



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES  
COMMITTEE

**Reference: Commonwealth Commissioner for Children and Young People Bill  
2010**

TUESDAY, 29 MARCH 2011

CANBERRA

BY AUTHORITY OF THE SENATE



## **INTERNET**

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

**<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to:

**<http://parlinfo.aph.gov.au>**

**SENATE LEGAL AND CONSTITUTIONAL AFFAIRS**

**REFERENCES COMMITTEE**

**Tuesday, 29 March 2011**

**Members:** Senator Crossin (*Chair*), Senator Barnett (*Deputy Chair*) and Senators Furner, Ludlam, Parry and Pratt

**Substitute members:** Senator Hanson-Young to replace Senator Ludlam for the committee's inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010

**Participating members:** Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Eggleston, Faulkner, Ferguson, Fielding, Fierravanti-Wells, Fielding, Fifield, Fisher, Forshaw, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ian Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

**Senators in attendance:** Senators Barnett, Crossin and Hanson-Young

**Terms of reference for the inquiry:**

To inquire into and report on:

Commonwealth Commissioner for Children and Young People Bill 2010

**WITNESSES**

**BABINGTON, Mr Brian Keith, Chief Executive Officer, Families Australia ..... 7**

**BAKER, Dr Ken, Chief Executive, National Disability Services ..... 11**

**BUDAVARI, Ms Rosemary, Co-Director, Criminal Law and Human Rights Unit, Law Council  
of Australia ..... 18**

**FRASER, Ms Elizabeth, Queensland Commissioner for Children and Young People and Child  
Guardian, representing Australian Children’s Commissioners and Guardians..... 1**

**POCOCK, Mr Julian, Director of Public Policy and Practice Development, Berry Street ..... 14**

**WARRILOW, Ms Prue, Chair, Families Australia ..... 7**



**Committee met at 1.01 pm****FRASER, Ms Elizabeth, Queensland Commissioner for Children and Young People and Child Guardian, representing Australian Children's Commissioners and Guardians**

**CHAIR (Senator Crossin)**—I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee for our inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010. The inquiry was referred by the Senate to the committee on 26 October 2010 for inquiry and report by the last sitting day in May 2011. We have received 93 submissions for this inquiry and all of those submissions have been authorised for publication and are available on the committee's website. I want to remind witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence. We do prefer all evidence to be given in public, but of course there is the provision to be heard in camera, which you can do at a request of the committee.

To begin our proceedings today, I welcome Ms Fraser, the representative of the Australian Children's Commissioners and Guardians.

**CHAIR**—We have a submission from the Australian Children's Commissioners and Guardians which we have lodged as submission 20, so I am assuming that there are no amendments or alterations to that.

**Ms Fraser**—No.

**CHAIR**—I now invite you to provide us with an opening statement and then we will go to questions.

**Ms Fraser**—Thank you. I would like to advise that Mr Alasdair Roy, who is the Children and Young People Commissioner in the ACT, was attending but, unfortunately, he has not been able to come today. Thank you for the opportunity to make an opening statement, and you do have the submission that we tendered.

Senator Hanson-Young's bill has generated, we think, a welcome and important discussion about what role a national children's commissioner could and should play in Australia, and I think the depth and breadth of the submissions on the website attest to that. However, we do as a group have some concerns about some of the bill's current proposals and we outline those in our submissions. In particular, the issues that we have some concerns about are: the confusion that the role will create because of the overlap of proposed functions with those of existing state and territory commissioners, guardians and ombudsmen; the duplication that could lead to additional layers of bureaucracy, particularly in reporting and data collection; some risks associated with building unreasonable community expectations for the role to monitor and coordinate laws, policies, programs and funding Australia-wide; the need for further consultation as to how the role will interact with other state and territory commissions and guardians; and the missed opportunity to add value to what is working well and to work collaboratively to develop a vision for children and young people's rights and wellbeing in Australia.

ACCG members all advocate for children and young people at state and national levels, both individually and collectively, and many provide indispensable oversight of state and territory service delivery, particularly to vulnerable children and young people. In six of the eight jurisdictions, children's commissioners are appointed as independent statutory officers. While commissioner models may be at varying stages of development, all children's commissioners and guardians have specialist knowledge and experience of their own jurisdiction.

The ACCG members understand the context and the detail of their respective state legislation, and appreciate the strengths as well as the weaknesses of the systems and services in place for children and young people in their respective jurisdictions—particularly the most vulnerable and those in the child protection and youth justice systems. Most of their roles have been uniquely shaped in response to historical events and by significant inquiries. For example, the Queensland Forde inquiry, the New South Wales Woods inquiry, the Victorian ombudsman's inquiries and the Northern Territory Bath inquiry. My own experience in Queensland is that the combination of roles, including advocate, monitor of laws and services, guardian and acting on complaints is a significant and complex task and it is difficult to conceptualise how one centralised agency could effectively execute all of these roles on behalf of all Australian children. Charging a national commissioner with too many wide-reaching functions could take us further away from our common goal of improving the lives of children and young people in a real and meaningful way.

The ACCG is particularly concerned about the bill's proposal for a national commissioner to adopt a broad monitoring and reporting role with respect to children and young people's wellbeing. In the ACCG's view, it would be more valuable and effective for a national commissioner to advocate for strong and independent

oversight at the state and territory level to be strengthened than to try to duplicate or replace existing systems with this generic and significantly diminished national monitoring framework. State and territory commissions are best placed to monitor and report on support for children and young people on the ground in their own child protection systems. They have established networks and practices to gather evidence about children and young people's individual health, safety and wellbeing, as well as their actual lived experiences in the child protection system. This means that they are better placed to respond more effectively and quickly when needed.

I would like to share with you a Queensland example which demonstrates the importance and complexity of the on-the-ground monitoring and reporting. The Queensland Commission's Community Visitor Program has 154 community visitors who establish personal relationships with children and young people in care and youth detention by regularly visiting and listening to them to see that they are safe and receiving appropriate care, and also advocating on their behalf. Specialist programs like this are time and resource intensive but can achieve significant improvements in the lives of children and young people. For example, in 2009-2010 community visitors conducted over 47,000 visits to more than 7,200 children and young people in out-of-home care and youth detention centres, and assisted with the resolution of nearly 13,000 service delivery issues. In a recent report the Victorian ombudsman noted that program and identified Queensland's monitoring framework as one of two models warranting serious consideration by the Victorian government to improve transparency and scrutiny of the Victorian child protection system; the other was in Canada.

To conclude, the ACCG sees benefit in a national children's commissioner, with a national and international focus on rights-based advocacy for children and young people, and with a particularly important example being refugee young children. However, in establishing this role we must not jeopardise or weaken monitoring and advocacy systems that are already working well in states and territories. We believe that it is critical that we more clearly define the role, functions and powers of a national children's commissioner, avoid duplication that will create further bureaucracy and divert already scarce resources away from state and territory important oversight roles and mechanisms and clarify the relationship a national commissioner would have with state and territory commissioners and guardians. Thank you.

**CHAIR**—There has actually been a lot of support for the concept of the children's commissioner. Some submissions, though, have suggested that rather than go down this path of having a separate body statutory authority, that the children's commissioner should be another commissioner under the Australian Human Rights Commission Framework. Does your group have a view about that?

**Ms Fraser**—The view that we have is that the national commissioner should, in a sense, focus in on rights-based advocacy. Our view is that the national commissioner could be located within the Australian Human Rights Commission, and that it would be well placed to take on that role. In our view they could do the extended functions that we think need to be done from a national perspective. In part, they do actually carry some of the responsibilities that people have referred to, particularly with regard to trying to collate information for the UN Convention on the Rights of the Child reports and doing some of the complaints and advocacy work in that arena. From time to time they do look at those sorts of issues. I think further discussion needs to be taken in relation to the merits of that and we need to make sure that the Human Rights Commission's existing functions and powers regarding children and young people are not diminished in any way, particularly in relation to complaint handling and intervention in court proceedings. I think we are saying that could be a good place for that to be.

**CHAIR**—So you are not against the creation of a children's commissioner?

**Ms Fraser**—No; in fact we support it.

**CHAIR**—You are just saying not this model?

**Ms Fraser**—Yes. We do support the model, but we think we need to make sure that the model that is created addresses and strengthens the gaps that already exist and does not, in a sense, duplicate functions that are best done at the state and territory level but adds to that flavour at the national and international level and picks up on some particular issues where we think there are national rights interests.

**CHAIR**—Secondly, can I just ask you whether you have looked at the intersection between this commissioner's role and the Immigration (Guardianship of Children) Bill? Do you have a view about that?

**Ms Fraser**—We have not looked at the intersection in great detail, but we do think that young children coming in without specific visas or entitlements, or in detention—those sorts of areas; refugee children—are a group of children who are certainly outside of our jurisdiction and they would certainly merit attention. As that



is a Commonwealth responsibility, we would see that as an area where a national commissioner would have some role. But even in creating a role there I think there is an important issue in not confusing the doing with the role that a commissioner might have in advocating for the best interests of children and their rights, because sometimes in the doing you cannot then comment on the actual doing that you were involved with.

