge his or her functions or has behaved in a way that is not compatible with his or her continuing in office.[2997]

However, there may be some room for improvement in relation to tenure. The General Observations to the Paris Principles state that the dismissal process must be clearly defined, independent and objective. It may be argued that the above grounds for dismissal are too broad and open to subjective opinion. The statutory framework could be perhaps be improved by enumerating a number of objective tests or criteria that go towards a conclusion that the Commissioner is unfit or unable to discharge their functions.

Recruitment[2998]

The Children's Commissioner is entitled to appoint any staff considered necessary to assist in carrying out their functions.[2999] The Children's Commissioner has the power to determine the terms and conditions of such employment, promoting the independence of the Office of the Children's Commissioner.[3000]

In practice, the recruitment process appears to be open, transparent and merit-based. All staff roles are advertised on the Children's Commissioner website. The advertisements clearly set out the required skills and experience for the role.[3001]

1.10 Adequate funding of NHRIs

Summary: the Children's Commissioner is fully compliant with the Paris Principles on adequate funding of NHRIs.

NHRIs must be provided with adequate funding in order to function effectively and independently.[3002]

Adequacy of funding

In accordance with the Paris Principles, the Children's Commissioner is primarily funded by the State and funding is allocated as a separate budget line item applicable only to the Children's Commissioner. To date, the funding received has always been adequate.

The Act states that the Children's Commissioner is to be funded by payments made by the Secretary of State of "such amounts, at such times and on such conditions (if any) as the Secretary considers appropriate".[3003] The Framework Agreement with the Department of Education provides a framework for the funding process:

(xl) The budget is voted in the Department's supply estimate as a separate line item and is subject to Parliamentary control; and

(xli) By 31 March each year, the Department then sends the Commissioner a formal statement of the annual budgetary provision allocated.[3004]

The Framework Agreement further allows the Children's Commissioner to receive some funding from external sources without needing to seek prior approval, provided that such funding complies with various (anti-corruption) regulations and is disclosed to the Department.[3005]

In practice, this process provides adequate funding. There has been no suggestion either by the Children's Commissioner or commentators that the role is underfunded.

2997 *Children Act 2004* (UK) Sch 1 s 3(7).

2998 See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 2; GANHRI General Observations, G.O. 2.4.

2999 *Children Act 2004* (UK) Sch 1 s 5. See *Department of Education Framework Agreement* [13.2].

3000 *Department of Education Framework Agreement* [13.1].

3001 See Children's Commissioner, *Vacancies* (Webpage) <https://www.childrenscommissioner.gov.uk/about-us/vacancies/>.

3002 GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

3003 *Children Act 2004* (UK) Sch 1 s 7.

3004 *Department of Education Framework Agreement* [11.1]–[11.2].

3005 *Department of Education Framework Agreement* [11.6]. See GANHRI General Observations, G.O. 1.10.

In the 2019-20 financial year, the budget was £2.764m.[3006]

Allocation of funding

The Children's Commissioner has near complete autonomy to allocate its budget. The Framework Agreement requires the Children's Commissioner to manage its budget responsibly and in compliance with good financial practice and to notify the Department of Education promptly if over-spending is anticipated.[3007] Beyond that, the Act gives the Children's Commissioner full autonomy to allocate its budget in the exercise of its statutory function as it sees fit.[3008]

Financial accountability

The Children's Commissioner is obliged to comply with the financial accountability requirements applicable to other independent agencies.

The Act states that the Children's Commissioner must:

(xlii) Keep proper accounting records;

(xliii) Prepare a statement of accounts for each financial year; and

(xliv) Send a copy of each such statement to the Secretary and the Comptroller and Auditor General as soon as possible after the end of each financial year.[3009]

The Framework Agreement between the Children's Commissioner and the Department of Education further requires that the Children's Commissioner to:

(xlv) Sign off the Annual Report and Accounts;

(xlvi) Ensure proper records are kept;

(xlvii) Ensure the Annual Report and Accounts are properly prepared and presented;

(xlviii) Provide timely forecasts and monitoring information on performance and finance to the Department of Education; and

(xlix) Promptly notify the Department of Education if over or under spends are likely.[3010]

1.11 Annual reports of NHRIs

Summary: the Children's Commissioner is fully compliant with the Paris Principles on annual reports of NHRIs .

As discussed in **part 1.6** above, the Act obliges the Children's Commissioner to publish:

(l) At the start of each financial year, a Business Plan that:

(a) highlights key human rights developments, provides a means of public scrutiny, and offers recommendations for change; and

(b) provides an account of the activities to be undertaken by the Children's Commissioner that year to further its mandate;[3011] and

(li) At the end of each financial year, an Annual Report that reports on the Children's Commissioner's progress that year in relation to the Business Plan.[3012]

[3006] Children's Commissioner for England, *Annual Report 2019-20*, [3.5.18].

[3007] See *Department of Education Framework Agreement* [11].

[3008] *Children Act 2004* (UK) Sch 1 s 2.

[3009] *Children Act 2004* (UK) Sch 1 s 8(1).

[3010] *Department of Education Framework Agreement* [6.2].

[3011] *Children Act 2004* (UK) s 7B; see, eg, Children's Commissioner for England, *Business Plan 2020-21* (Report, 2020) 12 <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/03/cco-business-plan-2020-21.pdf>.

[3012] *Children Act 2004* (UK) s 8.

The Act further obliges the Children's Commissioner to table these reports directly with the legislature.[3013]

2 Any criticisms made publicly about this role?

Many of the criticisms made about the Children's Commissioner were addressed in the reforms made to the *Children Act 2004* (UK) by the *Children and Families Act 2014* (UK). These reforms involved an extensive consultation process and were directed at ensuring that the Children's Commissioner was compliant with human rights standards.[3014]

However, there are several outstanding criticisms:

Powers

- UNICEF UK states that there should be a requirement for Ministers and public authorities to respond to the child rights impact assessments produced by the Children's Commissioner within a reasonable time frame.[3015]
- UNICEF UK suggests that the Children's Commissioner could also be given the power to provide a national sign-posting service for children where the Children's Commissioner could put children wishing to make a complaint in touch with the appropriate investigating authority.[3016]

Appointment mechanism

- UNICEF UK criticises the fact that the Children's Commissioner is appointed by the executive branch, which is a body that the Children's Commissioner is responsible for monitoring. UNICEF UK suggests that the "better guarantee of independence" is appointment by Parliament. UNICEF further suggests that there should be formalised requirements in terms of skills and experience as well as a wide advertisement of the position in order to ensure a transparent and competitive process.[3017]

Funding

- To remove the threat of any financial control, UNICEF UK suggests that funding should be removed from political control and be guaranteed over a given period.[3018]

3 What are the best features of this role?

- The Secretary must take reasonable steps to consider children's voices in appointing the Children's Commissioner: see **part 1.8**.
- The Children's Commissioner must take into account children's voices in exercising his or her statutory mandate: see **part 1.2**.
- The Act requires the Children's Commissioner to produce a Business Plan at the start of each financial year and an Annual Report at the end of each financial year,

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[3013] See *Children Act 2004* (UK) ss 2, 8.

[3014] See, eg, Joint Committee on Human Rights, *The role and independence of the Office of the Children's Commissioner for England* (Report, 2012) <https://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf>.

[3015] UNICEF UK, "Written Evidence submitted by UNICEF UK (CC 1)", *The role and independence of the Office of the Children's Commissioner for England* (2012) <https://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf>.

[3016] UNICEF UK, "Written Evidence submitted by UNICEF UK (CC 1)", *The role and independence of the Office of the Children's Commissioner for England* (2012) <https://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf>.

[3017] UNICEF UK, "Written Evidence submitted by UNICEF UK (CC 1)", *The role and independence of the Office of the Children's Commissioner for England* (2012) <https://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf>.

[3018] UNICEF UK, "Written Evidence submitted by UNICEF UK (CC 1)", *The role and independence of the Office of the Children's Commissioner for England* (2012) <https://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf>.

recording which human rights issues arise from year-to-year, steps to be taken, and steps actually taken: see **part 1.6** and **part 1.11**.

