



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES
COMMITTEE

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

WEDNESDAY, 30 MARCH 2011

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Wednesday, 30 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

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Committee met at 9.05 am**SCHULZE, Ms Anna Jane, Director, Policy Research and Advocacy, Save the Children Australia****CARDINAL, Ms Nicole, Policy Research and Advocacy Adviser, Save the Children Australia**

CHAIR (Senator Crossin)—I declare open this public hearing for the Senate's Legal and Constitutional Affairs Legislation Committee's 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. The committee has received 93 submissions for this inquiry. All submissions have been authorised for publication and have been made available on the committee's website. I want to remind all 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 to a committee. The committee prefers all evidence to be given in public but there is an opportunity if you need to go into camera, you would just need to request that of the committee and we will arrange it.

I now formally welcome representatives from Save the Children Australia. We have a submission from you which we have numbered 57 for our purposes, so I am going to invite you to make an opening statement and then we will go to questions.

Ms Schulze—Thank you for the opportunity to provide a submission to this inquiry. Save the Children Australia is a member of Save the Children International. We are the world's largest independent child rights organisation and we work in more than 120 countries around the world. We were established in Australia in 1920 and we currently have our head office in Melbourne, with offices and staff in every Australian state and territory. Save the Children strongly supports the establishment of a Commonwealth commissioner for children and young people.

Children are a vulnerable group who require special protection from adults, including government. Arguably, children are more affected by the actions of government than any other group in our society. Education policies dominate their working hours and public healthcare policies target their physical and mental development. Large numbers of children and young people have contact with both the child protection and the juvenile justice systems, yet children have no vote and little influence in the institutions that govern their lives. In many ways simply to be young is to meet the definition of social and political exclusion. For this reason a number of countries around the world and a number of Australian states and territories have recognised the need for special measures to protect children's rights and it is time for the federal government to also acknowledge the need for such protections and to establish a national commissioner.

As a signatory to the UN Convention on the Rights of the Child—CRC—Australia has committed itself to respect, protect and fulfil the rights of children and young people; however, despite being a signatory for more than 20 years, Australia has still not translated many of the rights of the CRC into national law. In 2005 the UN committee responsible for monitoring states' obligations under the CRC expressed concern regarding Australia's lack of a national commissioner for children's rights. It was also a recommendation following Australia's Universal Periodic Review by the UN Human Rights Council in January of this year. The establishment of a commissioner would clearly be a significant step forward in meeting Australia's international legal obligations under the CRC.

More broadly, Save the Children believes that a national children's commissioner could help improve the lives of children in a variety of ways: through policy and law reform, independent inquiries, research, public education and awareness. The role could provide national leadership and could support coordination and consistency in policies and laws among government departments and organisations working with children.

Whilst a number of our states and territories already have a form of children's commissioner or guardian, they vary in their roles and powers. They do not have the mandate to deal with children's issues at a federal or international level and they have no coordinating body or authority to drive national consistency. Most significantly, they do not cover all children, notably those in immigration detention.

A national children's commissioner could provide an independent voice for children and ensure that their views on issues are taken into account. This would not only improve the quality of discussion and decision making at a national level, but would also support children to become active and engaged citizens in our society. A commissioner could represent and be a national advocate for children, especially for vulnerable

groups of children such as those with disabilities, Aboriginal and Torres Strait Islander children and children in immigration detention.

Importantly, a national children's commissioner could also provide a child friendly complaints mechanism to ensure that children have an effective means of redress when their rights are violated. A commissioner could also monitor the welfare and wellbeing of children in Australia and report and make recommendations to parliament to improve lives.

Save the Children has a number of specific comments in relation to the current draft of the legislation and these are articulated in full in our written submission. Briefly, we believe that in order for the office of a national children's commissioner to be effective it must: (1) be independent from government; (2) have statutory authority, including security of tenure; (3) have sufficient funding and human resources; (4) possess broad powers, including the power to receive and investigate complaints of breaches of children's rights, the power to issue reports freely and publicly and the power to take legal action on behalf of children in appropriate circumstances; (5) have a broad mandate, including the power to determine its own agenda; and (6) be accessible to children and young people; (7) report directly to the federal parliament. Finally, it should cover all children in Australia and its territories, regardless of citizenship or residency.

We would like to see the legislation modified to require that the commissioner pay special attention to the needs, interests and rights of particularly vulnerable groups of children, including Aboriginal and Torres Strait Islander children.

In relation to children in immigration detention specifically, we believe that the commissioner should not act as the legal guardian of unaccompanied children and young people who arrive in Australia. We believe such a role would conflict with the commissioner's function to independently monitor, assess and report on their wellbeing. We believe that children in immigration detention would be better served by having the commissioner monitor the guardian, rather than be the guardian.

In conclusion, Save the Children believes the establishment of a national children's commissioner is an important and long overdue step to build a society that both values and protects the rights of children and young people. This is a role that the majority of Australians also support. In a survey of nearly 1,200 people conducted by Save the Children in November 2009, 78 per cent of respondents wanted to see a role in the national capital for a person who stands up for the rights of children and young people. We urge the federal government to move to establish a commissioner as soon as possible. Thank you and we are happy to take any questions.

CHAIR—Thank you very much. We will go first to Senator Barnett for questions.

Senator BARNETT—Thanks very much to Save the Children for your work and for your submission. It is a very comprehensive proposal you have put to us. I am concerned about the issue of overlapping and duplication, which came up in evidence yesterday. The states and territories all have a relevant commissioner, as you know, so how do we avoid that?

Ms Schulze—The states and territories have a variety of commissioners and guardians, all of whom have different roles, mandates and powers and none of whom have the power or mandate to intervene in issues at a federal or international level. We believe that, as with many other jurisdictions—for example, schools, where we have schools ministers and a federal schools minister—the role of a federal children's commissioner would be one of coordination, driving for consistency and for a bar that is international best practice consistent across the states rather than the patchwork and inconsistent coverage for children that we have now.

Ms Cardinal—In terms of national policy and national reform, states and territory commissioners do not have the authority or the mandate to address children's issues within those avenues. A national children's commissioner would certainly play that role. We would look at a national children's commissioner as being a national advocate and really supporting the work that state and territory commissioners are doing—supporting them and coordinating them, so very much working in cooperation.

Senator BARNETT—Should that focus only on commonwealth law and commonwealth policy?

Ms Cardinal—Commonwealth law and Commonwealth policy, but we think a national children's commissioner would be able to have oversight of what is going on in the states and territories. Given that Australia has signed up to the Convention on the Rights of the Child, it applies to Australia nationally. So while we appreciate that certain areas of jurisdiction fall within states and territories, the federal government has an international legal obligation to uphold the Convention on the Rights of the child. We would look at the national commissioner as playing that role and looking at best practice among the state and territory

commissioners. Right now my understanding is that they have informal communications but there is no peak body that can have an oversight and say: 'Okay, we see that what WA is doing is probably the best practice in juvenile justice, for example. Let's see if we can have that shared across all states and territories.' That is very much a cooperative role; we certainly are not advocating for any duplication.

Senator BARNETT—Yesterday we heard about their informal meetings twice a year, where the commissioners get together and report back to their relevant state ministers and authorities and the Commonwealth authority as appropriate. What do you put to the argument that we have a dearth of commissioners and now we are about to have another one. We are soon to have a commissioner for an age discrimination commission, I suspect, and we have race discrimination and disability discrimination commissioners. What do you say to the argument that we just have so many commissioners and one extra is really not going to help—particularly in the area of young people? You want to focus on perhaps Indigenous young folk, vulnerable people and vulnerable children, and people with kids with disabilities, but we already have those commissioners in place. What do you say to that argument?

Ms Cardinal—We are both keen to answer that.

Ms Schulze—I would reverse that and say if every other vulnerable group in our society has a commissioner to represent their rights, why not children as well? We can put together a laundry list of—

Senator BARNETT—Should we have a commissioner for every vulnerable group?

Ms Schulze—I think that children are a particularly significant and large group of vulnerable people who have interaction with government almost daily, as we said, with education and health. There are large numbers interfacing with the child protection and juvenile justice system. They are a group who are currently excluded from having a specific commissioner at this stage to stand up for their rights. It would not make sense to have a representative for all of the other groups and not for children. It does not make sense.

Ms Cardinal—Further to that, while we appreciate that certain commissioners who exist within the Australian Human Rights Commission cover certain issues for children, they cannot cover all issues—particularly issues to do with education and health. Children are only able to make a complaint to the Australian Human Rights Commission on the basis of age, race and sex discrimination—there are huge gaps. We look at a children's commissioner as being able to comprehensively take the Convention on the Rights of the Child and ensure that children have got a means of redress across all of the areas that impact their lives.

Senator HANSON-YOUNG—Thank you for your submission and for thinking in further detail about where the bill needs to be tweaked. The first draft of the bill was done in consultation with Save the Children originally, so it is good to see the process moving forward. One of the things that I was keen to explore was at what point of intervention do you think the commissioner should take when it comes to federal legislation or the federal government undermining the obligations set out in the UN Convention on the Rights of the Child? Are there specific areas at the moment that you see are being undermined and need to be addressed as examples of where we are falling through the cracks?