**CHAIR**—Good point.

**Senator HANSON-YOUNG**—It was wonderful to get your submission. Of course, the ACCG is best placed to give that state and territory perspective on how a national commissioner for children and young people would look. Firstly, I just want to say that the process of putting the bill to the Senate inquiries is precisely to get that feedback from the various different stakeholders and to see where things need to be tweaked. I agree with you that we would not want to see a piece of legislation go through the parliament that would diminish the roles or protections that are already in place for children in the various different states and territories, so we need to make sure that we link those things properly. I am also very open to the idea of the children's commissioner being placed, if it were to be agreed to by the parliament, within the Human Rights Commission. I have not been specific about that, because it is an issue where people have different ideas; but if it were about getting it in place, and if that is the place best resourced, then I would be open to that.

I just want to touch on the roles in having a rights-based approach. That is clearly something that is not specific to the roles of the state or territory commissioners or guardians, and I just want you to expand a bit on that gap, and how you think, if we could have a federal or a national commissioner to bridge that gap, how that would help in the work that is already being done in the states and territories?

**Ms Fraser**—In the work the commissioners are doing at the state and territory level I think that some do have a mandate in terms of promoting rights and wellbeing of children more broadly, as well as the monitoring and oversight and the complaints functions and advocacy roles. I guess our view is that the rights-based advocacy that needs to occur with the national commissioner needs to occur in the national and international spheres. Where there is probably work going on by some state and territory commissioners on children's rights—and in the Australian context they are often embedded in legislation designed to protect them, like the child protection legislation—we need to ensure that those rights are actually being picked up in the service frame and how those children are actually being treated. I guess we would not see the national commissioner role as necessarily moving into the sorts of areas where children are actually involved in state-directed services under the legislation within the states and territories, but that they would look at broader rights and whether or not there was an oversight of that within the jurisdictions; in particular, looking at things like income protection security, some of the national health early childhood and family law.

These are areas where the existing commissioners at the state and territory levels have, from time to time, put forward submissions and advocated, which have been well received. I think some of that work is useful because it highlights what is actually impacting on children in the local jurisdictions. In our advocacy there we would like to see this position really pick up on the rights in the national and international frame and add value to the work that is already happening, and if that work is not happening to the same level in the states then advocating that it should.

**Senator HANSON-YOUNG**—One of the recommendations—and it was a unanimous recommendation—of the *Forgotten Australians* report was for a federal children's commissioner. In some ways that is picking up, as you are saying, that there are some federal programs. But at the moment there is nobody at that national level whose responsibility it would ultimately be to advocate for those children. I just wonder, based on learned experience, if you believe those types of incidents in the past give weight to ensuring that we do put a role like this in place?

**Ms Fraser**—I think that there are gaps in that context where improvements do need to occur. I think that this role could pick up on those. I think the important thing is learning also from the lessons where we have the intersection of federal, state and territory systems and where, in the past, sometimes we added new things in there to achieve the outcome that we were seeking and, instead of achieving something better and some consistency, we ended up with a little bit of overlap and duplication because there may have been gaps. I think there is a bit more work to do in trying to design that, to actually make sure that the framework works in that way.

**Senator HANSON-YOUNG**—Have you had any thought as to how—taking all of that on board, and not wanting to diminish but rather to strengthen and to fill those gaps from a national perspective—the state and territory individual commissioners could interact, either formally or informally, with a federally based commissioner?

**Ms Fraser**—We would be more than happy to work together, but I think an important aspect of that is having the structure and the governance arrangements worked through so that there are opportunities to optimise that linking and meeting and working together. We currently, as state commissioners around Australia, meet twice a year to talk about what is happening in the various jurisdictions. We look at what are some of the issues that are coming up; where do we need to advocate on that. People like the Human Rights Commissioner is invited to that. We are quite interested in looking at what various ombudsmen are doing in our territories. I guess what we are always looking to see is where can we add value to what is actually happening there because, clearly, the responsibility of policies and programs and services spans governments and there are also contracted people within that frame as well as advocates and other people. So I do not think it would be problematic for the relationship to work, for that collaboration to occur and for good work to be progressed by people. But I think you have to start from a base that is reasonably clear in terms of roles and responsibilities. Also, for the public, I think it is important for them to have a view because, as you can read from some of the submissions, some people have a strong expectation that if we have a national commissioner then everything will be fixed or that they will deal with complaints.

From the ground, I guess what I am looking at is the example that I gave in Queensland: if a child has an issue or someone has an issue about services to a child, I think it needs to be clear to them where they are going to get the most immediate, quick response in terms of the issue without thinking, ‘Well, maybe I’ll go to here,’ and then being referred back, or not having the clarity of where do to go for what particular purpose. It is for that that we say we would like that sort of clarity. We would be more than happy to work on the specifics of it. At this stage what we have provided is really broad-brush information. As I said before to Senator Crossin, we support the idea and we have for a long time, even though our commissions have only been in place for 12 or 14 years, and some for much less time. So we do know that there is a place for it but we want to make sure that where it comes in links and adds value, and if there are gaps at the state level then the consistency in that framework needs to be supported as well so it is not an opportunity, in my head, for this role to then fill gaps that should rightfully be filled by other parts of government as well.

**Senator HANSON-YOUNG**—Sure. Thank you.

**CHAIR**—Senator Barnett?

**Senator BARNETT**—Thanks, Ms Fraser. I just want to flesh out some of those answers and concerns expressed about duplication and overlap with the state commissioners and this view that if a Commonwealth commissioner is appointed then they are going to solve all the problems of at least Australia. I want to say that I really appreciated the matrix that you provided in your submission regarding the roles and responsibilities of the state and territory commissioners and focusing on service delivery in those states and territories regarding child protection, juvenile justice and so on. Can you in your own words flesh out your role and responsibilities in Queensland so that the committee can get a better feel as to your roles and responsibilities, just a short summary, if that is possible?

**Ms Fraser**—In Queensland, and as the Queensland children’s commissioner, as I said before, all of us have started from fairly unique positions of recommendations that certain things were not travelling well for children. My mandate now is to promote and protect the rights, interests, safety and wellbeing of all children in Queensland.

**Senator BARNETT**—Zero to 17?

**Ms Fraser**—Zero to 17, placing particular focus on vulnerable children. They are nominated in my legislation as Aboriginal and Torres Strait Islander children, children who are disabled in some way, children who may be homeless, children who have mental health issues and children who are geographically isolated; so there is a requirement to look at the particular needs of vulnerable or disadvantaged groups in what are known to be development attainments.

Within that, just to be clear: for all children in Queensland I have a general advocacy role, and I can look at different proposed policies, legislation and programs and make comment on all of them. I try to bring to that information which I know from research may assist the policy makers and the program developers to promote children’s wellbeing and to address the particular needs of groups who may not be sharing the particular advantage in that area. That is for all children.

I have particular responsibilities for children in regulated service environments, and regulated service environments in Queensland are deemed to be those areas where children have to receive services. I am talking there about if they are going to school, or if they are taken into foster care, or if they are placed in

detention, or they are in a residential care environment or those service environments where we think it is a positive developmental experience for children to be involved in. My act requires those organisations to manage the risks for children in those contexts. People who are working in those contexts have to be screened and achieve a working-with-children check, and we monitor all those people in context of any changes in criminal history.

For kids in regulated service environments, which are quite a lot, I have other responsibilities. With regard to children on child protection orders who are in residential facilities of any kind—that is, a mental health facility, a respite facility or if they have a disability, or if they are in a children’s shelter or in detention—

**Senator BARNETT**—What about immigration detention?

**Ms Fraser**—I do not deal in the immigration detention area, but in any state government funded facility or contracted facility I have a responsibility for monitoring and seeing what is happening for those children in terms of their safety and wellbeing. As I said before I have a capacity to visit all those children, and we do visit them on a regular basis to ascertain whether they are in fact getting the services and whether they are safe. Then we raise those issues with the agencies at the local level, and basically seek the children’s perspective on the impacts on them of the services that they are getting in care.

**Senator BARNETT**—That is an extremely comprehensive overview, for which I am very thankful. It seems to me that you provide a very comprehensive service to children and young people in Queensland in terms of their rights and advocacy for and on their behalf. One of the issues you have already noted in your opening remarks, and it is in your submission, is this concern regarding duplication. It seems to me to be a very real one. I assume you report to the minister and other key stakeholders in Queensland when you do your annual report?

**Ms Fraser**—The annual report is tabled in parliament, and I meet with a joint parliamentary committee twice a year.

**Senator BARNETT**—What is the name of that committee?

**Ms Fraser**—The Social Development Committee; they are responsible for overseeing and monitoring the performance that we provide. I do not report to a minister; my act requires me to be independent. Clearly I do not sit in parliament, so in order to get my reports into parliament I provide them to a minister who has responsibility for the legislation that I work under. But if I provide that report and require her to table it, she is required to table it within 14 days.