- The Children's Commissioner is supported (and challenged) in his or her role by a diverse Advisory Council: see **part 1.8**.
- The Children's Commissioner does not have the power to handle individual complaints. The Children's Commissioner's role is instead to engage with human rights issues on a systemic level: see **part 1.1**.

4 Impacts of the Children's Commissioner for England

The Children's Commissioner reported having the following impacts in the 2019/20 financial year:

- **Mental health support in schools** – Following the Commissioner's call for better mental health support in schools, the Government rolled our mental health support teams in schools and additional access to specialist mental health care from NHS England.[3019]
- **Childcare fund** – Following the publication of the Children's Commissioner's "Children Manifesto" which called for schools to be open on evenings and weekends to provide more safe spaces for children to use at these times, the Government announced a £1 billion childcare fund to increase the use of schools on evenings and weekends.[3020]
- **Inpatient mental health care** – Following publication of a report on "Children Behind Closed Doors", the Commissioner was appointed to chair an Independent Oversight Board scrutinising the work of the NHS England Taskforce in relation to inpatient mental health care for children.[3021]
- **Social media duty of care** – Following a long period of advocacy by the Children's Commissioner, the Government has agreed to introduce a statutory duty of care owed by social media companies to minors.[3022]
- **Older children in care** – Following recommendations by the Children's Commissioner, the Government is now in the process of consulting on proposals to improve standards in unregulated accommodation for those between 16 and 18 and ban the use of unregulated accommodation for under 16s.[3023]
- **Review of children's social care** – Following the publication of the Children's Commissioner's "Children Manifesto", the Government has initiated a review into the children's social care system and how the outcomes of vulnerable children can be improved.[3024]

[3019] Children's Commissioner for England, *Annual Report 2019-20* (Report, 2020) [3.5.3] <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/07/occ-annual-report-and-accounts-2019-20.pdf>.

[3020] Children's Commissioner for England, *Annual Report 2019-20* (Report, 2020) [3.5.4] <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/07/occ-annual-report-and-accounts-2019-20.pdf>.

[3021] Children's Commissioner for England, *Annual Report 2019-20* (Report, 2020) [3.5.6] <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/07/occ-annual-report-and-accounts-2019-20.pdf>.

[3022] Children's Commissioner for England, *Annual Report 2019-20* (Report, 2020) [3.5.7] <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/07/occ-annual-report-and-accounts-2019-20.pdf>.

[3023] Children's Commissioner for England, *Annual Report 2019-20* (Report, 2020) [3.5.8] <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/07/occ-annual-report-and-accounts-2019-20.pdf>.

[3024] Children's Commissioner for England, *Annual Report 2019-20* (Report, 2020) [3.5.9] <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/07/occ-annual-report-and-accounts-2019-20.pdf>.

26 The Ombudsman for Children (Norway)

A. The Ombudsman for Children (Norway): Summary table

Question	Summary response
Country/State/Territory	Norway
Commissioner entity name	Ombudsman for Children (‘*Barneombudet*’)
Date established	11 September 1981.[3025]
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	Partial compliance – most principles are upheld well within the Act and accompanying instructions, but there is a significant lack of transparency around the appointment and selection processes of the Ombudsman and office staff.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	The Ombudsman functions independently, governed only by the general instructions laid down by the King.[3026] The Ombudsman reports to the Ministry [of Children and Families].[3027] The office consists of the Ombudsman, a secretariat, the staff of the secretariat, and the permanent deputy for the Ombudsman (executive officers).[3028]
Accountability arrangements What is the reporting line for the role? Who sets the budget?	The Ombudsman must submit a public yearly report to the Ministry [of Children and Families] about their activities in the preceding calendar year.[3029] Budgeting rules and amounts are unclear but the budget appears to be set by the State.[3030]
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person?	Qualifications and Aboriginality: • There are no listed requirements of qualification or experience within the legislation, nor a requirement of Aboriginality. Selection and appointment: • The ‘King in Cabinet’ appoints the Ombudsman for a term of 6 years.[3031] The King is a symbolic role in Norway, so appointment largely falls to the members of Cabinet.[3032]

[3025] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981.

[3026] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 6.

[3027] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 8.

[3028] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 9.

[3029] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 8.

[3030] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 9.

[3031] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 2.

[3032] Gary Melton, ‘Lessons from Norway: The Children’s Ombudsman as a Voice for Children’ (1991) 23(2) Case Western Reserve Journal of International Law 198, 203.

Question	Summary response
What is the selection and appointment process?	• The Ombudsman may appoint a Permanent Deputy for the Ombudsman.[3033]
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	The Ombudsman operates independently but is also bound by the financial rules applicable to the Ministry of Children and Families[3034] and Chapters I-III of the Public Administration Act and the Freedom of Information Act.[3035]
Purpose What is the purpose and objective of the role?	To promote the interests of children in relation to public and private authorities and promote the conditions under which children grow up.[3036]
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries?	Particular duties of the Ombudsman include: • Protecting the interests of children in connection with planning and study-reports in all fields;[3037] • Ensuring that legislation relating to the protection of children's interests is observed, especially in accordance with Norway's commitment to the UN Convention on the Rights of the Child;[3038] • Proposing measures to strengthen children's safety under the law;[3039] • Propose measures to solve or prevent conflicts between children and society;[3040] and • Educating public and private sectors concerning children's rights and measures required for children.[3041] Other functions contained within the Instructions for the Ombudsman: • The Ombudsman may take up cases either on their own initiative or at the request of other people (via applications);[3042] • The Ombudsman cannot decide cases or set aside decisions relating to administration – they must refer them to the relevant administrative body;[3043] • The Ombudsman cannot hear cases regarding domestic disputes;[3044]

[3033] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 6.
[3034] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 9.
[3035] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 6.
[3036] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3.
[3037] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3 a).
[3038] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3 b).
[3039] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3 c).
[3040] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3 d).
[3041] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3 e).
[3042] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 2.
[3043] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 1.
[3044] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 3.

Question	Summary response
Regard to UN human rights instruments required when performing their functions or exercising their powers?	
Budget What is the annual budget for the role?	The Ombudsman is governed by the financial rules applicable to the Ministry.[3045]
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	The role is governed by the Act relating to the Ombudsman for Children and the Instructions which accompany it. Both are contained in one document – the Instructions may be found at: https://lovdata.no/dokument/INS/forskrift/1981-09-11-4877 The Act may be found at: https://lovdata.no/dokument/NL/lov/1981-03-06-5
Most recent annual report or equivalent document (link)	Public journal: https://barneombudet.no/for-voksne/postjournal/ We note that there are limited English resources available for our review.

[3045] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 9.

B. Norwegian Ombudsman for Children: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs

Summary: The Norwegian Ombudsman for Children partially satisfies this Paris Principle requirement, noting the legislation lacks detail.

Entrenched in law[3046] ***/ Mandate and powers***[3047]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[3048] The Norwegian Ombudsman for Children was established by the *Act No 5 of March 6 1981 Relating to the Ombudsman for Children* and its accompanying instructions, subsequently laid down by Royal Decree on 11 September 1981.[3049]

The Ombudsman operates independently but remains bound by the financial rules applicable to the Ministry of Children and Families[3050] and Chapters I-III of the Public Administration Act and the Freedom of Information Act.[3051] The Ombudsman must also submit yearly reports to the Ministry [of Children and Families].[3052]

Appointment mechanisms[3053]

The Ombudsman is appointed by the King for a period of six years, with no option for reappointment.[3054] There are no other legislative requirements around appointment.

Quasi-judicial competency (complaints-handling)

The instructions outline the powers of the Ombudsman in processes of case referral, application, rejection, shelving, and reporting.[3055] This indicates a mandate to receive, consider, and/or resolve complaints alleging violations of human rights, particularly the 'needs, rights and interests of children'.[3056] This reflects the Ombudsman's quasi-judicial competency as an NHRI.

The Ombudsman's office is vested with the power to receive and hear complaints against both public and private bodies in its jurisdiction.[3057]

These practices directly promote compliance with the Paris Principles, as outlined by the GAHNRI.[3058]

Complaint-handling processes are clearly contained within the Ombudsman's instructions, but they are broad and defer much of the decision-making to the Ombudsman.[3059] It is unclear

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[3046] See Paris Principles, Competence and responsibilities, Principle 2; GANHRI General Observations, G.O. 1.1.