Ms Schulze—Do you mean where we are currently in breach of our obligations under the CRC?

Senator HANSON-YOUNG—Yes.

Ms Schulze—The first and most obvious example of that is children in immigration detention. That is a clear breach. The Australian Human Rights Commission, as well as other bodies, has highlighted that breach and I think it is generally understood that it is a breach. There are other areas that are not as topical or political where we have a lack of consistency and have fallen well behind world's best practice because we do not have a champion for children's rights at the federal level.

One of those issues is corporal punishment. Corporal punishment against children in all settings is an issue of international significance. A number of countries around the world have banned corporal punishment against children in all settings, including the home. But the majority of countries around the world have banned corporal punishment in schools. In Australia we have not banned corporal punishment in schools. A number of states have banned it in schools and a number of states have banned it partially in government schools and, then, in areas like the Northern Territory it is not banned by legislation at all; it is banned by policy.

That is an example of where we have fallen well below best practice. Children who live in one state are treated differently from children who live in another state and their rights are differently infringed, depending on where you live. That is an area where a national children's commission could certainly intervene, be aware

of world's best practice, be driving for world's best practice at a national level and be trying to get consistency among the states.

Ms Cardinal—I would also add something, particularly focusing on the article 12 of the Convention on the Rights of the Child, which is the article dealing with child participation. It says that state parties will endeavour to listen to children in decisions that impact their lives. We tend to do that a bit better in the court system. In the political arena we really do not. So much of policy and so much of legislation does impact children and I think there is still this notion that they do not necessarily have something valuable to contribute, which we obviously disagree with. We think that that legislation and policy would be improved by incorporating children's voices whether it is in urban development to ensure that there are going to be playgrounds and child-friendly spaces or whether it is in the arena of parental leave in terms of not just what is best for a mother or a father but what is best for that child within the first years of their life. It would really be putting that article into practice.

Senator HANSON-YOUNG—Do you have a view as to whether the commissioner should be housed within or outside of the existing Human Rights Commission?

Ms Cardinal—We have been discussing this. If it would make sense to have it in the Australian Human Rights Commission then we support that. We think that it probably has more to do with the detail. As long as the commissioner has adequate resources, adequate funding, a proper mandate and wide powers—if all of those characteristics are able to be encompassed within the Australian Human Rights Commission, then so be it. If it would in any way impact on their independence or their ability to perform the role then we would be advocating for a role very much outside of the Australian Human Rights Commission. So it is a bit where it makes sense and it really comes up in terms of the detail.

Senator HANSON-YOUNG—Could you outline for the committee and for the sake of *Hansard* what other countries that are signatories to the Convention on the Rights of the Child have fulfilled the obligation to introduce such a position.

Ms Cardinal—Absolutely. There are a number of them. Norway was the first country to create a children's ombudsman, in 1981. They were very successful in terms of extending maternity leave for mothers and in terms of banning corporal punishment. Children's commissioners have also been introduced in Northern Ireland, England, Belgium and New Zealand, which is a really good example in our area of the world. There has been a children's commissioner in New Zealand for almost 20 years—I think it dates back to 1984. A number of countries have indeed looked at having a children's commissioner. It is probably one of the best ways to implement the Convention on the Rights of the Child, recognising that, while all portfolios and areas of government will come into contact with children, they are sometimes overlooked. Having somebody at a national level that plays that pivotal role is probably the easiest way to implement the convention. Those are some of the examples.

Senator HANSON-YOUNG—Has Australia copped any criticism from the United Nations because we have not moved on implementing such a position?

Ms Cardinal—Absolutely. In 2005, in Australia's Concluding Observations—these are the most recent Concluding Observations from the Committee on the Rights of the Child, which is the organ responsible for monitoring the implementation of the Convention on the Rights of the Child—concern was expressed that there was no commissioner with a specific mandate for children's rights. Also, in relation to the Australian Human Rights Commission, it expressed concern that its funding was reduced over the years. More recently, the Human Rights Council, which is a relatively new United Nations body, reviewed Australia—it was the Universal Periodic Review of Australia's human rights record. Again, it was highlighted that Australia is lacking both a national children's commissioner and a national policy framework for children. These are issues that are continuing to come up again. Australia will be reviewed by the Committee on the Rights of the Child in the next couple of years—I think it is either next year or the year after—and I am certain that this will be an issue that will come up again.

Senator HANSON-YOUNG—It would be good to get one in place before then to give you something positive to report.

Ms Cardinal—Absolutely. It would be a significant step forward.

CHAIR—In your submission you tell us that you conducted a survey of 1,200 people in November 2009. Were they members of your organisations, or just from the broader community?

Ms Schulze—It was an online poll conducted by a commercial research company—an Omnibus poll. So it was a number of questions to the community at large.

CHAIR—And 78 per cent of those 1,200 believed that there should be somebody like a children's commissioner?

Ms Schulze—That is right. We did not use the moniker, National Children's Commissioner; we said a person who would stand up for the rights of the children.

CHAIR—Senator Hanson-Young asked a question about whether or not it should be in the Human Rights Commission. There has been some discussion from other submitters about the age and whether it should be extended up to 24. Your submission suggests that it should stay in line with the definition under the Convention on the Rights of the Child, which is up to 18. Is that right?

Ms Schulze—Yes. We suggest for consistency with the Convention on the Rights of the Child that we should use the same definition of a child, which is under 18. We also believe that there is a risk that, if the commissioner's focus is extended to include youths up to the age of 25, the focus may shift to all of the issues that are significant with that group and detract from a focus on early childhood and young children. We also recognise that there are significant issues and the day someone turns 18, particularly if they have been in contact with government in one form or another, to immediately say that you are no longer afforded the protection of the children's commissioner. It would be a challenge and perhaps unfair, so we are able to be swayed.

CHAIR—Perhaps the new age commissioner would kick in there. I do not know what the mandate there would be. Given our inquiry into that piece of legislation, it does not specify just seniors or senior citizens.

Ms Cardinal—We recognise that you have to draw the line somewhere. So, for the focus of the position, and based on the Convention on the Rights of the Child, as well, we draw the line there.

Ms Schulze—We can have a very clear focus on upholding Australia's obligations under the CRC if the definition is consistent and the focus is on children under 18.

CHAIR—In section 9 of your submission you have outlined quite a range of modifications to the bill. They are slight, but they outline very succinctly what your view is about just tweaking it a little bit or broadening some of the aspects or just defining them succinctly. Thank you for your evidence.

[9.29 am]

HYTTEN, Mr Frank, Chief Executive Officer, Secretariat of National Aboriginal and Islander Child Care

CHAIR—Welcome. We have received your submission, which is numbered 53. Would you like to make a short opening statement?

Mr Hytten—Thank you for having me. Essentially, SNAICC supports the introduction of the Commonwealth Commissioner for Children and Young People Bill. The impetus for the national children's commissioner came as part of the National Framework for Protecting Australia's Children 2009-2020. SNAICC has been advocating for the establishment of an Aboriginal and Islander children's commissioner for a number of years. We believe that the complexity of issues facing Aboriginal and Torres Strait Islander children requires a special attention of someone who is independent of the government of the day and also independent of the bureaucracy, which obviously has an obligation to the government of the day. One of the key issues is the need to overcome intergenerational disadvantage faced by Aboriginal children and I guess that comes with a 250-odd year history since colonisation. The need for a commissioner is reflected by the need for someone to be monitoring and evaluating key areas of disadvantage. Various governments do various things but an independent person doing that is also, I think, necessary.

We need to monitor the health, well-being and care for Aboriginal and Torres Strait Islander children and young people, to ensure that the policies and systems being implemented uphold the importance of culture and the engagement of children with the processors designed to protect them, to maintain a specific focus on children's issues within the context of Aboriginal families and communities and I guess that is also in the context of the families and communities being important. We cannot look at children as separate entities and there clashes in thinking around that one. SNAICC's view is that families and communities need to be a part of the package, and to uphold a sustained commitment to a federal form. For example, the current government has a number of policies in place—as do state jurisdictions. There seems to be a constant flow of new reforms but we come up with the same statistics at the end of each set of reforms. That is of considerable concern to an organisation like SNAICC. A lot is being done or has been attempted. We need someone a little bit distant from it all to work out why so much of it does not seem to bring major change in the longer term.

SNAICC's recommendation is that a separate Commonwealth Commissioner or Deputy Commissioner for Aboriginal and Torres Strait Islander children be established, that the position should have broad powers to initiate investigations and reviews of child protection, out of home care and family support services. Family support services are important to us because that is a preventative measure. If we can keep families strong and healthy, perhaps we will not need as much child protection.

The position should report directly to parliament and encourage or sustain an ongoing vigilance and a national perspective on Aboriginal and Torres Strait Islanders. It comes back again to being independent. The commissioner needs to be independent so that they have a clear mandate. Obviously the position needs to complement and not be subhuman by current existing government policies. The framework for protecting Australia's children has a very strong set of statements around it and the National Quality Framework for Early Childhood Education and Care is another fairly strong framework which we would support. There are a number of other recommendations in the submission itself and I am happy for you to ask questions or seek clarification of that.