**Senator BARNETT**—Understood. When you have your two meetings twice a year with your colleagues in the states and territories, do you then report back to either your state joint parliamentary committee or the state minister? Or from time to time do you ever report to the relevant Commonwealth minister or Commonwealth department that may have an interest in your views and the views of your state and territory colleagues?

**Ms Fraser**—I would quite often write to various ministers at all levels of government with respect to any particular point that I thought may be impacting on children in Queensland or a particular child in that context and refer matters for their consideration. Sometimes if it is an issue that I have picked up I might then liaise with the other commissioners around Australia and see if it is an issue that they want to join in with, and sometimes we write jointly to a Commonwealth minister in that respect. At a state level I would write myself.

**Senator BARNETT**—I am just thinking of your interaction with the federal government from time to time. Do you have a chairman or chairperson of your state and territory jurisdictions or do you just agree that you all sign it jointly to express your views to the Commonwealth authority or Commonwealth minister?

**Ms Fraser**—It is a voluntary group that meet; they have seen benefit in doing that. When we meet, we meet in rotating jurisdictions and the person in that jurisdiction chairs the meeting for that period. We do not have a permanent chair per se.

**Senator BARNETT**—But it is an official meeting?

**Ms Fraser**—It is a meeting that we think is official, but it does not have any statutory requirement. If we decide that we are going to jointly submit something to a federal government minister, we would make a decision about who is going to coordinate that. If it is joint, obviously it means that everyone has agreed they want to participate in it. In this one, for instance, I took the lead in coordinating it but everyone signed off on it.

**Senator BARNETT**—You have made a point in your submission regarding visa requirements and legal cases relating to the rights of children and young people and you have expressed the view that it is vitally

important in supporting vulnerable children and young people, they require specialists and technical knowledge and legal authority should be arranged through the agreements with state governments. What about detention centres—would that apply in detention centres?

**Ms Fraser**—Are you talking about youth justice detention centres?

**Senator BARNETT**—No, I am talking about immigration detention centres.

**Ms Fraser**—Because I have not had a role there I am not familiar with what is there, but I would think that people who are needing to link in would have to have quite a few skills in knowing what they were doing. It is a very different area, you have obviously got different cultural backgrounds that you are dealing with, so I think there would have to be quite a bit of thinking about how you were going to appropriately move into that space and advocate or connect with young people. A lot of what commissioners do is try to bring forth the point of view of young people and children and what the impacts are on them, as opposed to broadly advocating for the service environments.

**Senator BARNETT**—So what you are saying is that specialist and technical knowledge is required in that instance of immigration detention, as an example, and you think that principle should apply in that type of situation?

**Ms Fraser**—I think it would have to be someone who would be able to establish some rapport with the people who were there, to have some understanding of the impact of change and what was happening. They would have to have some skills in dealing with people from other cultures and some capacity to know how and what the context was in terms of who they need to link with to achieve change there. In some instances, some of the changes might be quite practical and simple and you would deal with those at the local level, some of them might be quite significant programmatic issues and some of them might be policy matters.

**Senator BARNETT**—Thank you very much.

**Ms Fraser**—Could I just add one more thing? In the summary that I made, whilst I was comprehensive in what I was talking about, there were probably two functions that I did not refer to. One of those was our complaints and investigation function, which we do have, and I can receive complaints from children in Queensland on an individual basis.

**Senator BARNETT**—Do other states and territories have a complaints function?

**Ms Fraser**—Some of them do. Some of them are not on an individual basis. Some of them are on a systemic basis. I do both in Queensland.

**Senator BARNETT**—Could you let us know, perhaps on notice?

**Ms Fraser**—It is in that spreadsheet matrix. The other function I have is maintaining the Queensland child death register for all children in Queensland and chair the committee that reviews any deaths associated with children in care. A lot of the information we seek to use to input into prevention activities. There is a lot of data there. There is no point keeping child death statistics if you are not going to use it for some benefit.

**CHAIR**—Thank you very much. We thank you for the submission as well.

**Ms Fraser**—Thank you very much. We would certainly be very happy to assist with any further input if that is relevant.

**CHAIR**—We will be in touch if we need that assistance.

[1.36 pm]

**BABINGTON, Mr Brian Keith, Chief Executive Officer, Families Australia**

**WARRILOW, Ms Prue, Chair, Families Australia**

**CHAIR**—Welcome. Families Australia has lodged submission No. 17 for our purposes. Do you have any alterations or changes you need to make today?

**Ms Warrilow**—No, we do not.

**CHAIR**—Then I invite you to make a short opening statement. Then we will go to question.

**Ms Warrilow**—I am going to read a short opening statement. We welcome the opportunity to provide evidence to the Senate committee. Families Australia is a national peak independent not-for-profit organisation that aims to protect and promote the wellbeing of families and children in Australia. We are in our 10th year of operation and we have around 400 national members. The member organisations are those that are involved in working with children and families. We have played a leading role in developing *Protecting children is everyone's business: national framework for protecting Australia's children 2009 to 2020*, and we coordinate the Coalition of Organisations Committed to the Safety and Wellbeing of Australia's Children, a consortium of around 100 major non-government community organisations and researchers who are working closely with governments to implement the national framework.

We strongly welcome the bill and we have made several recommendations in our submission. Our submission rests principally on our experience in helping to develop and implement the national framework for protecting Australia's children, which was endorsed by COAG in 2009. The framework aims fundamentally to increase the level of policy and program engagement by Commonwealth, state and territory governments in the interests of child safety and wellbeing. It seeks to raise the profile of these issues at the community level and to bring about greater national consistency and equity in terms of how we support children, families and carers in areas such as out-of-home care and financial and non-financial support for foster and kinship carers.

A Commonwealth commissioner would be a really important complement to the existing and planned suite of national framework measures. In moving to create such an office, however, it is a critically important matter to delineate the role of the Commonwealth commissioner and those of the existing state and territory commissioners. Our view is that a Commonwealth commissioner is needed to perform the functions that are distinct from those at a state and territory level by virtue of the Commonwealth's specific and growing roles and responsibilities towards children and young people. A major point of difference with the state and territory arrangements is that the Commonwealth, with COAG agreement, has determined that it will, through the national framework as well as other national approaches—for example, the national quality agenda for early childhood education and care—instigate a whole-of-nation and whole-of-government approach in order to achieve better interagency coordination, enhance public awareness of children's issues and reduce cross-jurisdictional inequities.

The expectation embodied in the national framework is that such a new joined-up approach will bring better outcomes in the complex policy areas such as Closing the Gap, with young people transitioning to independence from out-of-home care and support for carers. Moreover, the national framework envisages a clarification of the roles and responsibilities of different levels of government in the provision of early intervention and prevention services, more targeted family support services and statutory interventions—in short, moving towards a cascading system of clearly defined roles and responsibilities for each level of government with clear coordination and planning mechanisms. These goals represent a really significant change in the way we do things in Australia and will require considerable and ongoing administrative and political propulsion.

While there is a government NGO consultative apparatus in place to monitor and progress the change under the national framework, there is little or no independent, national-level analysis and assessment that can inform government, NGOs and the public about the collective process towards these goals. A Commonwealth commissioner would fulfil this vital role. We also argue that the Commonwealth has specific legislative and policy responsibilities towards particular groups of children and that the discharge of these responsibilities would be greatly enhanced by the independent monitoring and evaluation role of the Commonwealth commissioner. We have in mind the Commonwealth's role in relation to Aboriginal and Torres Strait Islander children, the care of children of families seeking asylum and the wellbeing of adults who, as children, suffered abuse while in state sanctioned out-of-home care—the forgotten Australians.

Finally, we strongly support the proposition that a Commonwealth commissioner would be an ideal means by which the views of children and young people can be systematically gathered. We do not see a routine role for the Commonwealth commissioner in handling individual cases. The commissioner should play a role in facilitating the expression of children's views across a range of topics. At present, there is no standing comprehensive means for the Commonwealth to collect such information and a Commonwealth commissioner would therefore potentially play a valuable role in facilitating the transmission of these voices to those who need to hear them. We welcome any questions.

**Senator BARNETT**—Thank you for your submission and your evidence today. How do we avoid the duplication of the functions with the state and territory commissioners and the Commonwealth commissioner?

**Mr Babington**—The important principle, from our point of view, is to have a cascading national system where we have a Commonwealth commissioner and then state and territory commissioners or guardians. We acknowledge that the state and territory commissioners and guardians have a range of differing mandates, as the previous testimony here indicated. We think that over time we would like to see a greater consistency being achieved in some of those mandates, but a very good starting point, from our point of view, is to at least start with a Commonwealth commissioner whose remit is to broadly look at children's wellbeing.