[3047] See Paris Principles, Competence and responsibilities, Principle 2; GANHRI General Observations, G.O. 1.1.

[3048] GANHRI General Observations, G.O. 1.1.

[3049] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981.

[3050] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 9.

[3051] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 6.

[3052] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 10.

[3053] See GANHRI General Observations, G.O. 1.1.

[3054] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 2.

[3055] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, ss 2-7.

[3056] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 1.

[3057] GANHRI General Observation, G.O. 2.9, *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 1.

[3058] GANHRI General Observations, G.O. 2.9.

[3059] GANHRI General Observation 2.9, *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 6.

whether there are further procedures or resources publicly available, particularly in regard to upholding a fair and transparent complaints process.

1.2 Human rights mandate

Summary: The Norwegian Ombudsman for Children satisfies this Paris Principle requirement.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[3060] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[3061]

The legislation clearly mandates the Ombudsman to promote and protect the interests of children, particularly in accordance with Norway's obligations under the United Nations Convention on the Rights of the Child.[3062]

These functions are mandated in the 'duties' of the Ombudsman, which require the Ombudsman to actively educate 'public and private sectors concerning children's rights',[3063] monitor the implementation of children's rights in domestic laws,[3064] and make recommendations to improve current practices.[3065] The mandate clearly extends to the acts and omissions of both the public and private sectors and provides the Ombudsman with authority to address recommendations to public authorities which are tasked with upholding 'Norwegian law and administrative routines'.[3066] These practices indicate compliance with the Paris Principles.[3067]

The legislative text broadly mandates the Ombudsman to promote and protect *children's* rights. This is broadly defined as 'persons up to the age of majority'.[3068] The legislation does not refer to specific rights or standards. The broad mandate therefore allows the protection afforded to be wide, covering a wide range of international human rights standards.[3069]

Powers of inquiry and investigation

The Ombudsman's office is vested with the power to:

- Receive complaints against both public and private bodies in its jurisdiction;[3070]
- Receive and consider complaints either of their own initiative or by other persons;[3071]
- Investigate complaints (or determine the steps which should be taken to investigate the circumstances of a case);[3072] and
- Refer cases to relevant bodies (such as to specialised courts or tribunals).[3073]

There is limited information on how these powers have been exercised.

[3060] GAHNRI General Observations, G.O. 1.2.

[3061] GAHNRI General Observations, G.O. 1.2.

[3062] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3.

[3063] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3 e).

[3064] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s b).

[3065] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3 c)-d).

[3066] *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3 b).

[3067] General Observation 1.2.

[3068] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 1.

[3069] General Observation 1.2, justification, (ii).

[3070] GANHRI General Observation 2.9, *The Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 1.

[3071] GANHRI General Observation 2.9, *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 3.

[3072] GANHRI General Observation 2.9, *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 6.

[3073] GANHRI General Observation 2.9, *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 4.

1.3 Encouraging ratification or accession to international human rights instruments

Summary: The Norwegian Ombudsman for Children satisfies this Paris Principle requirement.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations. Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.

As discussed, a key function of the Norwegian Ombudsman is to monitor domestic legislation and ensure that 'Norwegian law and administrative routines'[3074] are in accordance with Norway's obligations under the UN Convention on the Rights of the Child.[3075]

The language of the legislation makes it clear that the Ombudsman's role of monitoring compliance with human rights is merely a feature of the wider role of the Ombudsman, which is to promote the values of the ratified instrument within domestic practices and laws.[3076] This ensures that the Ombudsman remains autonomous and exists beyond measuring compliance with human rights instruments.

1.4 Interaction with the international human rights system

Summary: The Norwegian Ombudsman for Children satisfies this Paris Principle requirement.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[3077] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[3078]

The Norwegian Ombudsman for Children is not required by law to report to beyond the Ministry [for Children and Families]. However, the language of the legislation does not preclude other forms of interaction with the international human rights system. For example, s 5 of the *Ombudsman Act* states that the Ombudsman 'has the right to make statements concerning conditions included in his working sphere'.[3079] This could allow the Ombudsman to make statements upholding international human rights recommendations/standards.

1.5 Cooperation with other human rights bodies

Summary: The Norwegian Ombudsman for Children satisfies this Paris Principle requirement.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[3080] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[3081]

National human rights frameworks include government departments, [3082] which the Ombudsman for Children has a clear systematic working relationship with; the Ombudsman reports annually to

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[3074] *Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s b).

[3075] GAHNRI General Observations, G.O. 1.3.

[3076] GAHNRI General Observations, G.O. 1.3.

[3077] GAHNRI General Observations, G.O. 1.4.

[3078] GAHNRI General Observations, G.O. 1.4.

[3079] *Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 5.

[3080] GAHNRI General Observations, G.O. 1.5.

[3081] GAHNRI General Observations, G.O. 1.5.

[3082] GAHNRI General Observations, G.O. 1.5.

the Ministry of Children and Families[3083] and has authority to refer cases to other administrative agencies/bodies where appropriate.[3084]

Beyond the above, there are limited provisions within the legislation which require the Ombudsman to regularly engage with other human rights bodies.

1.6 Recommendations by NHRIs

Summary: The Norwegian Ombudsman for Children satisfies this Paris Principle requirement.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[3085] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[3086] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[3087]

This function is clearly mandated in the Ombudsman Act, which requires the Ombudsman to propose measures to 'strengthen children's safety under the law' and 'solve or prevent conflicts between children and society'.[3088] This reflects the three areas which the SCA has identified as being important areas for recommendations to relate to (the creation of legislative or administrative provisions, any situation of human rights violations, and human rights in general).[3089]

It must be noted that neither the Act nor instructions require the Ombudsman to monitor the implementation of their recommendations or annual reports, which the GANHRI identified as an important aspect of an NHRI, particularly one with quasi-judicial competence.[3090]

1.7 Ensuring pluralism of the NHRI

Summary: The Norwegian Ombudsman for Children partially satisfies this Paris Principle requirement.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[3091] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI. Pluralism can be upheld pursuant to the various models of diverse composition.[3092] In particular, staff of 'single-member NHRI's, such as an Ombudsperson' should be representative of the 'diverse segments of society'.[3093]

The legislation establishing the Norwegian Ombudsman for Children mandates that 'the Ombudsman and his Executive Officers should have varied professional backgrounds'.[3094] This ensures diversity in the composition of the NHRI's members and reflects the requirement of pluralism as set out in the Paris Principles.[3095]

[3083] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 8.

[3084] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 4.

[3085] GAHNRI General Observations, G.O. 1.6.

[3086] GAHNRI General Observations, G.O. 1.6.

[3087] GAHNRI General Observations, G.O. 1.6.

[3088] *Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 3 c)-d).

[3089] GAHNRI General Observations, G.O. 1.6, justification.

[3090] GAHNRI General Observations, G.O. 1.6, justification.

[3091] GAHNRI General Observations, G.O. 1.7.

[3092] GAHNRI General Observations, G.O. 1.7.

[3093] GAHNRI General Observations, G.O. 1.7, d).

[3094] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 9.

[3095] GAHNRI General Observations, G.O. 1.7; Paris Principles, *Composition and guarantees of independence and pluralism*, 1.

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: The Norwegian Ombudsman for Children does not appear to satisfy this Paris Principle requirement.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[3096]

The selection and appointment of the Ombudsman is to be made by the 'King in Cabinet'.[3097] The legislative provisions and instructions do not provide further information on the procedures behind the appointment, which raises concerns regarding whether the appointment process is sufficiently 'clear, transparent, and participatory'.[3098]

1.9 Political representatives on NHRIs

Summary: The Norwegian Ombudsman for Children does not appear to satisfy this Paris Principle requirement.

In order to maintain a NRHI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[3099] An NHRI should also be independent from government.

As discussed above, there is a lack of transparency around the appointment and selection process of the Ombudsman and other staff members in the office. There is no provision to prevent the appointment of a political representative as the Ombudsman nor does it distinctly separate the operation of the Ombudsman from government agencies.