CHAIR—Your suggestion is that there should be a designated commissioner for Aboriginal and Torres Strait Islander children but in the event that there is not, one of the deputy commissioners should at least be designated with that responsibility.

Mr Hytten—That is correct, yes.

CHAIR—I personally cannot see two commissioners being appointed—one for children per se and then one just for Indigenous children. Can I also ask you to expand on the public health model. A number of submissions have suggested a public health model versus a rights model. Some people have suggested that they go hand in hand but you have an emphasis on public health. Can you expand how you would see that operating?

Mr Hytten—My interpretation of that is simply a model which is strengths based, built from the ground up and based around broader definitions of social health and well-being, including, specifically in the case of Aboriginal and Torres Strait Islander people, community reflection in the context of the family, which is often

structurally different from what you might call mainstream families and communities. The public health model from my point of view is a much broader model which is based on strengths and building from strength.

CHAIR—You would see that a children’s commissioner would not just look at the rights and well-being of a child but at the social and economic context in which that child is raised and finds themselves?

Mr Hytten—Yes.

CHAIR—Working with families as well, or governments?

Mr Hytten—As long as the focus is on what is in the best interests of the child, I think we need to look at a broad range of perspectives in terms of how they inform government or evaluate what is happening. For example, all the good policies on the planet for child protection—I am fairly heavily involved in the Northern Territory as well at the moment—cannot happen if there is no staff and the staff are not going to get there unless there are inducements. As long as you have overcrowding in housing, you are going to have problems with child protection issues. So yes, to use a cliched word, it needs to be a holistic approach, a broader approach, with the focus being on what is in the best interests of the child.

CHAIR—You are suggesting that it should be extended to people who are 24 or 25 years old. Interestingly there has been a lot of conflict about that.

Mr Hytten—I heard about that.

CHAIR—Some people are saying, ‘Let’s just get it up and running and let us stick within the definition of the United Nations rights of the child definition. You would have heard previous witnesses saying, ‘If you go to 25 the focus will become on the needs of 19- to 25-year-olds, which is vastly different from the needs of four- to seven-year-olds. I am wondering why you have opted to extend the age.

Mr Hytten—Some jurisdictions in Australia go to 25. The UN official definition of a youth is from 12 to 25 years, and of course we are talking children as well in this case. The biggest issue in our thinking is that where systems cut off at 18 years, for kids who have been through the system and the system has been their family they suddenly lose all support, which means that they spiral downwards fairly quickly, even if they have been doing pretty well within the system. Kids with families do not suddenly get cut off at 18 and be told to leave home and never come back. They continue to have the support of parents and support in terms of small loans, fixing cars, housing, someone to talk to—all sorts of stuff. Under the current system, we cut off at 18 and those kids are abandoned, in a sense. So we figure that up to 25 kids are still kids, still attached to parents, family and home. If the system has been home, that should continue.

Senator HANSON-YOUNG—Thank you for your submission, Mr Hytten. I am not sure whether you have had a chance to read any of the other submissions but there is overwhelming support for the children’s commissioner. Many people have asked for the bill to specifically mention the vulnerabilities of Aboriginal and Torres Strait Islander children and I think that is very much warranted.

I do like the idea of a deputy commissioner to focus on that role. I think that is a good way forward. I agree with the chair. In the context that we have been having this debate about a children’s commissioner for 20 years, I cannot see us getting two. But I think a deputy commissioner, someone to support the commissioner in that specified role, is warranted. I just want to know whether under the current context of the UN Convention on the Rights of the Child you see that there are breaches in our duty of care and the rights and welfare of Aboriginal children in Australia.

Mr Hytten—I cannot give you a specific answer because I would have to read it all again and think about it in that context. But in broad terms clearly when children are in situations that appear to be unresolvable—and not all but most children come into situations that are untenable for them at some point—when they are left year after year in a context where they have very little hope and they are constantly in a state of semi-abuse through neglect or active abuse then, yes, I think that is a breach of their rights, without using a big capital R. It is certainly an abuse of those children. That is not right. I have to try to avoid the ‘rights’ issue; this is not the platform. If it is not right, ethical or moral then we should not be allowing it to happen. I guess I would see the deputy commissioner or the commissioner—we will go for the commissioner because we might as well try; we can maybe settle for the deputy quite happily—as someone who needs to be asking those questions on behalf of people who do not have that voice for themselves and asking it of agencies like mine as well as government agencies like yours and bureaucracy wide.

This is continuing, and we know it has continued for over 20 years. Throwing money at it is not the only solution, in my view. It is about how we throw or spend the money. That seems to be almost irreconcilable. I

almost want to talk off the record here but, anyway, it is almost irreconcilable to me that we as institutions continue to make the same mistakes again and again. We do not listen to what families are telling us. We do not listen to cultural stuff. Our world view—and it is not racist with a capital R—does not account for a different culture. It does not account for a different way people live and, therefore, it keeps smashing those people against walls and punishing them for being who they are.

Senator HANSON-YOUNG—Have you seen examples in other places in the world where they have introduced this type of position, a commissioner or an ombudsman, under the banner of the UN Convention on the Rights of the Child where it has supported children from those more marginalised groups in those countries? Do you draw hope from that?

Mr Hytten—The only minor examples that I know of come from Canada where for a whole range of reasons the government 20 years ago approached the whole issue slightly differently. Canadian Native Americans—I am not sure if it is across Canada but certainly in pockets—have a far greater level of self-generated organisations and community controlled organisations. My understanding is that that as a general response is much stronger. There is certainly lots of evidence that says where a community has control of their own issues and have a strong cultural context, whatever that cultural context is, then, for example, the suicide rates are considerably lower than in other Native American communities that have been more damaged, if you like, through colonisation and do not have a strong cultural context. So it is not only between the mainstream and the Native American people; it is also between Native American communities where there is greater or lesser cultural context and identity.

Senator HANSON-YOUNG—For the sake of the *Hansard* and getting some of this on the record, could you outline some of the statistics around the deaths of children and young people in Aboriginal and Torres Strait Islander communities, whether they be in traditional and remote communities or in urbanised communities.

Mr Hytten—I would have to get back to you on that. I am happy to write a supplementary submission on that. Specifically what would you like to know?

Senator HANSON-YOUNG—I just think it would be good for the sake of the inquiry to have some of the statistics about the specific vulnerability of Aboriginal and Torres Strait Islander children. It is something that all of the submissions that we have had thus far have raised. Everyone agrees that these kids, in particular, are in a higher risk category in terms of their vulnerability. If we could have some of those statistics about suicide rates and homelessness that would be helpful.

Mr Hytten—Sure. They are all over the place. I do not carry them in my head, but they are easy to find.

Senator HANSON-YOUNG—That is fine. I have a final question. I would like to know if you have had any specific thoughts as to whether the commissioner position should be housed within or outside of the Human Rights Commission. We have heard views from both sides on this over the last two days. Have you thought about that? Where do you think it would be best placed?

Mr Hytten—I do not really know the structures of governments. My assumption and I think SNAICC's view would be that it would make sense. That is not a carefully considered view. It simply makes sense for it to be part of the Human Rights Commission. But I do not know enough about it, so I do not really have a strong opinion on where else it would go. I do not actually know where else it could go.

Senator HANSON-YOUNG—The argument is either for a standalone commission or for it to be part of the Human Rights Commission.

Mr Hytten—We can get back to you on that as well. I will check that out and ask people.

Senator HANSON-YOUNG—Thank you. The recommendations from SNAICC are fairly clear. I hear them a loud and clear.

Mr Hytten—Just one thing on your question about statistics. One of the things that one of my staff prepared for me says that in the 12 months ending 30 June 2010 the number of Aboriginal and Torres Strait Islander kids in out-of-home care increased by nearly 1,000 or 10 per cent. It was an increase of 946 children, which represents a percentage increase of about 9.6 per cent. So when all these other additional things are coming in to try to theoretically support and so on, we are having more and more kids actually being removed.

Senator HANSON-YOUNG—From their traditional family homes?

Mr Hytten—From their traditional families in the broader sense of extended community. There are some issues of fine detail that we are trying to work on with FaHCSIA and others around how you even define

carers. A grandma or auntie, for example, may have a police record from some years ago. In the Northern Territory lots of people have records from not paying parking fines, for example. So a whole bunch of people get disqualified from being carers for reasons that are relatively shallow.

Senator HANSON-YOUNG—But those children are being removed from those—

Mr Hytten—Children are being removed and not being placed with family because they say, ‘We can’t find people to place them with who meet the criteria.’ The criteria are set in a way that culturally make it very difficult for many people to meet them.

Senator HANSON-YOUNG—In this case, the commissioner could actually take that broad view and step back and say, ‘Hang on a minute. There is a bit of a mishmash going on here. What is best for the rights of the child? What is in their best interests?’

Mr Hytten—We have anecdotal stories. Organisations like SNAICC have no real research capacity—you are kind of almost looking at it!—and we cannot find that out, whereas a commissioner’s office should have the capacity to link with whoever to get money to find out if this anecdotal stuff is true or just somebody’s fantasy.

Senator HANSON-YOUNG—And ask direct questions of government to feed that data back.