We say with some degree of optimism and hope that we can achieve greater national consistency over time—by which I mean a greater consistency across the jurisdictions in the remits of those commissioners—by virtue of the undertaking embodied in the National Framework for Protecting Australia's Children that as a nation we move towards taking more consistent approaches which treat children, families, carers and communities more equitably.

**Senator BARNETT**—Do you support a rights based approach, a welfare based approach, or both?

**Ms Warrilow**—We would support underpinning the rights based approach but we also envisage that there may be some welfare aspects to the role, but certainly not looking at any duplication around the state and territory roles and not getting into the welfare approach around individual cases for children.

**Senator BARNETT**—Do you think that the Commonwealth commissioner should be able to review and initiate inquiries by itself?

**Mr Babington**—Yes, we do have the view that the Commonwealth commissioner, as an independent authority, should be able to initiate inquiries. However, I think it is important to delineate that there would be differences between inquiries into specific cases which would in general be more appropriately handled by state and territory commissioners or guardians. It would be helpful for a Commonwealth commissioner's office to provide information and possibly guidance to people in pursuing their individual cases but not necessarily take up those cases in detail because of the concern about duplicating the processes which rightly occur at those levels of government which are closer to those families and communities.

**Senator BARNETT**—I know Families Australia represents a lot of different organisations. I have not been to your website to assess that and I did not see it in the submission. Can you just tell us some of your members and how many there are?

**Mr Babington**—We have about 400 member organisations around Australia. These are broadly in two categories. There are general members, of whom there are approximately 25 or 28, and these are many of the large national bodies such as the Smith Family, Salvation Army, Mission Australia, Relationships Australia, Australian Foster Care Association, Child and Family Welfare Association of Australia, Grandparents Australia and organisations of that magnitude. In our second major category, associate members, are those organisations which are providing, broadly speaking, family and community services at state, territory, regional and local levels. These may range from individual children's services settings—child care centres—right through to very large state based organisations such as Berry Street in Victoria.

**Senator BARNETT**—I am aware that some of the members you have are faith based entities. Do you have a purpose to support both born and unborn children?

**Ms Warrilow**—We do not have a specific framework aside from our mission statement.

**Mr Babington**—I was wondering whether there were two parts to your question: one was about the independence of our mandate, would that be correct? And whether we have a mission or a religious or other affiliation?

**Senator BARNETT**—I have not read your mission. Does your mission cover both born and unborn children?

**Mr Babington**—We are concerned with children broadly. In respect of unborn children, directly speaking, it is not a policy issue that Families Australia has specifically addressed at this time.

**CHAIR**—The proposal in your submission is to not ignore the needs and interests of people above the age of 18. So when you see a commissioner for children and young people do you think it should be extended above the age of 18 rather than up to 17? I would be a bit confused about that because 18 is really an adult consensual age.

**Ms Warrilow**—Certainly there are young people who transition from care who are not successful in that transition when support cuts off at 18. We would argue that you would look at 25 for those children who were transitioning from out of home care situations. When we reflect on the forgotten Australians we are looking at adults who had very particular circumstances while they were children that have severely disadvantaged them and we would want them to fall under the remit of a Commonwealth commissioner because of events that occurred to them when they were children.

**Senator HANSON-YOUNG**—Thank you for your submission. It is wonderful that you have put so much time into coming up with some specific recommendations. As we go through the process of writing the report we will definitely be taking them on board.

Right at the front of your submission you specifically mention the need for the bill to explicitly relate and reflect the public health model. For those of us who are politicians and not in the health sector or directly in child welfare, could you expand and explain what you mean by that?

**Mr Babington**—The reference to the public health model is really something that flows from the conceptual basis of the National Framework for Protecting Australia's Children and it parallels in many ways what we are seeking to achieve through a Commonwealth commissioner in that there ought to be a cascading set of sorted out roles and responsibilities between levels of government. In short, the public health model is really saying that there are three essential tiers of interventions and supports that we might give to families, children and communities more broadly. At the top level is early intervention and prevention services—those things that might be universally applied in, say, public health type campaigns. At the secondary level are the sorts of services that might be more targeted on specific family needs, and they could be family support type programs delivered by, say, local family or relationship service providers. The third level is the statutory level and really refers to the legislatively mandated responsibilities or statutory responsibilities, in this instance, of child protection authorities to act in accordance with state and territory law.

What we are saying with respect to this bill is that we would like to see the Commonwealth commissioner have regard for not just the statutory end of the public health model but also the needs of children and families at the other levels, that is, the early intervention and prevention level and the targeted support level, so that we do not end up with a system where the Commonwealth commissioner is focusing entirely on a rather narrow albeit important set of interests. We want to keep the remit really at that children and family wellbeing level.

**Senator HANSON-YOUNG**—In the various submissions we received, a number of people—not necessarily all those we will speak to in the hearing process—have said they would like to see a particular focus on Aboriginal and Torres Strait Islander children. Another group of organisations and individuals have said that they would like a focus on children with disabilities. How do you as an organisation that represents 400-odd members and has obviously been advocating a role like this for quite some time—I have spoken for years about the fact that we need to move on this type of issue—see that we can deal with the needs of those competing interests in a way that still ensures that we have a broad scope to keep that rights based approach for all children regardless of their state, territory, abilities and background?

**Mr Babington**—I do not want to sound flippant but a good start would be to make it very big with an ambitious mandate in terms of the objective needs of children and families in the community. You have picked two issues, Aboriginal and Torres Strait Islander issues and issues to do with disability, which we would put a very high priority on with respect to a commissioner and an office of the commissioner having a very strong focus. In a day-to-day sense it may be that thematic approaches could be undertaken, just as we have, under the national framework, identified national priority areas. These could be staged in terms of attention by the office of the commissioner through the inquiry process. However, I think there are some themes that would be much more enduring and I know that there are those who have suggested, for example, that there ought to be an Aboriginal and Torres Strait Islander commissioner as well, or even a deputy commissioner. We are very sensitive to that argument but we have not ourselves figured out a way that acknowledges the importance of Aboriginal and Torres Strait Islander issues in the commissioner framework. I think others will be thinking about that.

**Senator HANSON-YOUNG**—Do you have any particular views as to whether this commissioner should be placed or housed within the existing Human Rights Commission framework?

**Ms Warrilow**—We have personal views but we do not have any specific views; but it should be housed in an independent entity of some description.

**Senator HANSON-YOUNG**—That would be your preference?

**Mr Babington**—It would be our preference that this be an independent statutory body. We have considered the rightful home for it, maybe within the Human Rights Commission framework, and that does present some advantages, though we cannot see why it could not be a stand-alone body. However, we do feel that it would impinge on the independence of the office if it were to be, say, integrated within a mainstream Commonwealth government department or an adjunct to that. So we are looking for it to be administratively separated and statutorily independent.

**Senator HANSON-YOUNG**—Thankfully, I do not think anyone has argued that it should be part of an official government department. In terms of ensuring that we do not simply overlap or duplicate the work of state and territory based commissioners and guardians, I would envisage that if this role were very specifically focused on the rights based approach you would naturally have that separation of responsibilities. Of course, then you look at programs such as income support programs, homelessness and housing programs and education programs, and you start to get into welfare but from a rights based approach. How do you envisage being able to draw that line? Is it simply about the specific roles: this person does not advocate for individual child protection cases and simply always only talks about the broader issues. Somewhere that line has to be drawn.

**Ms Warrilow**—You would need to have some specificity about the roles and responsibilities. A focus on the wellbeing of Australia's children is a much broader remit than most of the state and territory commissioners and guardians. If you look at the Commonwealth policy frameworks—I am particularly referring to the National Framework for Protecting Australia's Children and the National Quality Agenda for Early Childhood Education and Care—they are all about children's wellbeing, so they enable a Commonwealth delineation around the state rules.

**Senator HANSON-YOUNG**—Yes, exactly. They are good examples. We are already having to do that. It is just that they are not independent and they are not given much of a legal basis for the work they do. There are agreements by state governments by the minister.

**Ms Warrilow**—They still involve state and territory responsibilities and input, but ultimately those frameworks are sitting within a national agenda and within Commonwealth responsibilities.

**Senator HANSON-YOUNG**—Absolutely. But it is not like we are reinventing the wheel.

**Ms Warrilow**—No.

**Mr Babington**—To add to that, we would support the case for the office of the commissioner being able to initiate their own inquiries into matters they consider to be relevant. The bill, as we currently read it, talks about the commissioner coordinating the responses of the Australian government to, say, the UN Convention on the Rights of the Child. It seems to us that it would be at slight odds with the independence of the office.

On the plus side of that, we would see the office taking quite an assertive role in choosing issues on which it can provide critical analysis of performance of the Commonwealth; and not just to the Commonwealth but also of how arrangements are working nationally. We are trying to argue in our submission that we have seen this policy thrust, over the last three years in particular, of trying to have joined up national approaches. We see the Commonwealth commissioner as really adding to that suite of national approaches.