Guarantee of tenure for members of the NHRI decision-making body

The Ombudsman Act prevents the reappointment of Ombudspersons to the role after their term,[3100] despite the Paris Principles not requiring such a provision (in fact, the Principles allow reappointment, as long as pluralism can be ensured).[3101] This provision effectively balances the guarantee of tenure (which is critical for stability and independence)[3102] while ensuring diversity through the mandated reappointment of a new Ombudsperson every 6 years.[3103]

Recruitment and retention of NHRI staff

The Paris Principles also require NHRIs to be legislatively empowered to determine its own staffing structure, in a way which allows it to best fulfil its mandate. Staff should be recruited in a transparent and fair selection manner to ensure pluralism and diverse composition. This requirement is evident in the Ombudsman instructions, which state that '[t]he Ombudsman himself appoints one of the staff as permanent deputy for the Ombudsman'.[3104] By allowing the NHRI to possess the legislative authority to hire their own members, the legislation establishing the Norwegian Ombudsman effectively upholds the Paris Principles of fair recruitment and hiring independence.

1.10 Adequate funding of NHRIs

Summary: It is unclear whether the Norwegian Ombudsman for Children satisfies this Paris Principle requirement.

[3096] GAHNRI General Observations, G.O. 1.8.

[3097] *Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 2.

[3098] GAHNRI General Observations, G.O. 1.8.

[3099] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[3100] *Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 2.

[3101] Paris Principles, *Composition and guarantees of independence and pluralism*, 3.

[3102] GAHNRI General Observations, G.O. 2.1.

[3103] *Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 2.

[3104] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 9.

NHRIs must be provided with adequate funding in order to function effectively and independently.[3105]

The Ombudsman instructions state that the 'rules for the administration of the finances in the Ministries and the rules for the organisation and work procedures of the Ministries'[3106] apply to the Ombudsman's office.

There is very limited information available (in English) regarding the funding structure and figures for the Norwegian Ombudsman. While it is unclear what the exact funding figures are for the Ombudsman, reports suggest that the budget steadily increased throughout the early 1990's, following successful evaluations of its effectiveness.[3107]

1.11 Annual reports of NHRIs

Summary: The Norwegian Ombudsman for Children satisfies this Paris Principle requirement.

The Paris Principles require NHRIs to prepare, publicise, and submit an annual report on its activities and recommendations, to assess how well it has furthered its mandate that year.[3108] The report can include recommendations, opinions, proposals, or to address human rights concerns. Reporting is an essential aspect of ensuring the accountability of an independent agency.[3109]

The Ombudsman instructions require the Ombudsman to submit a report to the Ministry about his activities each year, by 1 April. The report is required to be publicised.[3110] The Paris Principles appear to be upheld sufficiently within the legislative text.

Note: There are no annual reports available on the Ombudsman website, only 'public journals' and some reports which are not available in English.

2 Any criticisms made publicly about this role?

In '*Lessons from Norway: The Children's Ombudsman as a Voice for Children*', Gary Melton criticises the structure of an 'Ombudsman'. He argues that the Ombudsman role is unconventional and particularly onerous on the individual because it operates without a board of constituents behind it. This is because the ombudsman model is an individualistic model which assumes a 'great person' theory of social change, which presupposes that the role will be filled by 'one person sufficiently talented and motivated who can really make a difference'. The Ombudsman therefore has a significant degree of control over its jurisdiction and power: "*the barneombud must define the job and then find a means of fulfilling it*".[3111] This may limit accountability and create an issue of consistency as the Ombudsman changes after each tenure, particularly if the appointment criteria is ambiguous.[3112]

Melton also criticises the 'vagueness of the statutory authority' for the Ombudsman. The discretionary powers of the Ombudsman are wide and the jurisdiction for its operation is broad.

[3105] GAHNRI General Observations, G.O. 1.10, Paris Principles, *Composition and guarantees of independence and pluralism*.

[3106] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 9.

[3107] Malfrid Grude Flekkoy, 'The Children's Ombudsman as an Implementor of Children's Rights' (1996) *Symposium: Implementation of the United Nations Convention on the Rights of the Child*, 359.

[3108] GAHNRI General Observations, G.O. 1.11.

[3109] GAHNRI General Observations, G.O. 1.11.

[3110] *Instructions for the Ombudsman for Children* (Norway) Laid down by Royal Decree of 11 September 1981, s 8.

[3111] Gary Melton, 'Lessons from Norway: The Children's Ombudsman as a Voice for Children' (1991) 23(2) *Case Western Reserve Journal of International Law* 198, 207.

[3112] Gary Melton, 'Lessons from Norway: The Children's Ombudsman as a Voice for Children' (1991) 23(2) *Case Western Reserve Journal of International Law* 198, 207.

This allows for potentially 'contrasting' approaches to the Ombudsman role. From a statutory perspective, this raises issues of consistency and accountability.[3113]

3 What are the best features of this role?

- The Ombudsman recognises that it is a 'single-member NRHI', which makes principles of plurality difficulty to uphold. This role therefore removed the ability for Ombudspersons to be reappointed after their tenure, which effectively balances the guarantee of tenure (which is critical for stability and independence)[3114] while ensuring diversity through the mandated reappointment of a new Ombudsperson every 6 years.[3115]
- Clear mandate and upholds international human rights commitments well, whilst maintaining autonomy.
- Operates well within a network of human rights bodies, government agencies, and other administrative bodies.
- Perhaps not a 'best feature' but a unique consideration: the Ombudsman model attracts criticism for following the 'great person' theory of social change, in that the Ombudsman role is a singular, powerful role where the appointed Ombudsman holds all the power to define the parameters of the role and then fulfil it. There is limited accountability and consistency. See 'Criticisms' for more detail. This might be a good discussion point for comparison of an Ombudsman-style role to a commission with multiple directors/board members.

[3113] Gary Melton, 'Lessons from Norway: The Children's Ombudsman as a Voice for Children' (1991) 23(2) *Case Western Reserve Journal of International Law* 198, 207-208.

[3114] GANHRI General Observations, G.O. 2.1.

[3115] *Ombudsman for Children, Norway* (Norway) Act No 5 of March 6 1981, s 2.

C. The Ombudsman for Children (Norway): Impacts

4 Assessing impacts through evaluation

There are limited English resources evidencing the impact of the Norwegian Ombudsman for children. A 1996 evaluation of the Ombudsman found that the Ombudsman was largely seen as being effective and that '*many municipalities, as well as Parliament', had quickly accepted a number of proposals from the Ombudsman'*.[3116] Many survey participants also viewed the Ombudsman as an effective tool as protecting the rights of children while acting as a supportive tool for parents.[3117]

[3116] Malfrid Grude Flekkoy, 'The Children's Ombudsman as an Implementor of Children's Rights' (1996) *Symposium: Implementation of the United Nations Convention on the Rights of the Child*, 358.

[3117] Malfrid Grude Flekkoy, 'The Children's Ombudsman as an Implementor of Children's Rights' (1996) *Symposium: Implementation of the United Nations Convention on the Rights of the Child*, 359.

27 Commissioner for Children and Youth in Canada

A. Commissioner for Children and Youth in Canada / Office of the Commissioner for Children and Youth in Canada: Summary table

Question	Summary response
Country/State/Territory	Canada
Commissioner entity name	Commissioner for Children and Youth in Canada / Office of the Commissioner for Children and Youth in Canada (**OCCYC**)
Date established	Not yet in effect: First Reading – 16 June 2020; Second Reading – 22 June 2020
Compliant with the Paris Principles? (fully OR partial?) To be completed as a short overall summary statement following the completion of your analysis in B.	The Commissioner is partially compliant with the Paris Principles. The Commissioner benefits from a clear legislative framework that includes a detailed mandate. The Commissioner has a broad power to advocate for children's rights, conduct community outreach and partnership building with sub-national bodies, review and comment on legislation and assess compliance with international rights instruments. The appointment and staffing processes appear balanced, with the requirement for broad consultation with relevant private and public actors prior to selecting any Commissioner. Whilst the Commissioner has investigative powers, these are limited to public entities. Whilst these investigative powers appear effective, their restriction to public entities constitutes a substantial shortcoming. The Commissioner holds an effective reporting and recommendation power, namely as reports must be considered and responded to in the Canadian parliament within 90 days of their release.
Structure Where does the role sit, is it: (a) a stand-alone office; or (b) part of an existing institution (specify which institution) What relationships are there between this role and other Commissioners or institutions?	• The Commissioner is deemed to be in the public service, a government employee and employed in a federal public administration;[3118] • The Commissioner holds the office for a non-renewable term of 7 years but can be removed for cause by the Governor in Council at any time.[3119]
Accountability arrangements What is the reporting line for the role? Who sets the budget?	• The Commissioner is paid a salary and expenses as determined by the Governor in Council, and is entitled to paid travel and living expenses incurred in relation to the performance of their duties;[3120]

[3118] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 6, available at <https://parl.ca/DocumentViewer/en/43-2/bill/S-210/first-reading>.