Mr Hytten—Yes. It is an administrative issue; it is not even a political issue. It is an administrative issue that at various levels of the bureaucracy we simply cannot get to.

CHAIR—I think that is a good point. The work of the Human Rights Commission when it started off with its inquiry on ‘pregnant and productive’, for example, then led to the impetus for paid maternity leave in this country. I suppose what you are saying is that, if the children’s commissioner has that research capacity and that national capacity to actually have some oversight of what is happening with inquiries and research, it could lead to change and an impetus to look at it and review it. It is a good point. Other submitters have not raised in our consciousness that point about the capacity to have that research and to drive change. People have more put to us that the commissioner would have the capacity to be at arm’s length from the government and be a bit of a watchdog and commentator. But you are right. It could have the capacity to drive change as well.

Mr Hytten—Just being a watchdog and a commentator, other than being a thorn in the side of government, is not really useful. You can go into the streets of Alice Springs and ask 10 people and they will tell you what they think is wrong with the way the system is working. The difficulty is how we get that into a policy context where it can be discussed and debated.

Senator HANSON-YOUNG—And you need to have leadership to drive that.

Mr Hytten—Yes. A commissioner can do that. Even SNAICC would love to do that. We are not resourced to do that. We are totally dependent on government for funding anyway, so how much of a thorn we can be is always the question. SNAICC would want to say, ‘Look, this person needs to be productive,’ but they need a positive influence and not just to be told, ‘You are not doing this right and you are not doing that right.’ It has to be a question of asking, ‘What the hell are the solutions? What can we do about this and how do we find out?’ It will be different in Alice from what it is in Darwin let alone Melbourne.

CHAIR—Thanks very much for your submission and your time this morning.

Mr Hytten—My pleasure. How soon do you need that material—ASAP?

Senator HANSON-YOUNG—As soon as you can, really.

Mr Hytten—The Social Justice Commissioner’s report probably has all of that, but I will send you something.

CHAIR—We do not actually table our report for quite a while. Our secretary has just suggested that it can be when we send you the proof *Hansard*. Do not rush to get it done in the next couple of days. Take your time. Take a good week. Thanks very much.

[9.54 am]

GODDARD, Professor Christopher Rex, Adjunct Professor, Child Abuse Prevention Research Australia, Monash University

NEWTON, Dr Rebecca, Research Associate, Child Abuse Prevention Research Australia, Monash University

Evidence was taken via teleconference—

CHAIR—Welcome. Thank you for your submission, which we have numbered 35 on our website. I now invite you to make a short opening statement and then we will go to questions.

Dr Newton—I would like to start by telling you a little bit about who we are and what we do. Child Abuse Prevention Research Australia, or CAPRA, is an independent research centre that represents a strategic collaboration between the Australian Childhood Foundation and Monash University. Our aim is to dramatically reduce both the rate of child abuse, neglect and murder by providing evidence based advice to government and child health and welfare organisations to guide the development of policy and practice. Central to our approach is giving children a voice. Our recent publications include internationally published books. *Human Rights Overboard*, with Professor Linda Briskman and Susie Latham, incorporates children's experiences of detention centres and received a human rights award. *The Truth is Longer Than a Lie*, with Dr Neerosh Mudaly, reported on children's experiences of abuse and subsequent protective services intervention. *Physical Punishment in Childhood*, with Dr Bernadette Saunders, again placed children's experiences at the centre of the research. In addition CAPRA has published referee journal articles on a diverse range of topics, including poverty, ethics and the neglect of children.

My colleague here this morning, Professor Chris Goddard, is the director of CAPRA and a regular contributor to newspapers, including the *Age* and the *Australian*. CAPRA presently works closely with two Australian state police forces on separate child abuse prevention projects, one of which is focused on the murder of children and the other on child exploitation material on the internet. Further areas of our research include the use of animals as therapy in the treatment of severely traumatised children; a legal review of the child death reporting legislation in Australia; child centred investigations of abuse and neglect; adoption; the relationship between culture, religion, child abuse and child protection; and the mapping and gapping of services. Our international research projects include investigations into out-of-home care and the ethics of undertaking research with children. More details about work can be found on our Monash website.

We welcome the Commonwealth Commissioner for Children and Young People Bill, bill. From our perspective it represents a vital step forward in the development of a much-needed national framework which will ensure the promotion and protection of children's rights in addition to compliance with our UN obligations. Whilst it is true to say that state commissioners are able to offer protection to children, only a national commissioner will be able to ensure that all children are afforded the same degree of protection regardless of their place of abode or circumstances. As such, we are grateful for the opportunity to contribute to the development of such a noteworthy piece of legislation.

The bill has the potential to significantly enhance Australia's capacity to protect all of our children effectively. However, in order to achieve this, we believe the bill in its current form has the opportunity to move beyond compliance with the UN convention and towards the provision of genuinely effective powers through the consideration of at least three issues. Firstly, with regard to function and powers, we believe that the bill needs to enable the commission to ensure the protection and promotion of the rights of all children in Australia, irrespective of their nationality, circumstances or ethnicity.

Secondly, the role of the commissioner is essential in regards to overcoming the interoperability issues that exist between states. However, the bill makes no mention of existing state and territory provisions for children's commissioners, nor does it mention how it would operate in practical terms in relation to this. We assume that where practicable the existing commission legislation would remain. However, given the variance that exists in these established laws, it remains to be seen whether and to what extent the legislation in its current form would genuinely be capable of operating concurrently.

Finally, with regards to the provision for information sharing and investigative powers, as presently drafted and unlike its counterpart in New Zealand, the bill contains no explicit power to obtain information or documents, nor does it contain any explicit powers of investigation. In relying on consultation and cooperation with state governments it remains to be seen how the commissioner in practice can act independently over and

above state governments and agencies. Furthermore, in engaging in consultation with individual state governments and their agencies, there is a very real probability of a lack of cohesion and commonality in terms of information sharing arrangements. As such, the bill in its current form remains largely symbolic as there is little capacity for it to achieve anything beyond ensuring compliance with UN obligations.

The history of child protection in Australia has been one of partial responses and limited effectiveness. We believe that the bill provides an opportunity to place children's voices and rights at the forefront of our endeavours. Our submission makes 15 recommendations for improvement, to deliver legislation that advances the capacity to genuinely protect all of our children.

CHAIR—Thank you. Professor Goddard, do you want to add anything to that?

Prof. Goddard—No, I wanted Rebecca to play the role in the forefront because she is the researcher in our centre who has done most of the work in this area. I am happy to answer questions as appropriate.

Senator HANSON-YOUNG—Thank you very much for your submission. I think it is quite interesting that your proposal is, as you have clearly outlined both in your verbal submission and in your written submission as well, to take the role of the commissioner and the responsibilities and the leadership that a commissioner would take beyond that just specified in the UN convention. In light of that, are there things that you see are currently breaches under the UN Convention on the Rights of the Child that Australia has? The fact that we do not have a children's commissioner is a clear breach, but aside from that are there specific things that you see are breaches currently and how far do we go to fixing those things and what type of role do you see the commissioner playing in helping to cover those gaps?

Dr Newton—I think it is essential that we have a piece of legislation that facilitates the role of a national commissioner in order to ensure our compliance with international statutes. I think the bill is a valuable step forward and a very positive contribution to ensuring our compliance. Essentially it is a question of whether and to what extent we perceive the bill as a bill for compliance or as a bill for compliance and a bill which facilitates the commissioner's role in other areas. For example, I believe very strongly that the role of a national commissioner has a vital part to play in policy coordination and the coordination of legislation as well. The overarching perspective that a commissioner could bring is essential in the development of future policy and practice and the development of national legislation as well. It will play a key role in facilitating a national approach to child protection. For example, the existence of a national commissioner and an overview of child death review processes would really go a long way to inform policy on a national level. So my understanding is that we need a bill for compliance but there is also an opportunity here to go further than that and to develop a piece of legislation which facilitates cooperation and coordination between agencies and which genuinely informs future policy.

Prof. Goddard—If I may, I could add something to that. I fully endorse what Rebecca has said. I want to just emphasise that it seems extraordinary to me that a wealthy country like Australia is lagging behind in so many areas. Like Rebecca, I see this as an opportunity to do something that is more than perhaps symbolic but actually demonstrates leadership and that we value children, respect their rights and respect their opportunities, or grant opportunities for them, to give voice to their views.

Senator HANSON-YOUNG—In your research, have you been able to compare the value that governments place on children in countries where they do have these types of established roles and they are complying with the obligations of the convention?

Prof. Goddard—We have done some research in comparing children's commissioners and we have followed with interest as well the criticism that children's commissioners get when they advocate for children. One of the important messages that we derived from our overview was summarised 10 or 12 years ago by the Hon. Alastair Nicholson, formerly of the Family Court, who stressed that, when he was advocating for a children's commissioner, it was important that the commissioner should be, for example, independent of the executive. I think he used the phrase in one of his lectures here in Melbourne that a commissioner needs the same independence as a judge. That is very important in our review. Underneath that, I would add that it is very important that there is the ability to investigate complaints. I know there have been criticisms in Wales, for example, and in Finland that too much time has been spent at times on individual complaints, but I think it is a very important aspect of the role to draw out the broader systemic problems and use those complaints, if you like, and group them together and review broader aspects. Those are two messages. Rebecca might have others.