**CHAIR**—Thank you for your submission and your input; it was very useful.



[2.00 pm]

**BAKER, Dr Ken, Chief Executive, National Disability Services**

**CHAIR**—Dr Baker, I welcome you to our hearing this afternoon. We have your submission, which is numbered submission 54 for our purposes. I will now ask you to make a short opening statement and then we will go to questions.

**Dr Baker**—Thank you for this opportunity to meet with the committee and provide evidence. NDS represents around 700 non-government organisations across Australia that provide services to people of all ages with disabilities, including children. We welcome this bill to establish a Commonwealth commissioner for children and young people.

Broadly, NDS wants to see the interests and needs of children and young people with disabilities reflected in all mainstream family and children's policies, including education. This vision of the inclusion of people with disability including children with disabilities is consistent with the National Disability Strategy which Council of Australian Governments endorsed in February this year. This is a strategy designed to promote the rights, wellbeing and inclusion of people with disabilities in all domains of life.

People with disability, including children with disability, have a history of social isolation and social exclusion. The report recently released by the National People with Disability And Carer Councils called *Shut out* reinforces this picture of children with disability experiencing risk and exclusion in many domains of their lives. There are disturbing experiences in that report which relate directly to children with disability.

There is a strong association that we know of between disability and factors that are detrimental to a child's wellbeing and safety. These include poverty and social exclusion. In 2003 almost two-thirds of school-age children with disability reported experiencing difficulty at school, and the principle source of that difficulty was problems fitting in because of communication and learning difficulties. So a major experience of children at school was the experience of social isolation.

Research overseas shows that there is a strong—at least there is a higher prevalence—of abuse of children with disability when compared with children in general. Because of this, we see a particular vulnerability of children with disability. We are seeking explicit reference to children with disability in the bill. Thank you. I might leave it there.

**CHAIR**—Your submission is the second one we have had today that talks about supporting a public health model. I am trying to crystallise in my mind what a 'public health model' versus a 'rights model' is. Can you assist me with that? Does one lead to the other?

**Dr Baker**—I think the two are related. The health model focuses on strategies to, for example, support positive family relationships or support better eating habits—which all contribute to the wellbeing of children and to the resilience of children and so decrease their vulnerability. This can be based upon a recognition of the rights of children with disability to be respected, nurtured and properly supported.

**CHAIR**—So not just the rights of the individual but also the rights embedded in a broader, more holistic sort of rights and welfare of the children. Would that encapsulate it?

**Dr Baker**—Yes, I think so. We are recognising that prevention and early intervention programs are a better approach and are more effective and often are even more cost-efficient than intervening only during times of a crisis—when a child is in crisis.

**CHAIR**—This legislation currently identifies, in particular, asylum seekers and Indigenous children. Your submission suggests that it should specifically mention children with disabilities.

**Dr Baker**—Yes. The reasons for that are, as I have outlined, that there is a particular vulnerability that children with disability have and there is evidence that rates of abuse among children with disability are higher than in the general population. Because children with disability often require specialist support, they are, I think, a particularly vulnerable group.

There are opportunities to include in the bill a direct link to the United Nations Convention on the Rights of the Child. Article 23 of that convention explicitly relates to children with disability. Under the objects of the bill, which is clause 3.3, article 23 could be referred to there as a direct link to children with disability.

**CHAIR**—Do you see this position as better being a standalone statutory authority or part of the Australian Human Rights Commission?

**Dr Baker**—I do not have a strong view about that. I think it is important—and the bill does spell this out—that the commissioner would be independent, but I have no particular view on where it should be located.

**CHAIR**—But you say that you do not think it should be required to prepare our report to the United Nations Convention on the Rights of the Child.

**Dr Baker**—No.

**CHAIR**—So you would see that as still being part of the Attorney-General's role; where as this person may well comment on that report?

**Dr Baker**—Yes, that is the way I would see it working. My understanding is that these reports are prepared by the Attorney-General's Department and often another department like FAHCSIA would be involved. It is a report on behalf of the Australian government. Given the importance of the independence of the commissioner, to provide input to that report is more appropriate than to prepare that report.

**Senator HANSON-YOUNG**—The NDS of course are not the only organisation that has specifically asked for children with disabilities to be directly mentioned in the bill. For all the reasons you have outlined in terms of particular vulnerabilities of children with disabilities, I think a specific reference—perhaps as you have said, in the objects of the bill—would fit. How do you see the role of this federal commissioner as opposed to the state and territory existing commissioners and guardians? Do you see that as a problem—that there would be a federal commissioner that would have their jurisdiction and the states and territories be left to what they do best?

**Dr Baker**—Clearly there is risk here of duplication. I am aware of those risks and they would need to be managed well. However, I think there are also some opportunities that could arise from the establishment of a Commonwealth children's commissioner that do not exist at state level. For example, there are emerging policy developments at a national level, such as the national framework for child protection, but also programs delivered by the Commonwealth government, such as the Helping Children with Autism package and the more recent Better Start for Children with Disability early intervention package—these are packages designed to assist children with a disability. There is also an opportunity for a Commonwealth commissioner to look across states and territories, compare what they are doing and see things that may be working well in one state that other states are not doing and use that. It could be a mechanism for disseminating best practice across Australia.

**Senator HANSON-YOUNG**—How would you see this role working with the federal commissioner for people with disabilities, where that is currently located within the Human Rights Commission? How would you see them working together, specifically in terms of children with disabilities?

**Dr Baker**—The role of the federal disability commissioner is fairly restricted. The commissioner administers the Disability Discrimination Act. They can respond to individual complaints but cannot initiate complaints. They can conduct inquiries. It is a quite restricted role. I think this would have a broader brief. However, clearly the two roles need to work well together.

**Senator HANSON-YOUNG**—Picking up on the issue of vulnerability of children with disabilities, you said in your opening statement that children with disabilities are at higher risk of abuse. Is that within the home, within state based care, within educational institutions? Could you expand on that vulnerability for me?

**Dr Baker**—The research I have in mind is a meta-analysis of many studies that have been done in this area over decades. The patterns certainly show that, in both contexts, children are at greater risk, both in the home and outside the home.

**Senator HANSON-YOUNG**—When you talk about children with disabilities, I imagine that you are also including children who develop over time various mental health concerns. Linked to that is the impact of appropriate services and protection for children who are sufferers of torture and trauma. How much does your organisation work in those areas?

**Dr Baker**—We are interested in disability however it arises—so, whatever the cause. Those causes may be birth, accident or circumstances which put sustained mental stress on a person.

**Senator HANSON-YOUNG**—In terms of the vulnerability of children in state care, immigration detention centres or juvenile justice detention centres, perhaps they were not classified as children of vulnerability when

they entered those facilities, because of their abilities. Would you envisage that, if an object of this bill were to advocate specifically for children with disabilities, they would be captured?

**Dr Baker**—Yes. I think it would be clear that the concern is for the child with a disability, regardless of how the disability was acquired.

**Senator BARNETT**—I think most of the questions have been asked that I wanted to put to Dr Baker, but I just want to put this one back to you again with regard to the duplication concern and perhaps potential waste. I know you have a background focusing on those areas in the past. What would you say about the concerns expressed by our first witness today in particular about the possible duplication of the roles between state and territory commissioners and a Commonwealth commissioner?

**Dr Baker**—As I said, I think this is rightly a concern; however, I think it can be managed. The respective roles would need to be carefully mapped out. I think there are advantages in having a Commonwealth commissioner who can, if you like, oversee systems. One advantage that I have already referred to is the opportunity to identify things in states that are happening well and things that are not happening well, and to use the position to facilitate exchange of best practice and avoidance of worst practice across jurisdictional boundaries. There is a trend both within children's policy and disability policy toward greater national consistency. In general, this is a good trend and this role could help facilitate that.

**Senator BARNETT**—Do you think these state and territory commissioners in their relative jurisdictions are adequately servicing the needs of people with disabilities or is there room for improvement at that level?

**Dr Baker**—The state jurisdictions in general?

**Senator BARNETT**—Yes.

**Dr Baker**—State governments—I think, as the Productivity Commission reported recently in its draft report on disability, support and care around Australia, that the current system is in a state of disrepair. It is unfair—these are the words of the commission—underfunded, fragmented and gives too little choice to individuals and their families. I think there is fundamental reform needed at all levels of the disability services system.

**Senator BARNETT**—Are you aware of Eskleigh Home for people with disabilities in Northern Tasmania with some 42 beds and their funding crisis that is currently a concern for Tasmania?

**Dr Baker**—I am not specifically aware of that circumstance, but that situation of funding crisis, unfortunately, is all too frequent around Australia.

**Senator BARNETT**—It is fair to say that the Commonwealth funds are at 28.9 per cent of the disability funding service that is provided to the state and territory governments.

**Dr Baker**—That sounds about the right figure, yes.

**CHAIR**—We do not have any other questions, so, Dr Baker, thank you very much. Thank you very much for your submission and also your availability this afternoon to come to the committee personally. It is much appreciated.