[3119] Commissioner for Children and Youth in Canada Act s 7; the Governor in Council is a privy council comprised of the prime minister and members of parliament selected by the Governor General. The purpose of the Governor in Council is to advise the governor general and the Queen on the use of executive power.

[3120] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 10.

Question	Summary response
	• The Minister must respond within 90 days to any annual report or special report provided by the Commissioner, setting out whether any violations of rights have occurred and assessing any impact thereof.[3121]
Qualification and Experience What qualifications and experiences are required for the role? Does the person need to be an Aboriginal or Torres Strait Islander person? What is the selection and appointment process?	• The Governor in Council may appoint any federal minister to be the Minister for the purposes of the OCCYC;[3122] • the Minister recommends a candidate for Commissioner for Children and Youth in Canada. The Governor in Council must consult with the leaders of every recognised parliamentary group in the upper and lower houses, and the appointment must be approved by resolution of the upper and lower houses;[3123] • the Minister must sufficiently advertise for the role, consult with organisations and people with a particular interest in the OCCYC's work, and must ensure the recommendation is of good character, with proven experience and commitment to the role.[3124]
Scope What is the scope of the role in relation to advocating on a national or state level for the rights, views and needs of the relevant individuals?	• The Commissioner has reasonable scope to advocate for these issues, by way of own-motion inquiry and the publication of reports. These reports must be responded to by government within 90 days; • whilst the mandate of the Commissioner includes to monitor and provide recommendations on legislation, the practical effecting of this function appears limited to providing advice and commenting in special or annual reports. The day to day involvement of the Commissioner in drafting and commenting on legislation either does not exist or is not sufficiently articulated in the legislation.
Purpose What is the purpose and objective of the role?	See Commissioner for Children and Youth in Canada Act s 11: (a) to advocate at the national level in Canada for the promotion and protection of the rights, well-being and views of children and youth, particularly those who belong to a vulnerable group; (b) to collaborate with First Nations, Inuit or Métis governing bodies to include First Nations, Inuit and Métis views and values in the Commissioner's advocacy for First Nations, Inuit and Métis children and youth; (c) to foster public understanding and recognition of the Convention, the role and activities of the Commissioner and the rights and well-being of children and youth in Canada; (d) to monitor the development and application of legislation, statutory instruments and government policies and practices affecting children and youth; (e) to promote, monitor and report on the effective implementation of Canada's obligations under the Convention that fall within the legislative authority of Parliament, particularly as they relate to: i. non-discrimination in ensuring the rights set forth in the Convention,

[3121] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 20(5).
[3122] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 3.
[3123] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 5.
[3124] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 5.

Question	Summary response
	ii. the primacy of every child's best interests in all actions concerning them, iii. every child's right to life, survival and development, and iv. the right of every child who is capable of forming their own views to express those views freely in all matters affecting them and the right to have those views given due weight in accordance with their age and maturity; (f) to review proposed and enacted federal legislation and statutory instruments in order to assess their impact on the rights of children and youth, including consistency with the Convention; (g) to monitor and report on the implementation of the Convention by government institutions, including in respect of policies, services and programs affecting children and youth and their rights; (h) to consider any recommendations, suggestions and requests concerning the rights of children and youth that the Commissioner receives from any source; (i) to assist in the development and implementation, in cooperation with First Nations, Inuit or Métis governing bodies, of programs adapted to the rights, well-being, traditions and needs of First Nations, Inuit and Métis children and youth; (j) to collaborate and cooperate with authorities across Canada that promote, advocate for or serve children and youth in order to foster common policies and practices and to avoid conflicts in the handling of matters in cases of shared jurisdiction; (k) to encourage, through the use of media, social networks and other methods, the participation of children and youth, according to their age and maturity, in all aspects of Canadian society and in the activities of the Office and Commissioner; (l) to consult with children and youth and representatives of children and youth groups, as well as service providers and others, in respect of issues that may have an impact on the lives of children and youth; (m) to promote accessible and effective complaint mechanisms for children and youth and to monitor their use; (n) to facilitate access to justice for children and youth and to effective remedies for breaches of their rights and to seek intervener or amicus curiae status as the Commissioner considers appropriate; (o) to promote First Nations, Inuit and Métis manners of collaboration, advocacy and dispute resolution in relation to First Nations, Inuit and Métis children and youth, with a view to ensuring that all actions regarding their rights are considered in the context of the collective rights of First Nations, Inuit and Métis children and youth; (p) to encourage the right of First Nations, Inuit and Métis children and youth to maintain cultural connections, including connections with extended families, lands and waters, traditional languages, songs, stories and all forms of artistic expression as markers of their identity; and (q) to encourage the implementation of First Nations, Inuit and Métis law and legal processes in all matters concerning advocacy for First Nations, Inuit and Métis children and youth, including implementing specific First Nations, Inuit and Métis

Question	Summary response
	preferences for protocol, forum, spiritual practice and community involvement.
Functions and Powers What functions and powers does the role have, in particular those promoting systemic oversight and accountability? Reporting: submits reports to the relevant Minister which must also be tabled by the minister in the federal parliament? Promotion of human rights: promote discussion and awareness of matters relating to the human rights? Review of laws? Complaints handling: powers to receive, investigate and determine complaints? Inquiry and reporting: the power to investigate and report publicly on particular issues, including any power to initiate own-motion inquires and reports as well as the ability to access information and documents relevant to inquiries? Regard to UN human rights instruments required when performing their functions or exercising their powers?	• The Commissioner may provide advice to any minister on the Commissioner's own initiative or on request;[3125] • the Minister of Foreign Affairs must consult the Commissioner before finalizing Canada's reports to the United Nations Committee on the Rights of the Child on the implementation of the Convention;[3126] • the Commissioner may unilaterally, or on request of a member of the public or a parliamentarian, conduct an inquiry into any matter relating the OCCYC's mandate;[3127] • in conducting an inquiry, the Commissioner has the powers set out in Part II of the Inquiries Act. This includes access to public premises, examination of documents, summonses of witnesses and subpoena powers;[3128] • the Commissioner may access government children's detention facilities or residences and have direct access to the children therein;[3129] • the Commissioner may access all documents and records under the control of government that relate to the Commissioner's mandate, and may question government employees with regards to same;[3130] • at the conclusion of any inquiry the Commissioner must prepare a report setting out the conclusions and recommendations;[3131] • the Commissioner must provide an annual report assessing the government's compliance with the Convention on the Rights of the Child ("**CROC**"), government initiatives in assisting children, and provide recommendations to improve compliance with CROC and such initiatives;[3132] and • the Commissioner may prepare a special report at any time dealing with any matter of urgency or importance.[3133]
Budget What is the annual budget for the role?	We note this role is still in the form of draft legislation before the Canadian Parliament. The budget is therefore unknown.
Legislative Requirements How is the role enshrined in legislation? Specify and link the applicable legislation.	Bill S-217: Commissioner for Children and Youth in Canada Act.

[3125] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 12.
[3126] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 13.
[3127] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 17(1).
[3128] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 17(4).
[3129] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 17(5).
[3130] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 18(1).
[3131] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 19(1).
[3132] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 20(1).
[3133] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 20(2).

Question	Summary response
Most recent annual report or equivalent document (link)	N/A

B. Commissioner for Children and Youth in Canada / Office of the Commissioner for Children and Youth in Canada: Further analysis

1 Essential requirements of the Paris Principles

1.1 The establishment of NHRIs[3134]

Summary: The Commissioner partially complies with this requirement, as the Act sets out the substantial elements of the Commissioner's role. However, as discussed below, there is limited legislative framework around certain issues, such as grounds for dismissal and the investigation of private entities.