Dr Newton—I concur with Chris's comments on that. I will just add that, in comparison with other legislation enacted in other parts of the world, such as the New Zealand Children's Commissioner Act 2003, the bill does not provide any powers of investigation. I would refer members of the committee to the New Zealand legislation as an example of how the bill may be enhanced to provide powers of investigation. To my mind that is closely linked with the absence of powers to obtain information as well. What concerns me is that the commissioner would be reliant on consultation and cooperation with state governments. It is concerning. I am not sure how the commissioner could act independently over and above those state governments in a way that promotes and protects the rights, interests and wellbeing of children if those are the information sharing arrangements in place. Also, there is a very real probability of a lack of cohesion and commonality, in terms of the information sharing provisions, leading to different arrangements occurring between the commissioner and the various states.

Senator HANSON-YOUNG—Given all of that, do you have a view as to whether the commissioner should be housed within or outside the existing Human Rights Commission—and given, specifically, that you are arguing for enhanced powers of such a commissioner?

Prof. Goddard—My view is that the position should be housed outside. Children have been recognised as being particularly vulnerable. That is why we are talking today. I feel passionately that very often children are exploited in many ways and in some ways we allow children and young people to be divided and ruled. If I may use the example of Victoria, we have had a number of what I would call tokenistic, partial responses to issues like this. We have a so-called child safety commissioner, and the Ombudsman in his recent review found that the child safety commissioner was supposed to be the independent scrutineer but was unable to initiate investigations and had limited investigative powers. We have had a partial response to the child abuse tragedies by having a child death review committee that actually excludes more cases than it includes and so on. As to the status and position of such a commissioner, I believe passionately that there should be a recognised place and responsibility that actually sends a very strong message that children are particularly vulnerable.

CHAIR—In your introduction you said that you were led to conclude that the legislation in its current form does not provide a Commonwealth commissioner with the requisite powers or independence to cover their duties effectively. You also make quite a number of recommendations in your conclusion about this piece of legislation. Can I ask you quite frankly whether you believe this piece of legislation should proceed, or does it need to be either amended quite severely or rewritten?

Dr Newton—The legislation in its current form represents a valuable starting point; however, I feel that it would benefit from refining. I think we need to consider some rewording in order to clarify and specify some aspects of the legislation so that these aspects are more meaningful in practice. In saying that I do not mean to say that we should forget about the legislation and that it is not worthy—far from it. I think it represents an extremely valuable contribution and a good starting point. But I do need to say that I think there is an opportunity to refine it and to clarify certain points. While I appreciate the probable intention of drafting certain things, I wonder whether in practice it actually works. Specifically, I am thinking of the provision under section 9 of the act, which enables powers of review and inquiry et cetera. Many of these powers are expressed very broadly, and I think there is scope to refine that in order to clarify what we mean and the scope of such powers.

CHAIR—The bill currently suggests that this commissioner would actually write the report of this country's compliance with United Nations obligations. Most submitters have suggested that that should not be the case, that it is a job that should be left with the government and that this commissioner should be the person who either critically analyses or supports those reports. Do you have a view about that?

Dr Newton—I think there is scope to clarify that any report that is made by the commissioner is done so in addition to government reports. My principal concern with reporting requirements is that the commissioner and any reporting that they undertake remain independent of government and that they have the scope to report freely on certain matters. It needs to be genuinely independent from ministerial control.

In many respects, the reporting requirements that are contained within the bill as it stands are very similar to those provisions found within legislation in other jurisdictions. I am thinking specifically of the legislation in England, section 8 of the Children Act 2004. Within this jurisdiction the commissioner is required to report annually on their activities and findings and matters of consideration for the forthcoming year. A copy of the report is then sent to the Secretary of State. Having said that, the bill in its current form differs from the legislation in Sweden, which merely specifies that the ombudsman must report annually to the government.

Similar arrangements occur in Finland. Regarding the reporting requirements, I think it is important that the commissioner remains independent. It may be a case of clarifying in the legislation that the commissioner's reports are in addition to government reports.

CHAIR—I think you mentioned earlier that you have done some research or you have a paper that looks at the children's commissioner in New Zealand versus the UK versus Belgium. Is that a paper that you could provide this committee with?

Dr Newton—We have actually undertaken research looking specifically at the child death review processes in various Australian states, and I am quite happy to furnish you with a copy of that paper. I think it would be worth while referring to the New Zealand legislation as an example of how the bill in its current form might be enhanced—and specifically with regard to the powers of investigation.

Although I do not have a paper specifically on that area, I am more than happy to forward to you the relevant aspects of the New Zealand legislation and our paper looking at child death reviews and the commissioner process with regard to that.

CHAIR—So you do not have any research that you have done that compares the role or the effectiveness of children's commissioners in other countries?

Dr Newton—No, I do not.

CHAIR—As there are no further questions, I thank you very much for your submission and for making yourselves available this morning to help us with our inquiry into this legislation.

Prof. Goddard—Thank you very much for the opportunity. Could I just make a concluding comment?

CHAIR—Yes, certainly.

Prof. Goddard—I believe this is very important I thank you for the opportunity. I do believe passionately that we should be ashamed of the way we treat many children. The obvious example of course, is the way we have treated children in detention centres and continue to do so. The other one that I feel equally passionate about is the failure to have any federal understanding or, if you like, agreement on definitions of what child abuse and neglect actually are.

If you look at the figures, you see that we have this amazing situation where we hardly have any reported sexual abuse in the Northern Territory, and every year we release figures saying that we cannot compare states. I think this is a great opportunity to develop leadership and demonstrate that we want to move forward. Linda Briskman and I have called keeping children in detention centres organised and ritualised abuse, and I would hope that we are moving away from that—and this is one of the vital steps; so thank you.

CHAIR—Thank you once again.

[10.20 am]

GAUTHIER, Ms Kate, Chair, ChilOut—Children Out of Immigration Detention

MANNE, Mr David, Executive Director and Principal Solicitor, Refugee and Immigration Legal Centre

CHAIR—I now welcome representatives from ChilOut, Children Out of Immigration Detention, to our hearing this morning. Thank you for making yourselves available. Do you have any comments to make on the capacity in which you appear today?

Mr Manne—I represent the Refugee and Immigration Legal Centre, but I am also a long-term associate of ChilOut.

CHAIR—We have a submission from you which we have numbered 63 for our purposes. I invite you to make a short opening statement and then we will go to questions.

Ms Gauthier—Thank you this opportunity to speak in favour of this bill to establish a children's and young people's commissioner. This inquiry is happening very quietly, without a lot of media or political interest, but there is nothing more important in our society than our children. Without our children, who needs to worry about climate change? Without children, who cares about interest rates, carbon tax, GST, the Murray-Darling Basin or Work Choices? There is simply nothing as critical to the future of Australia than ensuring that we protect and nurture our children.

ChilOut is a volunteer run community organisation campaigning on the issue of children in immigration detention. This year we commiserate our 10 year anniversary. Perhaps if there were a children's commissioner ChilOut would not have had to come into existence. Australia is a signatory to the Convention on the Rights of the Child but has no single agency or body specifically mandated to oversee compliance in meeting our obligations in the way other human rights instruments have a body specialising in that area of concern, such as gender or disability issues. We believe a children's commissioner will address this and provide the expertise in children's rights and needs that is required.

Current issues that we believe need to be advocated by such a commissioner include that the conditions in which children are detained in the immigration regime have no minimum standards codified into law, unlike our prison system. This means serious offenders have more protection in the conditions of their accommodation than a child. State child protection laws bind state governments in their treatment of children, but there are no laws binding the federal government. A 2004 High Court case found the federal government engaged in child abuse as defined by South Australian child protection laws, but those laws did not apply to the federal government. We need a mechanism to oversee the federal government's interaction with and treatment of children.

Unaccompanied asylum-seeking children are in a particularly perilous situation. The Minister for Immigration and Citizenship is their guardian, responsible for protecting and nurturing children in his care. A guardian's care should include advocating for the best interests of that child, obviously by their release from detention and in their visa outcome. But the minister is also the final decider in both the decision to detain and the visa outcome, and this is clearly a conflict of interest. These children are effectively left without an adequate guardian.

We have brought David Manne with us, the Executive Director and Principal Solicitor of the Refugee and Immigration Legal Centre in Melbourne. He has represented many families and unaccompanied children. He is an expert in this area and can go into detail on the legal situation facing these children. ChilOut believes the lack of appropriate guardianship cascades into a critical failure of responsibility to protect children in Australia's care. We welcome questions the committee will put to Mr Manne about outlining their situation.

CHAIR—Mr Manne, did you want to add anything to that?

Mr Manne—The only thing that I would like to add to that is this. When we have the Commonwealth of Australia arguing before the High Court, as it did recently in the ongoing case of M169 and the Commonwealth, that it is in the best interests of an unaccompanied minor asylum seeker to remain incarcerated on Christmas Island instead of being released into the community on the mainland, we know that we have fundamental problems in this system which require remedy. Essentially, the Commonwealth is asserting to the highest court in this land that it can continue to detain unaccompanied children asylum seekers when all of its own policies and reports say the opposite.