**Dr Baker**—You are welcome.

**Proceedings suspended from 2.18 pm to 2.38 pm**

**POCOCK, Mr Julian, Director of Public Policy and Practice Development, Berry Street**

*Evidence was taken via teleconference—*

**CHAIR**—I welcome Mr Pocock, the representative of Berry Street, to the hearing. I am an ex-Melbournian, so I know about Berry Street. We have your submission, which we have numbered 74 for our purposes and for the website. I invite you to make a short opening statement and then we will go to questions.

**Mr Pocock**—Berry Street welcomes the opportunity to participate in this hearing and to comment on the bill. From the outset, we would like to emphasise that we support in principle the establishment of a national commissioner for children and young people, so we commend the Greens for bringing forward a bill for that purpose. Having said that, however, there are a number of aspects of the bill which we believe could be improved to ensure that the model for the commissioner is the most effective model in protecting the rights and needs of Australia's children and young people. Some of the areas where we believe the model can be improved are as follows.

Firstly, we suggest extending the definition of young people proposed by the bill to the age of 25. Berry Street is aware and concerned that young people between the ages of 18 and 25 are a group within the Australian community for whom there are significant transitional issues as they move from dependence to independence. It is an area where Australia certainly has a long way to go in providing the right policy frameworks and assistance to ensure that all young people in that age bracket make a successful transition to independence. So we believe the role of the commissioner should be extended to cover young people in that age bracket and should have a focus on matters that could assist them to make that transition to independence.

Secondly, we believe that the proposed commissioner would be better located within the Human Rights Council of Australia and that locating the commissioner still with a level of independence but within that structure would provide opportunities for the commissioner to work within a broader human rights framework. It would enable the commissioner to work collaboratively with the other existing commissioners within that structure and take an integrated and team approach to how we progress the rights of children and young people.

Thirdly, we believe there are a number of areas where the bill introduces some possible conflicts within the role and that these need to be clarified. Specifically, we refer to section 9(e), where the bill proposes that in some circumstances the proposed commissioner may act as a guardian of children and young people. In relation to section 25, which refers to the preparation of Australia's annual report to the UN Committee on the Rights of the Child, we believe that those two specific functions create a conflict within the role. We believe that it is very important that the role has the capacity to independently comment upon and monitor the Australian government's compliance with the UN Convention on the Rights of the Child and that having the commissioner take on the role of preparing Australia's report does not make sense in terms of the desire for the role to have a level of independence. We think it would be far more productive for them to play a coordinating role working with the non-government sector, children and young people, and other interested parties in preparing a complementary or alternative report to the UN in relation to Australia's compliance with the convention.

In relation to the matter relating to the commissioner acting as a guardian for children and young people, our concerns about that relate to the demands that that role may place on the commissioner. If there is a need for there to be a guardian in particular for unaccompanied minors and refugee children and young people then our view would be that the Commonwealth should establish such a guardian for those children and young people and not have that function absorbed within the functions of a commissioner who is supposed to be independently monitoring the performance of the Australian government and other governments in relation to securing the rights of children and young people. It just seems to us that they would have the dual role of providing those rights to children and young people and monitoring whether that is occurring. That, to our reading, is a conflict of interest.

Lastly, in relation to proposed section 26 around annual reports, that section highlights a significant weakness in the model as proposed compared to the model that we have within the Human Rights Council of Australia and their existing commissioners. Specifically, the annual report that the commissioner is required to prepare focuses mostly on the operations of the commissioner's office and does not specifically and directly speak to the extent to which children and young people in Australia enjoy and exercise their human rights. We would contrast that with section 46C of the Australian Human Rights Commission Act, where it details the

report that has to be submitted to the minister after 30 June each year in relation to the human rights enjoyed by Aboriginal people. That framework and that way of establishing the annual reporting function is a much clearer and more useful way of doing that than what proposed section 26 of this bill sets out. Those would be our summary comments.

**CHAIR**—Thanks very much, Mr Pocock. I am going to start. In relation to proposed section 9E, I think you make a fair point there. What you are saying is that you cannot actually be the legal guardian and the person who oversees the rights and welfare of those children at the same time. Is that about it?

**Mr Pocock**—Yes, that is essentially our point. Certainly our experience in child welfare and protection at the state level is that we see on a daily basis how that can create difficulties. We see scenarios where the Secretary of the Department of Human Services in the Victorian context is the guardian of children and young people in care and is required to act in their best interests. That same department is also the monitoring body in relation to standards of care and practice for out-of-home care. We see many examples of where those two roles conflict. We think it is important that those roles are separated.

**CHAIR**—Also, on the preparation of the government's report on the United Nations convention I think I made a point to a witness this morning that it is usually the government that prepares that report and then it would be organisations like the Human Rights Commission that would critically analyse that report. Do you see the children's commissioner having that role—analysing and being critical of the report or even substantiating it and endorsing it rather than writing it itself for the government?

**Mr Pocock**—Absolutely. It just does not seem to make sense to us to on the one hand argue that this commissioner is to be independent of government and independent of the minister and then require them to prepare Australia's report to the UN in relation to the Convention on the Rights of the Child. We note that the legislation allows the minister to provide what other reports they wish to provide to the UN, as well. But that could possibly see a scenario where the UN receives two reports from Australia both purporting to represent Australia. So we would certainly prefer the model of the Australian government having the right, and in our view it should provide the report to the UN on these matters, as it does on other matters. But it should be open to the report they provide being publicly scrutinised. We believe that the proposed commissioner could play a useful role in that regard, including in consulting with children, young people and others, to provide some scrutiny of what is put forward by the Australian government.

**Senator HANSON-YOUNG**—Thank you for your submission. The points that you have raised are not particularly different to the key issues raised by other people who support the concept but want the bill tweaked, so they are all good ones. I want to get you to tease out the proposed definition of children and young people where in your submission you specifically go into the differing age determinations that the United Nations actually has—the idea of what the convention says as under 18, but the United Nations refers to 24 for young people. Could you explain that and why you think that it is an important aspect that we should be taking on board.

**Mr Pocock**—Focusing firstly on the UN definitions, my understanding is that, for the purposes of the Convention on the Right of the Child, the UN defines children to be people up until the age of 18. We would agree with that. It is also been the practice within the UN to define—and they use the term youth rather than young people—as people between the ages of 15 and 24 years of age. My experience, both in my time at Berry Street and also in previous roles when I was the CEO of AYPAC, the nation youth peak, in the 1990s, is that the accepted convention across all state and territory governments and the Commonwealth government was that the definition of 'young people' was people aged 15 to 24 years, inclusive. Most youth policy developed by jurisdictions in Australia frames youth policy in that way.

In terms of why it is important, beyond the definitional reasons, I would particularly point to issues in the labour market, in access to employment and education and in relation to health. Young people, and when I say young people I am working with my definition of people aged 15 to 24 years of age, are the only group in the Australia community, including Aboriginal people, whose health status has declined over the last three decades. In a range of policy areas, particularly in relation to labour market, education and employment policy, we have consistently presumed that fundamental policy settings such as promoting school retention and higher levels of achievement in secondary education will make a significant difference to young people's employment prospects, yet the evidence says otherwise.

For more than two decades in Australia we have been pursuing policy settings in relation to the needs of young people around securing their long-term future by promoting much higher levels of school retention; yet 20 years down the track our school retention rates are virtually no different than they were in the early 1990s. I would highlight that as an area where we have a group within the Australian community who suffer significant disadvantage in terms of making that transition to independence.

Government persists with a range of policy settings which clearly are not working and which have been tried and re-tried without much input from or consultation with young people themselves and they continue to fail. We would argue that it would be appropriate for the national commissioner for children and young people to have a broader mandate that extends across young people up to the age of 24 years inclusive and that the commissioner have the capacity to focus on some of these critical areas of public policy around which we have not made significant progress in the past two decades.

**Senator HANSON-YOUNG**—I would like to go back to the comments that you made around the unaccompanied minors in immigration detention and the reference in the bill to the commissioner being a guardian for those. I take the point that you have raised; however, I also consider the current situation to be an even more extreme set of circumstances of conflict, where we have the immigration minister being the person who decides whether an individual is detained, their conditions of detention, how long they are detained for, what legal support they get, what other type of support they get, whether they are allowed to go to school or not. All of those decisions are made by the immigration minister, who, under the current legislation is also meant to be the person advocating for their welfare and their rights. If this is not the way forward, what would you suggest should happen?

**Mr Pocock**—To me, the scenario you have described is of a minister acting as the legal guardian of these children and young people but not doing a very good job as the guardian of those children and young people. That is how I would summarise what you have just put to me—and I think we would agree with it. The issue is to be clear about who the guardian of these children is and to be clear that the performance of that person as the guardian of those children and young people will be subjected to rigorous independent scrutiny to ensure that those children and young people, like all other children, enjoy their rights under the UN Convention on the Rights of the Child. We think that the way to arrive at that position is to make clear that the minister is the guardian of these children and to make clear that the role of the commissioner is to scrutinise the performance of the minister in acting as the guardian of these children.