Entrenched in law[3135]

A NHRI must be established by a sufficiently detailed constitutional or legislative text which prescribes independence and a clear mandate.[3136]

The Commissioner for Children and Youth in Canada Act (**the Act**) establishes an independent Office of the Commissioner for Children and Youth in Canada (th**e OCCYC**) to support the Commissioner for Children and Youth in Canada (**the Commissioner**).[3137] The Commissioner has control over the OCCYC and all matters connected with it, and the Commissioner may enter into contracts and similar arrangements to assist the Commissioner or the OCCYC.[3138]

Mandate and powers[3139]

The Commissioner's mandate is expressed with considerable particularity in the Act. This provides a clear legislative framework for the functions and purpose of the Commissioner, as follows:

11 (1) The mandate of the Commissioner is:

> (a) to advocate at the national level in Canada for the promotion and protection of the rights, well-being and views of children and youth, particularly those who belong to a vulnerable group;
>
> (b) to collaborate with First Nations, Inuit or Métis governing bodies to include First Nations, Inuit and Métis views and values in the Commissioner's advocacy for First Nations, Inuit and Métis children and youth;
>
> (c) to foster public understanding and recognition of the Convention, the role and activities of the Commissioner and the rights and well-being of children and youth in Canada;
>
> (d) to monitor the development and application of legislation, statutory instruments and government policies and practices affecting children and youth;

[3134] See especially: GANHRI General Observations, G.O. 2.9 - The quasi-judicial competency of NHRIs (complaints-handling); consider also: General Observation 2.7 – Administrative regulation of NHRIs.

[3135] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

[3136] GANHRI General Observations, G.O. 1.1.

[3137] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 21.

[3138] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 ss 22, 23.

[3139] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 1.1.

(e) to promote, monitor and report on the effective implementation of Canada's obligations under the Convention that fall within the legislative authority of Parliament, particularly as they relate to:

(i) non-discrimination in ensuring the rights set forth in the Convention,

(ii) the primacy of every child's best interests in all actions concerning them,

(iii) every child's right to life, survival and development, and

(iv) the right of every child who is capable of forming their own views to express those views freely in all matters affecting them and the right to have those views given due weight in accordance with their age and maturity;

(f) to review proposed and enacted federal legislation and statutory instruments in order to assess their impact on the rights of children and youth, including consistency with the Convention;

(g) to monitor and report on the implementation of the Convention by government institutions, including in respect of policies, services and programs affecting children and youth and their rights;

(h) to consider any recommendations, suggestions and requests concerning the rights of children and youth that the Commissioner receives from any source;

(i) to assist in the development and implementation, in cooperation with First Nations, Inuit or Métis governing bodies, of programs adapted to the rights, well-being, traditions and needs of First Nations, Inuit and Métis children and youth;

(j) to collaborate and cooperate with authorities across Canada that promote, advocate for or serve children and youth in order to foster common policies and practices and to avoid conflicts in the handling of matters in cases of shared jurisdiction;

(k) to encourage, through the use of media, social networks and other methods, the participation of children and youth, according to their age and maturity, in all aspects of Canadian society and in the activities of the Office and Commissioner;

(l) to consult with children and youth and representatives of children and youth groups, as well as service providers and others, in respect of issues that may have an impact on the lives of children and youth;

(m) to promote accessible and effective complaint mechanisms for children and youth and to monitor their use;

(n) to facilitate access to justice for children and youth and to effective remedies for breaches of their rights and to seek intervener or amicus curiae status as the Commissioner considers appropriate;

(o) to promote First Nations, Inuit and Métis manners of collaboration, advocacy and dispute resolution in relation to First Nations, Inuit and Métis children and youth, with a view to ensuring that all actions regarding their rights are considered in the context of the collective rights of First Nations, Inuit and Métis children and youth;

(p) to encourage the right of First Nations, Inuit and Métis children and youth to maintain cultural connections, including connections with extended families, lands and waters, traditional languages, songs, stories and all forms of artistic expression as markers of their identity; and

(q) to encourage the implementation of First Nations, Inuit and Métis law and legal processes in all matters concerning advocacy for First Nations, Inuit and Métis children and youth, including implementing specific First Nations, Inuit and Métis preferences for protocol, forum, spiritual practice and community involvement.

Appointment mechanisms[3140]

The Commissioner is appointed on the recommendation of the Minister (the relevant Minister is not specified in the legislation and may be whichever Minister is appointed under the Act) by the Governor in Council.[3141]

Before appointing a Commissioner, the Governor in Council must consult with the leaders of every recognised political party in the upper and lower house, and the candidate must be approved by a resolution of the upper and lower houses.[3142] Requiring a resolution of both houses may generally practically only require that the government of the day support the candidate. This may expose Commissioners to accusations of partisanship, although would likely ease the process of appointing a Commissioner (as opposed to requiring, e.g. a consensus or super majority).

Quasi-judicial competency (complaints-handling)[3143]

Whilst the Commissioner's mandate includes promoting and monitoring effective complaints and dispute resolution mechanisms,[3144] it does not itself have a mandate or specific powers to receive and determine complaints. As its mandate does not include any quasi-judicial competency, it is not required to hold any such powers.

1.2 Human rights mandate[3145]

Summary: The Commissioner appears broadly empowered to produce reports, engage in community outreach and movement building and provide recommendations. However, a substantial shortcoming is the limitation of inquiry powers to public entities. In this respect the Commissioner is partially compliant with the requirements.

'Promotion' of human rights is understood to include functions such as education, advocacy, and public outreach, as well as the autonomy to investigate or report on issues concerning human rights.[3146] On the other hand, 'protection' of human rights is understood to include functions that address and seek to prevent human rights violations (such as powers of inquiry and complaints-handling).[3147]

Competence and responsibilities[3148]

The Commissioner and OCCYC have a legislatively defined mandate, which includes advocacy around the promotion and protection of children's rights, public promotion of said rights, monitoring of legislation and policy, promotion and monitoring of international human rights instrument compliance, investigative powers, facilitating complaint mechanisms for children and access to justice and the promotion of First Nations people's culture and law.[3149] This broad mandate covers the elements set out under GO 1.2, however the powers to facilitate such a mandate appear limited to powers of inquiry and reporting, and only with respect to public entities and government departments. An inability to investigate private bodies is a substantial shortcoming of the role and is non-compliant with Articles 2 & 3 of the Paris Principles.

[3140] See GANHRI General Observations, G.O. 1.1.

[3141] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 5(1).

[3142] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 5(1).

[3143] See Paris Principles, *Additional principles concerning the status of commissions with quasi-jurisdictional competence;* GANHRI General Observations, G.O. 2.9.

[3144] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 ss 11(1)(m), (o).

[3145] Consider also: General Observation 2.3 – Protection from criminal and civil liability for official actions and decisions undertaken in good faith; General Observation 2.6 – Limitation of power of NHRIs due to national security; General Observation 2.8 -- Assessing NHRIs as National Preventive and National Monitoring Mechanisms.

[3146] GAHNRI General Observations, G.O. 1.2.

[3147] GAHNRI General Observations, G.O. 1.2.

[3148] See Paris Principles, *Competence and responsibilities,* Principle 2; GANHRI General Observations, G.O. 2.6.

[3149] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 11.