CHAIR—Senator Hanson-Young, you will probably ask most of the questions I would want to ask and I will let you go first.

Senator HANSON-YOUNG—Thank you very much to both of you for appearing and specifically to Chilout for the submission. It seems quite obvious through all of the submissions that we have got that the vast majority of them believe that there needs to be a children's commissioner established. The argument is about exactly how it works, what type of powers this person has and there is discussion about whether this position is the appropriate position to take on the guardianship of unaccompanied minors in particular. A number of organisations have argued either way. Having said that, no-one has argued that the current situation where you have an immigration minister who is both the jailer and the guardian is acceptable, and that needs to be looked at. Why do you specifically believe that a Commonwealth children's commissioner should have that role? Perhaps you would be able to answer this, Mr Manne: in light of Australia's context of being a signatory to the Convention on the Rights of the Child, are there clear breaches beyond the detention of children that you see Australia is participating in at the moment?

Ms Gauthier—Firstly, we very strongly advocate that as a minimum the guardianship of children does need to be removed from the minister for immigration. There are a range of options. One of the options which we would support is that the children's and young people's commissioner become the guardian. However, Chilout believes there is a potential conflict of interest there in that you would have somebody who is mandated both to investigate potential breaches for the treatment of children and that person being the guardian. That being said, it is certainly a much better arrangement than we currently have because of course the conflict of interest of the children's and young persons' commissioner is not about whether or not you detain that child or grab them a visa.

As far as breaches of the Convention on the Rights of the Child are concerned, they are multiple and varied and go across a whole range of areas. For asylum seeking children they are not just about detention and it is not just kids in detention; it is also the kids in the community. Some of the breaches are article 3.1, where the best interests of the child have to be taken as the primary consideration. The ultimate breach of that again goes back to the guardianship issue, because we have the guardian not able really to take decisions in their best interests. There are breaches on education, access to Medicare—a range of those other breaches. I think we have outlined them individually in our submission. I believe the Hotham Mission also quite clearly outlined the breaches happening for asylum seeking children in the community whose parents are essentially destitute and they do not have adequate housing, food or medical attention.

Mr Manne—I think some of those matters have been very well covered. I did want to briefly refer to the department of immigration submission because you referred, Senator, to the fact that there seems to be overwhelming agreement that there is a problem with the conflict of interest. May I begin by saying that with the utmost respect to the submission lodged by the Department of Immigration and Citizenship, which refers to the situation with the minister being the guardian of children in detention, unaccompanied minors, potentially giving rise to the perception of conflict of interest. With the utmost respect, the fact is that it gives rise to an actual conflict of interest. The person who is the detainer, the decider and indeed the potential deporter, that is remover, from Australia of an unaccompanied minor is also the person who ought to be acting in the best interests at all times of that child. So it is simply untenable. I think it is very important that the government and the department of immigration confronted squarely the fact that it is not just potentially giving rise to a perception of conflict, it is an actual conflict. If it does recognise the problem, it may well do something better than has been done in the past.

I should say that I have been working in this jurisdiction full time for over 10 years. During that period there have been regular overtures about resolving this actual conflict of interest and nothing has been done. I think the critical point here is that the department of immigration in its own submission suggests that some work is being done. Well, the time has come to move beyond the overtures about work possibly being done or potential conflicts to confronting the reality that we have an untenable conflict. Having myself acted for a number of unaccompanied minors in remote detention, I can tell you the reality is that the conflict plays itself out graphically and in very harmful and problematic ways. I will give you an example.

When I visited Christmas Island in 2008, we were referred, under the IAAAS contract, an unaccompanied minor, a 15-year-old Afghan boy, who had come here by boat seeking asylum. When I finally met with him it became apparent that for more than one week of being detained on Christmas Island he had been specifically prohibited from contacting his parents overseas. He had a telephone number that he wanted to use to contact them but he was prohibited from making contact. The point is that the person who was responsible for

deciding whether the decision should have been made to prohibit that minor from making a call, and whether it should persist, happened to also be the detainer—that is, the minister or indeed the person from the department of immigration who had been delegated the responsibility of being the guardian. The detainer was the person deciding whether or not that prohibition should continue. That is a completely untenable and unacceptable situation. It is the type of situation that could well be remedied by a child having someone they can contact who is actually acting on their behalf as guardian in their best interests.

There are numerous other examples of a common nature that I have personally experienced over the years of being referred clients under the IAAAS contract. Just to be clear, under that contract we are referred clients who arrive by boat seeking asylum and then we act as their independent legal advisers in relation to their claims for refugee status. On a number of occasions I have personally been involved in the representation of children who are 13, 14, 15 or 16. When I met with them, they had literally no-one present or available to assist with providing instructions on life or death matters. We are talking about life or death matters: what does that child fear, what will happen to them if they return and what are the considerations in relation to their welfare? There is literally no-one other than me, as legal adviser, and an interpreter sitting in a room with a child to prepare a complex case with detailed forms and a written statement of claims. The only person that has ever potentially been available has been, again, the decider—that is the guardian or the delegated guardian of the minister, being someone from the department of immigration, which of course is completely inappropriate given that their role is to decide the case, not prepare it or present it.

This situation is happening right now. The department of immigration may well put in a submission suggesting that they are looking into it and that there may be perceptions of potential conflict. With all due respect, that is simply untrue. There is an actual conflict and, in a sense, it goes on. This is one of the various areas where we are talking about the serious cutting of corners in a situation where serious mistakes can happen if there is not proper support provided—and the consequences in this area are potentially no less than life and death. If we get it wrong in this country and the child is not supported properly, we could well be making decisions which result in someone being sent back to the real prospect of being persecuted.

Ms Gauthier—I would like to emphasise that point. In a lot of our discussions around immigration detention, particularly in relation to the guardianship of unaccompanied minors, sometimes we get sidetracked by the detention issue, the conditions of detention and where that child is being detained. Of course, that is a very important area of concern—the conditions under which we accommodate children—but that in essence is a finite experience. Deciding the visa outcome and the protection outcome for an asylum-seeking child is permanent and, if we get it wrong, the outcome for that child is potentially persecution and death. We need to have an adequate delegated guardian ensuring that the legal advice and the processes are being properly followed so that the visa decision is made correctly and that child is able to participate in providing the information so that a correct decision is made. If we get that wrong, the outcome is absolutely catastrophic and much more important.

Mr Manne—There are many examples of the fundamental flaws in the system at the moment because there are not proper guardians involved and there is not an age appropriate approach taken in relation to detention and to determination of refugee status. I will give you one example of many that I could offer. These things matter. Recently a lawyer from my organisation sat in at an interview conducted by the department of immigration. A minor was being interviewed in relation to their written refugee claims for around three hours. There are plenty of policies and procedures that indicate that interviewing a child or adolescent for that period of time could well be problematic for them in relation to their stress and difficulty with coping with that sort of process. Indeed, that was the case. Again, it is a good example of the fact that we need in this area—and we do not have this—proper oversight and safeguards, such as the presence of the guardian to intervene when inappropriate processes are being applied to the plight of children.

Senator HANSON-YOUNG—*The forgotten Australians* report got a lot of coverage in the end, which it deserved, and we had an apology and a lot of commiseration following that. One recommendation of the report that was unanimous was the establishment of a Commonwealth children's commissioner. Given the examples you have highlighted and the goings-on in a system that you argue is fundamentally flawed and damaging to children, do you believe we are at risk of creating another mistake through this next generation of young people?

Ms Gauthier—You only have to look at how much money the department of immigration has had to pay out in compensation cases to children in the immigration detention regime to know that that is already happening; yes.

Mr Manne—I think the answer is yes. More than two years ago this government announced a fundamental reform of detention policy in relation to asylum seekers which promised to bring to an end the practice of mandatory, indefinite and arbitrary detention of asylum seekers and instead to use detention only as a measure of last resort for the shortest practical time. In that the government rightly recognised the profound harm that had been done by detaining people, including children, for prolonged periods in these circumstances. Their own policy statement at the time said it was dehumanising, was ineffective and was not a civilised approach that caused severe psychological and physical harm. All of those things are true and we are seeing them happen at the moment. We are also seeing the complete failure to implement that policy, including in relation to children. Going back specifically to your question, I want to draw upon the department of immigration's submission—

Senator HANSON-YOUNG—Their submission to this inquiry?

Mr Manne—Yes. I think it is very telling in terms of where we need to go, and it is not where they suggest. In its submission to this inquiry, the Department of Immigration and Citizenship's central contention appears to be that it opposes the establishment of a children and youth commissioner—

Senator HANSON-YOUNG—One of the only submissions that does.

Mr Manne—Yes, because the central contention appears to be—as far as one can comprehend it—that an extra layer of oversight is unnecessary. With respect, the current external oversight mechanisms are significantly flawed and inadequate. One example is this: the Commonwealth Ombudsman, which the department refers to as one of the key bodies of oversight, cannot review the detention of a child for six months. It is only after six months that a review can be conducted. Is the department seriously suggesting that it is adequate to only review a child's detention at a six-month point?