**Senator HANSON-YOUNG**—Yet, of course, his primary role is to executive the functions of the Migration Act—which is to detain them, first and foremost.

**Mr Pocock**—That might go to the adequacy of the Migration Act to require of the minister that they appropriately fulfil a guardianship role in relation to these children and young people.

**Senator HANSON-YOUNG**—I would also pick up the other comments that you make around the relationship of this particular role to refugee children and young people. You specifically talk about ensuring that this is about not just about the rights of unaccompanied children but also those who arrive with family. Could you just expand on that for me?

**Mr Pocock**—In relation to that, Berry Street is quite simply expressing a concern that refugee children and young people are a particular group of children and young people in the community who have suffered significant disadvantage prior to their arrival in Australia and require particular measures, approaches and support to be able to make a successful transition to adulthood and to enjoy the benefits of residency and citizenship of Australia. I suppose it sits within the context of us arguing that the bill should specifically reference a number of groups of children and young people, given we know that these groups of children and young people are disproportionately overrepresented in child protection, in unemployment statistics, in relation to poor health outcomes et cetera. We want the Commissioner for Children and Young People to focus where the highest levels of need are.

I suppose I would describe it as a weak signal, but something we picked up from the bill—and we are not quite sure that it was intended—is that there seems to be a lack of focus on the hard end of social policy and on the particular groups of children and young people who most need a commissioner for children and young people looking out for them. We would say that those three groups of young people and children are Indigenous children and young people, children and young people who have been in the care and protection system, and refugee children and young people.

**Senator HANSON-YOUNG**—A fourth to add to that, which has been argued in a number of submissions, is children with disabilities.

**Mr Pocock**—Yes, we would certainly concur with that.

**Senator HANSON-YOUNG**—I do not think that was a signal that was deliberately put in the bill, but I take your point that specifically identifying the various groups might be a good way of sending a clearer message, even if it were to be in the objects of the bill, perhaps.

**Mr Pocock**—Yes.

**Senator HANSON-YOUNG**—Overall, though, you are in support of the establishment of a children and young people's commissioner; you just want some of these things tidied up. How do you argue that the commission should be under the framework of the existing Human Rights Commission? Some people are arguing strongly that it should not. They believe that it actually needs to be independent of the commission because the rights of children, whether or not they overlay into the other rights represented by the Human Rights Commission, are so distinct that they would not want them to be weakened.

**Mr Pocock**—I will start with why we think it should sit within the commission and then I might take a moment to try to answer that query or criticism that has obviously been raised. Our sense—and it is not much more than a sense—would be that locating the commissioner within a broader framework and a broader organisation where this is the core business provides opportunities for collaboration and an integrated approach to how we advance the rights of children and young people in Australia. Certainly all of the existing commissioners within the existing Australian Human Rights Commission already have a responsibility to children and young people. In his role, Mick Gooda has a very clear responsibility and a very clear commitment to the rights and needs of Indigenous children. It just seems to us that there is a logic in ensuring that that is integrated. Certainly we agree that, if the Commissioner for Children and Young People were separate to the commission, it would not mean that the model would not work, it would not mean that we would not support the model and it would not mean that the model would not achieve many things. But in our view the optimal model is to locate it within the Australian Human Rights Commission.

In terms of the question of overlap, our view would be that the overlap already exists. There is already overlap in all sorts of UN protocols that deal with human rights. Sticking with the case of Aboriginal and Torres Strait Islander children, they enjoy rights to a life free of racial discrimination. They also enjoy rights as children and young people. So I am not sure that the question of overlap between different human rights instruments provides us with a rationale about where we locate this commissioner, one way or the other.

**CHAIR**—Thank you, Mr Pocock. We have exhausted our questions for you today, but I thank you and Berry Street for providing us with a submission and for your availability this afternoon for our inquiry.

**Mr Pocock**—My pleasure, and thank you for the opportunity to participate.

[3.06 pm]

**BUDAVARI, Ms Rosemary, Co-Director, Criminal Law and Human Rights Unit, Law Council of Australia**

**CHAIR**—I welcome Ms Budavari, a representative from the Law Council of Australia. We again have a submission from the ever-reliable Law Council of Australia. Thank you very much for that. We have numbered it 78 for our purposes. Would you like to provide us with an opening address before we go to questions?

**Ms Budavari**—The Law Council considers that this bill is an important step towards implementation of Australia's international human rights obligations. It addresses significant issues in relation to the rights of children and young people in Australian society. The establishment of the commissioner's position would complement the important functions carried out by other Commonwealth commissioners who are members of the Australian Human Rights Commission. For this reason, but also for a number of other reasons, we recommend that this committee examine the advantages and disadvantages of the commissioner being a member of the Australian Human Rights Commission rather than a separate, independent statutory officer, as is proposed in the bill.

We have also noted that the commissioner would complement the functions of existing children's commissioners and guardians in the states and territories, although we have noted in our submission that some of those commissioners and guardians have quite limited functions, particularly in South Australia. That has been brought to our attention by the Law Society of South Australia. We do support the concurrent operation of state and territory laws relating to children's commissioners and guardians and relating to children's rights generally, given the particular division of constitutional responsibilities that we have in Australia in relation to children's matters. But due to that division and due to the existing bodies we feel that the commissioner will need to focus on Commonwealth laws and really only examine state and territory laws and policies in the sense that they interact with Commonwealth laws. We strongly support any avoidance of duplication of the functions of Commonwealth commissioner with those of the state and territory children's commissioners.

We are very supportive of the concept of this bill but we do have a number of concerns, which are outlined fully in the submission, about the drafting of certain provisions of the bill. These concerns would be largely resolved if the commissioner was established as a member of the Human Rights Commission. The provisions of the legislation applying to the Human Rights Commission would therefore apply to this commissioner in the same way that that framework applies to the Aboriginal and Torres Strait Islander Social Justice Commissioner at present. If the commissioner is not established as a member of the Human Rights Commission we do make a number of recommendations in the submission for amendments to the drafting of particular provisions of this bill.

In closing I would just like to note that since making the submission, which was dated 6 January—and we thank the committee for giving us an extension of time in which to lodge the submission—the government has announced the appointment of a full-time race discrimination commissioner. That was announced on 27 January, just prior to Australia's appearance before the United Nations Human Rights Committee in relation to its universal periodic review.

We have also noted in the submission that the Sex and Age Discrimination Legislation Amendment Bill, which this committee would be familiar with and has provided a report on, also establishes the position of age discrimination commissioner. The point we have made in the submission is that we do have some reservations about putting the commissioner within the Human Rights Commission, because of the practice which has grown within the commission of requiring individual commissioners to carry out in effect two jobs. We have had one person acting in the roles of both race discrimination commissioner and disability discrimination commissioner. We also currently have the sex discrimination commissioner acting as the commissioner responsible for age discrimination. So we do have some concerns that if this commissioner is located within the Human Rights Commission they may pick up some other role at some stage and necessarily lose some of their focus on children. But overall we would strongly recommend that the committee give a good deal of consideration to the advantages of locating the children's commissioner within the Human Rights Commission. That concludes the opening statement. Thank you.

**CHAIR**—Thank you very much. Senator Barnett.



**Senator BARNETT**—Thank you very much for, as usual, putting in a very comprehensive and thoughtful submission. It is appreciated. You have made a number of good points that I will not go into. But I just want to quiz you on your concerns about overlap and duplication—that has come up a few times at this hearing—and the views of the Law Council with respect to avoiding that. I note your point about the Human Rights Commission—and maybe that assists to some extent—and your point about it covering Commonwealth law. Can you expand on that to ensure that we are satisfied that there is not going to be duplication and extra costs?

**Ms Budavari**—This is a very difficult question given our constitutional framework and given the particular funding arrangements between the Commonwealth and the states in relation to some of these matters. If you take family law for example, there is significant overlap with child protection law and domestic violence law, which are governed by the states and territories, and it is difficult to unpick that interaction. I cannot really add anything other than the suggestions we have made in the submission that certain provisions of the bill be redrafted so that they say the commissioner can examine all of those Commonwealth, state and territory laws and policies but that this Commonwealth commissioner has a particular focus on the Commonwealth laws and policies and how they interact with state and territory laws and policies. There are already provisions within the bill which encourage interaction between the Commonwealth and the state and territory commissioners. We would support that interaction, but it is difficult to see a way of drafting that so prescriptively that the necessary flexibility that is going to be required is not done away with.

**Senator BARNETT**—You normally have some very particular and thoughtful advice for our committee. I see this as an issue. I do not know whether you heard our first witness this morning, Ms Fraser, talk about the twice-a-year meetings between state and territory commissioners.