The Commissioner is also required to report on the outcome of any inquiry conducted,[3150] annually, on the government's implementation of CROC and related matters of child welfare, recommendations to improve these matters and the Office's functions and activities, and on an ad hoc basis in response to any issues of urgency or importance.[3151]

Functional immunity[3152]

The Commissioner and employees of the OCCYC are protected from criminal and civil liability with respect to anything done in good faith in the course of exercising their duties and functions under the Act.[3153] Similarly, the Commissioner and employees of the OCCYC cannot be compelled as witnesses in relation to any matter that comes to their attention as a result of performing their functions under the Act.[3154]

Powers of investigation and inquiry

The Commissioner holds the power to inquire into any matter related to the Commissioner's mandate, including both individual and systemic issues.[3155] Inquiries may be initiated on the Commissioner's own motion or on request from any Minister, committee member of the Canadian parliament or member of the public.[3156]

The Commissioner is afforded substantial autonomy over whether to pursue an inquiry, and may decline a request for an inquiry, and abandon or set aside an inquiry.[3157]

In conducting an inquiry, the Commissioner holds the powers of a commissioner appointed under Part II of the Inquiries Act. These include powers to enter premises, access documents and require individuals for examination.[3158]

However, the Commissioner's inquiry powers appear limited to public entities and government departments.[3159] This prevents the Commissioner from responding to *all* violations of human rights. The Commissioner may access children in any place of detention or residence controlled by the government, subject to reasonable notice, personal safety and security considerations.[3160] The Commissioner is empowered to access reports, information and explanations from government institutions that relate to the fulfilment of the Commissioner's responsibilities.[3161] This power is minimally fettered by requirements that access be granted at "convenient" times,[3162] and the Commissioner cannot access documents held by the Queen's Privy Council for Canada.[3163]

These qualifications depart from GO 1.2, as access is not unfettered. As recent Australian experiences indicate (with respect to the Don Dale Youth Detention Centre), personal safety and security considerations may be used as improper excuses to restrict access to facilities at times of heightened vulnerability for children, or as a means to limit outside observance whilst human rights abuses are ongoing.

[3150] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 19(1).

[3151] *Commissioner for Children and Youth in Canada Act 2020* s20(2).

[3152] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1 & 2.3.

[3153] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 27(2).

[3154] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 27(1).

[3155] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 17(1).

[3156] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 17(1).

[3157] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 17(2), (3).

[3158] *Inquiries Act* R.S.C., 1985, c. I-11.

[3159] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 ss 17, 18; see also, *Inquiries Act 1985.* RSC, 1985, c. I-11.

[3160] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 17(5).

[3161] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 18(1).

[3162] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 18(1).

[3163] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 18(2).

1.3 Encouraging ratification or accession to international human rights instruments

Summary: The Commissioner partially complies with this requirement, with legislated interaction with international instruments limited to the Convention.

Compliance with this Paris Principle is generally satisfied where the NHRI reviews relevant national laws, regulations, and policies to determine their compatibility with international human rights obligations.[3164] Other functions may include monitoring developments in international human rights law, promoting state participation in the development of international instruments, or making domestic recommendations to promote international compliance.[3165]

As above, the Commissioner reports on the government's adoption of, and compliance with, the Convention and provides recommendations to further adopt and improve compliance. The Commissioner complies in this respect with Article 3 of the Paris Principles, and the mandate is specifically included in the enacting legislation.[3166] However, the Commissioner does not have a specific obligation to promote broader compliance with other international human rights instruments.

The primary method for reviewing and furthering compliance is the Commissioner's reporting function.[3167] The Commissioner is required to provide an annual report that specifically considers the government's implementation of the Convention.[3168] Importantly, the government is required to respond to this report within 90 days, providing an accountability mechanism that requires engagement with the Convention.[3169]

The Commissioner does hold a specific mandate to review proposed and enacted federal legislation and statutory instruments in order to assess their impact upon children, and their compliance with the Convention.[3170] Whilst observance of the Convention is well integrated into the role, there does not appear to be any obligation to observe or implement human rights instruments more broadly. This derogates to some extent from Article 3 of the Paris Principles, and demonstrate a narrower approach to the implementation of international human rights instruments than other comparable Australian and international entities.

1.4 Interaction with the international human rights system

Summary: The Commissioner is not compliant with this requirement, in that there are no clear legislative requirements on the Commissioner to interact with the international human rights system.

Interaction with the international human rights system is an effective way for NHRIs to promote and protect human rights domestically.[3171] It can include requirements for the NHRI to submit parallel/shadow reports to international human rights bodies, make statements during debates before review bodies, or promote particular recommendations made by international human rights bodies.[3172]

Absent the requirements to promote and observe the Convention, discussed above, there are no specifically legislated requirements that the Commissioner engage with the broader international human rights system.[3173]

[3164] GANHRI General Observations, G. O. 1.3.

[3165] GANHRI General Observations, G. O. 1.3.

[3166] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 11(1)(e), (f), (g).

[3167] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 20.

[3168] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 20(1)(a)(i).

[3169] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 20(5).

[3170] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 11(1)(f).

[3171] GAHNRI General Observations, G.O. 1.4.

[3172] GAHNRI General Observations, G.O. 1.4.

[3173] The General Observations notes that this interaction may be by way of reporting to the Universal Periodic Review, Special Procedure mechanisms, Treaty Bodies Committees; Human Rights Council and Office of the United Nations High Commissioner for Human Rights.

However, the Commissioner's mandate is broadly drafted so as to allow engagement with the broader human rights system and constituent entities.[3174] Therefore, whilst engagement with the international human rights system is not specifically legislated, it appears possible under the current mandate. This does not, however, comply with Article 3 of the Paris Principles which requires that engagement be specifically articulated and legislated.

1.5 Cooperation with other human rights bodies

Summary: The Commissioner substantially complies with this requirement, as engagement with national and sub-national human rights bodies is legislated as part of the role.

The Paris Principles require NHRIs to regularly and constructively engage with all relevant stakeholders to effectively fulfil their mandates.[3175] This can involve engagement within a national human rights framework or other domestic institutions and actors mandated to promote human rights.[3176]

The Commissioner's mandate includes collaboration with national and sub-national human rights bodies. This includes First Nations, Inuit and Métis governing bodies,[3177] and any authorities across Canada that promote, advocate for or serve children and youth.[3178] The Commissioner appears effectively compliant with Articles 3(f), (g) of the Paris Principles with respect to these groups.

Although not a formal human rights body, the Commissioner is required to consult with children and youth and representatives of children and youth groups, as well as service providers.[3179]

These requirements are expressed as part of the Commissioner's mandate and the draft legislation does not prescribe any particular method for engagement or cooperation.

1.6 Recommendations by NHRIs

Summary: The Commissioner substantially complies with this requirement, in holding a broad recommendation power. Additional powers to require compliance or at least consideration of recommendations would strengthen this aspect of the Commissioner role.

The Paris Principles explicitly state that NHRIs should be mandated to make recommendations to public authorities on how they can better uphold or promote human rights.[3180] Recommendations can relate to the amendment/creation of legislative or administrative provisions, any situation of human rights violations, or human rights matters in general.[3181] NHRIs should also follow up, monitor, and report on how well any recommendations have been implemented.[3182]

The Commissioner is required to annually consider and report on proposed legislation, compliance with the Convention and any other matters affecting the rights and well-being of children and youth.[3183] The Commissioner may also report on, and provide recommendations in relation to, any matter of sufficient urgency or importance.[3184] However, there is no specific requirement for the Commissioner to follow up on the actions recommended in these reports, which is inconsistent with best practice in not only monitoring, investigating and reporting on relevant matters, but also undertaking rigorous and systematic follow up. Notably the government is required to respond to any report, including recommendations therein, within 90 days and

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[3174] See, eg, *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 11(1)(f)

[3175] GAHNRI General Observations, G.O. 1.5.

[3176] GAHNRI General Observations, G.O. 1.5.

[3177] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 11(1)(b).

[3178] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 11(1)(j).

[3179] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 11(1)(l).

[3180] GAHNRI General Observations, G.O. 1.6.

[3181] GAHNRI General Observations, G.O. 1.6.

[3182] GAHNRI General Observations, G.O. 1.6.

[3183] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 20.

[3184] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 20(2).

specifically address any alleged violations of children's rights or impact assessments therein, legislating some degree of follow up from government.[3185]

In conducting these inquiries, the Commissioner does not hold any power to hear or resolve individual complaints. Members of the public may request that the Commissioner inquire into certain matters within the Commissioner's mandate,[3186] which could presumably include individual cases and complaints, however the Commissioner does not hold any power to determine or resolve these complaints.

1.7 Ensuring pluralism of the NHRI[3187]

Summary: The Commissioner and OCCYC are partially compliant with this requirement. The relevant Minister must conduct broad based consultation in appointing the Commissioner, with legislated input from First Nations groups. There is no clear requirement for pluralism amongst staff.

A key aspect of the Paris Principles requires a NHRI to be a diverse decision-making body, composed of a broad representation of national society.[3188] This enhances a NHRI's ability to promote accessibility and equality and promotes the institutional independence of the NHRI.