Going on that from that, the review is confidential. So we have no idea what the review involved, what the Ombudsman recommended, let alone what the Department of Immigration and Citizenship did in response and whether it responded adequately. There is no body in Australia that has the role of reviewing individual cases and reporting publicly unless the detention is over two years long. That also applies to children. So the idea that we somehow have adequate oversight at the moment—

Senator HANSON-YOUNG—Can you just repeat that?

Mr Manne—There is no body in Australia that has the role of reviewing individual cases of minors in detention and reporting publicly unless the detention has gone beyond two years.

CHAIR—Doesn't the Ombudsman have that role?

Mr Manne—No, the Ombudsman does not have that role. The Ombudsman has the role of reviewing detention at six month periods. What I am saying is that there is no body that is required to review individual cases and then report publicly unless the detention is two years or more. The idea that somehow that is adequate and that we do not need further oversight beggars belief.

What we know from many episodes in the past, and history must guide us here, is that public accountability in these matters is fundamental. There are many past situations we could point to where there was not proper accountability. One of the key themes of the Palmer report was better and proper accountability and better processes. We do not have it at the moment. A child commissioner, I think, would be a critical development in progressing what is a fundamentally flawed system at the moment so that we had proper public accountability in ensuring that the best interests of children are achieved.

Senator HANSON-YOUNG—I just wanted to pick up on one of the points that was made about access to education. Are either of you able to outline the current requirements to ensure that children in immigration detention actually go to school?

Ms Gauthier—For immigration detention there used to be the immigration detention standards and they had to be complied with in the contracting arrangements. They are actually repealed; they are not using immigration detention standards anymore. So standards of service provision are written into the contract, which is about 759 pages from memory, and it is very difficult to pull out the specific requirements on the contractor. It is almost impossible for advocates on the outside to oversee that process. What we do know is that certain states have requirements for the age limit in which children have to attend school. In the Northern Territory it is 15 years old. So they are sending children under the age of 15 to school up there, and we have heard that all under 15s are being sent.

However, the process to set that up has taken many, many months. There have been cases we know where children have waited three or four months, and on Christmas Island it is a lot longer; children over the age of 15 are not provided with outside schooling, and the type of education they are provided with in the centre is laughably inadequate—to put it politely.

ChilOut has really grave concerns for preschool-age children as well. There are a lot of very young children who are being kept in the—

Senator HANSON-YOUNG—There are a number of children who have been born in immigration detention?

Ms Gauthier—Yes, born in detention, and there are a number of under school-age children—under fives. Those kids do not have external preschooling. There was a program running on Christmas Island for a while—that was cancelled. Those kids are going to have real developmental problems and, given the fact that the APODs—the alternative places of detention—are not set up or purpose-built facilities for long-term detention, recreation facilities provided to under school-age children is woefully inadequate. I feel horrified for parents who are trying to keep those children meeting their developmental milestones in a detention environment. It would be absolutely impossible.

CHAIR—If the FaHCSIA minister actually became the guardian of these children, how do you see that working—legally and logistically? How do you see that working? Would that need an amendment to the Migration Act, or new legislation in its own right?

Let's be realistic about this; no matter which party is in government, both the FaHCSIA minister and the immigration minister sit in the same cabinet, essentially. Is one likely to rebut the other? Let's be realistic about this: is one likely to say to the other person, 'Your treatment of this child in this particular case actually needs to be reviewed'? Is that not better placed with, say, an ombudsman or somebody external?

Mr Manne—Our position on this is that no minister should be responsible, that the fundamental problem that we continue to confront is the one that you have alluded to; that any minister of government—sitting in cabinet or otherwise, whether it be the FaHCSIA minister or a special new ministerial portfolio—is not sufficiently independent from the whole of government and government policy.

The best example I can give you—and once again I want to come back to it—is the extraordinary disconnect that we have between policy on paper and practice at the moment. Again, I want to refer to the Department of Immigration and Citizenship's submission to this inquiry. They state:

... children are only detained as a last resort ...

They refer to the detention values—the policy that was announced over two years ago—that detention is a last resort, but then that there are 'occasions' where children may be detained in other areas.

This is simply untrue; the fact is that the opposite is the case. The fact is that hundreds of children—it was over 1,000 recently—are detained mandatorily, indefinitely and often for long-term periods around Australia in complete conflict with the announced policy. Whether that situation would change by having another minister with oversight of the situation is very questionable, I think. The real issue here is that it is not occasionally that children are detained at the moment; it is done by default, it is done routinely and for the duration of processing in complete conflict, really, with the policy. I do not see that being remedied by a different minister dealing with the matter. It needs to be someone who is independent.

CHAIR—Do you think it should be the children's commissioner?

Mr Manne—The way that it has been designed in the bill certainly has significant merit. I should preface that by saying that I do not sit here professing to have specific expertise in precisely the best mechanism. On the face of it, I can say that it appears to meet the critical principles and objectives that are necessary to remedy this really serious flaw that we have.

CHAIR—The other option is to leave the current situation and the children's commissioner becomes the person who children can appeal to or can make a complaint to or children can get them to advocate on their behalf.

Mr Manne—There is a problem and we continue to see it. The former, coalition government started the process of, if you like, liberalisation of the policy of indefinite detention of children and there were some reforms on that front. They were semi-implemented. Then we got a new government, a different government, that came up with, on paper, advancement on that, and we do not have implementation of it. It seems to me that what we see with successive governments is failure to actually implement what ought to be

implemented—what has been promised and what is clearly needed, and that is, for example, in this area, to not detain children. It should be only a measure of last resort and not a default.

Senator HANSON-YOUNG—In that instance, are you arguing that the mandatory detention element in the Migration Act that dictates that children have to be detained needs to be amended?

Mr Manne—There is no doubt. We have argued very strenuously and publicly for some time that what needs to happen is an amendment to the Migration Act which ensures, in a legally enforceable way, the abolition of indefinite detention of children. We do not have that at the moment. We have a principal in the Migration Act which says that children should only be detained as a measure of last resort, but it is not enforceable in the ordinary way. For example, a child who is detained for a prolonged period, or indefinitely, could go to court and say that the statutory right has been breached. It is not as clear as that at the moment. Clearly, there is a case on foot before the High Court, but the argument is far more complex. At the moment, the fact is that the minister for immigration is the person who has the personal call in this country as to whether and for how long a child is detained in this country. There is no legally enforceable right under the Migration Act or otherwise which can compel the government to release a child from incarceration.

Ms Gauthier—Just to quickly go back to your point, Senator, as to whether or not it would be enough to have a children's commissioner able to review the decisions of the guardian, if it remained with the immigration minister, the person who has guardianship needs to be a person who can make the first-instance decision in the best interests of the child. Regarding a review or an appeal, it is not an enforceable decision by the children's commissioner when a child appeals; the decision is still left up to the minister for immigration. We have seen—

CHAIR—Unless you have an act made it an enforceable decision.

Ms Gauthier—Yes. It would be great if the children's commissioner had enforceable powers. But, if they do not, we do not think it will go far enough to protect children.

Mr Manne—The evidence is in, in a sense. We can talk all we want, but the evidence is in. We have a policy on paper that has promised something different for 2½ years. We saw this when we had the previous, coalition government: they essentially promised something different and it was not really implemented. History must be a guide here. What is clear is that we need a fundamental change, and I think enforceability is critical.

Senator BARNETT—I have two questions. Most of the issues have been covered, and thanks for that. You have referred to the Department of Immigration and Citizenship submission. I just want your response to point 8, which says:

Both the Ombudsman and the AHRC can investigate complaints made by individuals in relation to, respectively, administrative actions of Australian Government officials, and breaches of human rights.

What do you say to that?

Mr Manne—That is correct, but what they are really saying is that it is adequate. The question is not whether they can. The question is whether it is adequate. The central contention here by the department of immigration is that to have a child commissioner would be an unnecessary layer of oversight. What is clear is that the functions, the powers and the performance, if you like, of those current bodies is inadequate. Unless—

Senator BARNETT—So the government and the commission are not doing their jobs.

Mr Manne—No, I am not saying that they are not doing their jobs. I am saying that the powers and functions that they have are inadequate. That is what I am saying. When I talk about performance, I am talking about performance within the powers and functions that they have.

Perhaps I could raise the question again: does anyone seriously think that it is adequate that the first review of the child's detention does not take place for six months and when the review happens there is no public accountability on what was actually recommended and what was actually done.

Senator BARNETT—The government would say that there is a failsafe there. You have got the Human Rights Commission and you have the government, which reviews these matters from time to time and would act in the best interests of the child. I am being a devil's advocate. What do you say to that?

Mr Manne—Indeed, no doubt you will ask the department for more detail about it when they appear. The fact remains that there are many cases and situations where both bodies do not have to look at a matter, for

example, for six months. And there are many situations where they are just not properly resourced, for example; it is not a central task and it is not their primary focus. As the Human Rights Commission itself says, it is part of what they do but they are not fully and properly resourced to investigate all of the matters that—

Senator BARNETT—I have not heard that argument with regard to the Human Rights Commission. In fact I have heard the opposite arguments about their resources. But, nevertheless, that is interesting to get your perspective on it.