**Ms Budavari**—I was not here but I am aware that they do have those meetings.

**Senator BARNETT**—Obviously they sound to be most useful and meritorious meetings which provide feedback to the states and territories. From time to time they interact with the Commonwealth. Frankly, their role in any event is very comprehensive at state and territory level, it would appear, based on the evidence, on the matrix they put to us and on the remarks she made this morning. Do you think there is a way of helping cover the base by formalising those twice-a-year conferences or perhaps more frequent conferences, to bring issues to the Commonwealth's attention and then to the attention of states and territories? Is there anything there which you think could be done?

**Ms Budavari**—Certainly there are provisions in the Human Rights Commission Act which do not directly deal with the Australian Human Rights Commission's relationship with state and territory bodies which also operate in the area of anti-discrimination law. There are provisions within the Australian Human Rights Commission Act relating to the convening of meetings by the president of that commission. So potentially there is the prospect of drafting something which would require some form of regular meeting between the Commonwealth and the states and territories. I am not sure whether there would need to be complementary legislation within the states and territories or whether it could be left as a voluntary commitment by those commissioners. We could certainly give some thought to that.

**Senator BARNETT**—If may want to take it on notice and give thought to it. Have you considered the cost involved to resource such a commissioner at the Commonwealth level and given any estimates to it?

**Ms Budavari**—We have not really thought about the cost in any detail but an implication from what we are saying in relation to looking seriously at the advantages of locating the commissioner within the Human Rights Commission is that presumably there would be a cost saving—rather than setting up a completely new office. I think you heard this morning from Mr Roy from the ACT.

**Senator BARNETT**—No.

**Ms Budavari**—Certainly in the ACT the children's commissioner is located within the overall ACT Human Rights Commission. They have a discrimination commissioner, a commissioner for community services and people with disabilities and the children's commissioner all located within one office. That appears to allow them to share staff and resources.

**Senator BARNETT**—What do you say to the argument, 'We've got enough commissioners as it is. We already have an Indigenous commissioner, a disability commissioner and state and territory children's commissioners. How many commissioners do we need in terms of red tape and costs to the taxpayers?' What do you say to taxpayers?

**Ms Budavari**—I think that referencing something like the National Human Rights Consultation, which had extensive consultations around the country and engaged in turn in consultation in a myriad of forms, certainly concluded that the most significant issues relating to children, particularly at the Commonwealth level—

**Senator BARNETT**—Of course their main recommendation for a human rights act was dropped by the government.

**Ms Budavari**—Yes, that is the case, but a lot of the other recommendations were incorporated into the human rights framework that the government announced almost a year ago. Really, the point of referring back to that consultation is that there were significant concerns raised by a variety of contributors to that about the position of children and young people in Australia, and particularly vulnerable children, as was discussed with the previous witness—children with disabilities, children who have been through care and protection, Indigenous children and children of asylum seekers.

**Senator BARNETT**—Could I just put it to you: we already have a commissioner for Indigenous affairs, so why do we need a commissioner for Indigenous children, for example? Isn't there an overlap with these roles and responsibilities? In a separate bill, of course, just in the last few weeks, we were looking at the appointment of an older person's function as well. How far do we go with these appointments?

**Ms Budavari**—It could be argued that the commissioner who currently has responsibility for age discrimination should look at the situation of children. My understanding is that she in fact does, and she deals with complaints relating to discrimination against children and complaints relating to breaches of rights under the Convention on the Rights of the Child. She is also currently doing another massive job in relation to sex discrimination. That situation may be eased with the appointment of a full-time age discrimination commissioner, but I think it is also fair to say that, as commendable as the job that is done by each of those individual commissioners within the Human Rights Commission is, there is still an enormous amount of work to be done, particularly in addressing systemic issues. Because each of the commissioners, other than the Aboriginal and Torres Strait Islander commissioner, has a responsibility for dealing with complaints under each of the individual discrimination acts, they necessarily spend a fair bit of their time on that particular function. As we read it, the purpose of this bill is to establish something which looks much more at systemic issues, has an overarching mandate to consider the situation of children and young people in Australia, makes recommendations and takes necessary action. The Law Council's view is that there is an established need and that that need should be filled.

**Senator HANSON-YOUNG**—What is the Law Council's view on Australia signing conventions and then not following through with the things that we have agreed to do—for example, signing the Convention on the Rights of the Child required us to establish a children's commissioner, and the UN has of course questioned Australia on that numerous times? At what point do we say: 'We will sign up. We will agree to this part but not that part?' What is the Law Council's view on that?

**Ms Budavari**—The Law Council has a fairly consistent view on this, which is that any convention obligations should be implemented into domestic legislation fully. We have contributed to reports to a number of those UN committees which make that point, and we make that point to ministers of governments of both persuasions regularly.

**Senator HANSON-YOUNG**—In relation to the support for a children's commissioner and the various roles it would take, it was a unanimous recommendation of the forgotten Australians report that was handed to the parliament a year or so ago. Rather than getting caught up with taking over the jobs of the state and territory commissioners—because that is not the purpose of it at all—do you see the value-added role of a federal children's commissioner as, in some ways, a better check for government to avoid disasters happening down the track?

**Ms Budavari**—There is certainly a compelling case for an oversight role rather than just an individual complaints based mechanism.

**Senator HANSON-YOUNG**—Which is primarily what the state and territory commissioners or guardians do, don't they? They are very much based on individual cases.

**Ms Budavari**—I think the situation in the states and territories varies quite considerably, but a number of them do have a strong focus on dealing with complaints.

**Senator HANSON-YOUNG**—So you are saying that the role of a national children's commissioner would need to be broader if it was to value-add?

**Ms Budavari**—Yes.

**Senator HANSON-YOUNG**—What is the Law Council's position or view on the current situation of the guardianship of unaccompanied minors in immigration detention?

**Ms Budavari**—I think our position is reflective of the philosophical position behind the provision in this bill: the Law Council does see that there is a conflict of interest for the minister in his role as the guardian of unaccompanied minors and also as the decision maker under the legislation. This is also a very difficult area to come up with an alternative. In our submission we have noted that a number of other submitters have suggested that perhaps the Minister for Families, Housing, Community Services and Indigenous Affairs may be a more appropriate guardian given that she does not have that same responsibility as a decision maker, or that state and territory ministers for child protection would be more appropriate guardians.

The difficulty with both of those proposals is that the Minister for Families, Housing, Community Services and Indigenous Affairs has an enormous portfolio already, although it could be said that some of the work of that department would be quite relevant to the care of children. For state and territory ministers with responsibility for child protection, the difficulty is that those ministers and departments are quite well known as being overwhelmed with the amount of child protection work that there already is at the state and territory level. They would need to be further resourced to provide a role in relation to unaccompanied minors. So it is a very difficult issue, but the bottom line for the Law Council is that we do see that it is currently a conflict of interest for the minister.

**Senator HANSON-YOUNG**—Yes, the current situation is not tenable.

**Ms Budavari**—We note that the department has also made a submission to your committee on this bill in which they point out that the minister does delegate a number of his responsibilities to some state and territory agencies and to an organisation called Life Without Barriers. We have had some concerns reported to us about some of the focus of Life Without Barriers, and we are currently in discussions with the department about that particular issue. It is a difficult issue.

**Senator HANSON-YOUNG**—But with regard to the other rights, in relation to pinpointing the vulnerabilities of various different groups of children and young people within Australia, you are also advocating that asylum seeker children or children of asylum seekers fit into that high-risk, high-needs group.

**Ms Budavari**—Yes. I think you only have to look at recent reports from the Human Rights Commission, previous reports by the Immigration Ombudsman and a range of reports that indicate that those children are particularly vulnerable. Whatever extra coverage can be given to the protection of those children, we would support.

**Senator HANSON-YOUNG**—I think that is all my questions.

**CHAIR**—Before you go—I think Senator Hanson-Young covered a fair few of mine—I just wanted to ask you whether you think the children's commissioner should look at people up to the age of 17 or whether that should be extended to 24—young people versus youth, I guess.

**Ms Budavari**—We have taken the position in the submission that it should be up to 18, which coincides with the Convention on the Rights of the Child and in fact with most state and territory legislation other than particular legislation in Queensland that allows children over 17 to be held in adult prisons, which we have a particular concern about. We have not really addressed that issue of looking at young people over the age of 18. We do not profess to have any particular expertise in that area, and there are a number of other organisations that do who have made that submission. I suppose we see that there is a difficulty if this bill is based on compliance with the Convention on the Rights of the Child, which clearly states up to 18, and then there may be a difficulty with the constitutional basis for the bill if it is implementing that convention. By the same token, there appear to be some compelling arguments for someone to have some responsibility to look at the situation of young people, particularly those who move out of perhaps immigration detention arrangements or out of the care and protection system at the state and territory level and, from one day to the next, are left without support. As to whether that is solved by changing the definition of children and young people is another issue.

**CHAIR**—That is all I have. Ms Budavari, thank you. Thanks for your submission and making your time available and for coming up a bit earlier than we anticipated today.

**Committee adjourned at 3.33 pm**