Pluralism[3189]

The Commissioner must be of good character, with proven experience with, and commitment to, promoting the rights of children and youths.[3190] There are no requirement that the Commissioner be from any particular background, noting, however, that the relevant Minister may establish their own hiring criteria which could include pluralism requirements.[3191] In recommending a Commissioner, the relevant Minister must:[3192]

(a) advertise the vacancy or prospective vacancy across Canada in a manner sufficient to enable qualified individuals to apply for appointment;

(b) consult with organizations or persons that, in the opinion of the Minister, have a particular interest in the work of the Commissioner, including representatives from First Nations, Inuit or Métis governing bodies and organizations representing First Nations, Inuit and Métis children and youth.

This substantially complies with the Paris Principle requirements, by ensuring that a broad range of voices from the Canadian society are heard during the recruitment process. The G.O. note that pluralism may be hard to effect in the context of single role, and that ensuring pluralism amongst staff more broadly may go some way to ensuring representation in the context of gender, ethnicity or minority status.

However, there are no mandated hiring practices in the OCCYC's enacting legislation, but for the requirement that employees of the Office be appointed in accordance with the *Public Service Employment Act 2003.*[3193] This legislation is aimed at ensuring that hiring and promotion are based on merit and free from any partisanship. The Public Service Employment Act does not appear to impose any specific pluralism requirements. The OCCYC therefore does not comply with the relevant Paris Principle obligations.

[3185] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 20(5).

[3186] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 17(1).

[3187] Consider also: General Observation 2.1 – Guarantee of tenure for members of the NHRI decision-making body; General Observation 2.2 – Full-time members of an NHRI; General Observation 2.4 – Recruitment and retention of NHRI staff.

[3188] GANHRI General Observations, G.O. 1.7.

[3189] GANHRI General Observations, G.O. 1.7.

[3190] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 5(2).

[3191] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 5(2)(c).

[3192] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 5(2).

[3193] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 24.

1.8 Selection and appointment of the decision-making body of NHRIs

Summary: There is no requirement to appoint a decision-making body as part of the OCCYC. This does not comply with the relevant requirement.

The GANHRI paper emphasises the importance of ensuring a formal, transparent, and participatory selection and appointment process of the NHRIs decision-making body. Such processes should ensure that the position is filled by an applicant who has undergone a fair and merit-based selection process.[3194]

The draft legislation does not specifically identify any relevant decision-making body. The OCCYC is comprised of the Commissioner and Assistant Commissioner, staffed by public service employees. In hiring the Commissioner, the Governor in Council is required to advertise the appointment in a manner suitable to enable qualified individuals to apply.[3195] The hiring process and requisite qualifications and experience for the Commissioner are set out at 1.1 and 1.7 above.

The Assistant Commissioner is appointed on the recommendation of the Commissioner,[3196] and there are no criteria for this appointment.

There is no legislated requirement for a decision-making body comprised of experts, social and political representatives or interest groups. In this respect, the Commissioner and OCCYC do not comply with Articles B1 – B3 of the Paris Principles.

1.9 Political representatives on NHRIs

Summary: The strong legislative basis for the Commissioner, and the Commissioner's autonomy over staffing and operation of the OCCYC, suggest a significant degree of political independence. There is a lack of clarity around the grounds upon which the Commissioner may be dismissed and no available information regarding funding sources, rendering the Commissioner role partially compliant.

In order to maintain a NHRI's structural, operational, and compositional independence from government agencies, the Paris Principles require that any political representatives must only be involved in an advisory capacity.[3197] An NHRI should also be independent from government.

The first and second reading material, and preamble to the legislation, emphasise that the Commissioner and OCCYC are intended to be roles independent of government.[3198] However, there is no general prohibition against government representatives and members of parliament serving as the Commissioner or forming part of the OCCYC. The significant degree to which the Commissioner's powers, functions and structure are legislated provide a degree of stability, limiting arbitrary interference by government. However, the lack of any information regarding the budget of the OCCYC is a major inhibiting factor in assessing the overall degree of political independence.

Tenure[3199]

The Commissioner holds office for a non-renewable period of seven years.[3200] However, the Commissioner may be removed at any time for cause by the Governor in Council.[3201] "Cause" is

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[3194] GAHNRI General Observations, G.O. 1.8

[3195] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 t s 5(2).

[3196] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 14.

[3197] Paris Principles, *Composition and guarantees of independence and pluralism*, 3(e).

[3198] Senate of Canada, Debates of the Senate (Hansard) 1st Session, 43rd Parliament, Volume 151, Issue 22; Senate of Canada, Debates of the Senate (Hansard) 1st Session, 43rd Parliament, Volume 151, Issue 25.

[3199] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.1.

[3200] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 7.

[3201] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 7.

not defined in the Act; neither does the relevant explanatory material indicate what matters could constitute cause.

Removal for cause may be understood as carrying a particular meaning in Canadian public law and we have not conducted further inquiry into this question. Whilst removal for cause suggests on common usage a requisite degree of wrongdoing, the absence of any clearly defined terms upon which the Commissioner may be removed fails to satisfy the Paris Principles.

Recruitment[3202]

Employees of the OCCYC are appointed in accordance with the *Public Employment Act 2003* (**Employment Act**).[3203] A brief review of the Employment Act suggests it emphasizes the values of merit, non-partisanship, fairness, access, transparency and representativeness, and would not appear to unduly fetter the OCCYC. The Commissioner is appointed as chief executive officer of the OCCYC, with the power to engage staff to advise and assist the OCCYC.[3204] This would appear to offer the Commissioner a substantial degree of control over the staffing of the OCCYC, with consequent ability to maximise independence.

1.10 Adequate funding of NHRIs

Summary: Absent any indication of the total budget for the Commissioner and OCCYC, it is difficult to determine whether funding is adequate. In this respect, the Commissioner role is not compliant.

NHRIs must be provided with adequate funding in order to function effectively and independently.[3205]

The salary and expenses of both the Commissioner and Assistance Commissioner are set by the Governor in Council.[3206] The draft legislation does not otherwise address the budgeting for the Commissioner or the OCCYC. As the enacting legislation creates the OCCYC as a separate office to support the Commissioner, it appears likely that the OCCYC would receive separate funding. The extent and source of this funding is, however, unclear and does not therefore satisfy s B.2 of the Paris Principles.

1.11 Annual reports of NHRIs

Summary: The Commissioner substantially complies with this requirement, holding an obligation to provide annual reports which must be tabled with, and considered by, the Canadian parliament.

As above, the Commissioner holds the power to inquire into any matter related to the Commissioner's mandate, including both individual and systemic issues.[3207] At the finalisation of any inquiry, the Commissioner must produce a report summarising the inquiry and outlining any relevant recommendations and findings.[3208] The report must be published on the Office's website, however the government is not required to respond to the report in the same way that it is required to respond to annual or special reports.[3209]

[3202] See Paris Principles, *Composition and guarantees of independence and pluralism,* principle 3; GANHRI General Observations, G.O. 2.2.

[3203] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 24.

[3204] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 23.

[3205] GAHNRI General Observations, G.O. 1.10; Paris Principles, *Composition and guarantees of independence and pluralism*.

[3206] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 10, 15(2).

[3207] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 17(1).

[3208] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 19(1).

[3209] *Commissioner for Children and Youth in Canada Bill 2020*, s-210 s 19(2).

2 Any criticisms made publicly about this role?

There do not appear to be any substantial criticisms of the draft legislation.

3 What are the best features of this role?

- The Commissioner has a broad mandate. The legislative mandate covers the elements expressed at GO 1.2 and could provide an effective basis for model legislation;

- Although not unique to the jurisdiction, the reporting powers of the Commissioner appear consistent with best practice. That is, a requirement for annual reporting on the Commissioner's mandate, along with a power to initiate special reports on matters of urgency or import. The requirement that government respond to these reports within a specific period is an effective accountability mechanism;

- The hiring and recommendation process for the Commissioner substantially complies with the Paris Principles, in requiring broad consultation not only with the parliament and political parties but with relevant sector interest groups and representative of First Nations, Inuit or Métis governing bodies and organizations.

C. The Commissioner for Children and Youth in Canada: Impacts

4 Impacts of Commissioner for Children and Youth in Canada Act

There are no demonstrable impacts of this role, as the role has not yet been established.