Mr Manne—Perhaps you might ask them whether they believe that they are fully and properly resourced to investigate all complaints—

Senator BARNETT—I have never heard a government agency say, ‘We have too much resources.’ They usually say they do not have enough.

Mr Manne—and serious matters involving children, which can arise. But you might also ask the question: at the moment, given the absence of a proper guardian, are children well placed to actually bring complaints?

Ms Gauthier—In relation to DIAC’s submission, they have argued in the past many times that their functions were being carried out adequately and appropriately and that there was no need for any additional oversight. We have heard this from them many times before. They said that when they deported a physically and mentally ill Australian citizen overseas.

Senator BARNETT—Noted.

Ms Gauthier—They have said that many times. How many times are we going to listen to them when they say that they do not need any additional oversight? In the 2004 inquiry into children in immigration detention, they said that the conditions were fine in Woomera, Curtin and Baxter and there was no need for oversight.

Senator BARNETT—Point 23 of their submission states:

Neither the Commissioner for Children and Young People Bill nor its explanatory memorandum outline whether there would be arrangements in place to allow the guardianship to be delegated.

What do you say to that? Is it accurate?

Mr Manne—Are you asking whether it is a statement of fact, whether it is true or not or whether there ought to be—

Senator BARNETT—I am asking your opinion as to whether that statement is accurate.

Mr Manne—It does not appear clear to me that there is a fully developed mechanism for delegation. But presumably that would come. It would be developed in regulations. That is the sort of matter that would be clearly developed. Obviously a child—

Senator BARNETT—It is in the context of their point 23, which you have in front of you, in terms of how the commissioner could have the capacity to provide day to day care as required of a guardian.

Mr Manne—The minister for immigration is currently the guardian. He also currently has the personal call on thousands of request for humanitarian stays if someone fails in their asylum claim or some other claim. Clearly that is a job description problem if they personally have to deal with every child’s concern on a daily basis. So clearly there needs to be a delegation mechanism.

Senator BARNETT—Are you saying that it would be sorted out in regulations?

Mr Manne—In some way. Regulations would seem to be the sensible way of doing it—it is the ordinary way one would approach it.

CHAIR—We do not have any other questions, so I thank you both very much for your submission and for making yourselves available today for our inquiry.

Ms Gauthier—I would like to make one final point on the department of immigration’s submission and their position that they do not need additional oversight. As I was trying to say before, this position from the department has been stated many times in the past. They have said they do not need additional oversight and when the evidence has come out we have seen that there has been a failure in a range of ways in which they have treated people in the immigration detention system and in the immigration system as a whole. I would also have to ask the department whether, in all their advisory panels, they have people who are specifically child welfare experts as part of their advisory system. They are saying they do not want expert advice on hand to assist them in treating children in the immigration system. Are they really saying that children do not need to be treated differently in any way.

CHAIR—So on CISSR, which is the minister's peak advisory committee, you have a woman who is a psychologist.

Ms Gauthier—Yes.

CHAIR—But you are saying there is no-one with specific child welfare expertise?

Ms Gauthier—Child welfare expertise and people who are there specifically for the issue. There is Dr Louise Newman, who has expertise in the area of child psychiatry, but she is not there specifically for child welfare issues. She can provide advice certainly on child mental health issues but there is a whole range of other issues which need to be addressed and the department is not being provided that advice.

CHAIR—That is a good point.

Mr Manne—And the department, in implementation, is the custodian of our international obligations in relation to the Convention on the Rights of the Child and in relation to the stated policy on the new directions in detention and detention values which the government still says is its policy. But it is not a child welfare agency and has no professed expertise in these matters. The other thing is that CISSR is the advisory body to the minister but does the department always check in relation to the areas where it does not have professed expertise with those who do?

Senator HANSON-YOUNG—Or do they listen.

Mr Manne—That is a question which may well be of great interest to many people.

Ms Gauthier—In their submission they say that they are 'exploring alternative ways in which the Immigration (Guardianship of Children) Act could better meet the objective of providing for the care and welfare of unaccompanied minors'. I would suggest that that act was passed in 1946, that maybe they have had enough time to explore alternative areas. Maybe it is time to take it out of their hands.

CHAIR—Thank you both very much.

Proceedings suspended from 11.03 am to 11.16 am

BRANSON, Ms Catherine, President and Human Rights Commissioner, Australian Human Rights Commission

Evidence was taken via teleconference—

CHAIR—Good morning. Welcome to our public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010. I have a spiel here that reminds people that officers of a department of the Commonwealth or a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to the minister. Can you provide us with some opening comments and then we will go to questions?

Mr Branson—The Australian Human Rights Commission has, for a considerable time, advocated for the establishment of a statutory office of a Commonwealth commissioner for children and young people. The commission is pleased by the introduction of the Commonwealth Commissioner for Children and Young People Bill 2010 which would, if passed, establish that office. Over the past few years there have been widespread calls by civil society organisations working with children and young people for the establishment of such an office, which we suggest demonstrates the growing recognition of the need for a coordinated approach to children's rights in Australia.

As a signatory to the Convention on the Rights of the Child, Australia has specific obligations to respect, protect and fulfil the rights of children. To help it comply with those obligations, the United Nations Committee on the Rights of the Child has encouraged each state party to establish an office of a children's commissioner and has consistently expressed concern at Australia's failure to do so.

Many, perhaps most, children in Australia are able to enjoy their rights; however, the rights of some children are vulnerable. These include children experiencing homelessness, children experiencing violence, bullying or harassment, and children who live with a disability, including those living with mental illness. There are also particular groups of children whose rights are at risk, including Aboriginal and Torres Strait Islander children, children in out-of-home care, children in detention—particularly those in immigration detention—and children living in rural and remote areas of Australia. The right of children to participate in decisions affecting them is recognised both internationally and in Australia. Children's views should be heard on issues that affect their lives and these opinions should be respected by those involved in the official decision making processes.

A Commissioner for Children and Young People could facilitate this participation. However, there may be times when children are not able or not invited to participate directly in decision-making processes. At these times it is critical that there is someone with a mandate to speak on behalf of children and to represent their interests to government and policymakers. A Commissioner for Children and Young People would operate as the national advocate for children's rights.

A Commonwealth Commissioner for Children and Young People should be given the following functions, we suggest: to monitor, investigate and report on the implementation of children's rights under the United Nations Convention on the Rights of the Child; to promote respect for the views of children and ensure that their opinions are expressed and heard; to support children involved in court proceedings and intervene in relevant matters before courts; and to promote public understanding of children's rights among government, government agencies and the general public.

The commission believes that it is essential that a Commonwealth Commissioner for Children and Young People operate under a human rights framework. A human rights framework would ensure focus on the rights of all children. It would consider children to be rights holders rather than merely service recipients. For each right there is a corresponding obligation on the part of government, service providers and individuals to respect, promote, and protect and fulfil that right. A rights based approach also relies heavily on the active and meaningful participation of children. Finally, a rights based framework would improve the accountability of governments and institutions through the scrutiny of laws and policies and support positive steps for reform should they be necessary.

The commission has two primary concerns with the bill. The first concerns the guardianship of unaccompanied minors in immigration detention. The commission has repeatedly recommended that an independent guardian be appointed for unaccompanied minors in immigration detention. However, the commission is not convinced that this role should be taken on by a Commonwealth Commissioner for Children and Young People. We favour guardianship responsibilities being undertaken by people with

appropriate expertise who are located as close as practicable to places of detention. A Commonwealth commissioner might play a coordination role but, we suggest, should not be directly responsible for the guardianship of individual children.

Secondly, that the commission has concerns about the stipulation in the current bill that the Commonwealth commissioner prepare Australia's national report to the United Nations Committee on the Rights of the Child. In the view of the commission, this has the potential to compromise the independence of the commissioner as well as their capacity to monitor the implementation of children's rights and to advocate for change. The Commonwealth commissioner should be able to prepare an independent report to the committee should he or she wished to do so. I thank the committee again for this opportunity to appear before it.

CHAIR—Thanks very much, Ms Branson. Your first recommendation is that a statutory office of a Commonwealth Commissioner for Children and Young People be established. Do you see that as being part of the Australian Human Rights Commission?

Ms Branson—The Australian Human Rights Commission has similar functions and powers to those that are envisaged for a Commonwealth Commissioner for Children and Young People, but we do not have a strong view on whether the Commonwealth commissioner should be placed within the Australian Human Rights Commission. What we see as most important is that the office is established, that it has a rights based focus, and that it coordinates effectively with state and territory children's commissioners. Of course we recognise that it could easily fit within the Australian Human Rights Commission and we could provide a suitable home for that reason for it. But whether or not the commissioner forms part of the Australian Human Rights Commission, it is likely, we think, to prove both efficient and effective for the commissioner to receive policy and corporate support advice from the Australian Human Rights Commission. So, in short, we agree that it could be within the Australian Human Rights Commission but the most important thing is not where it is placed but that it be created and what that position is empowered to do.

CHAIR—Children's commissioners around the country are not part of the state and territory discrimination commissions are they?

Ms Branson—They are not.

CHAIR—They are statutory authorities. Can I go to the complex discussion that is evolving in this about children in detention, particularly children who are seeking refugee status, either as unaccompanied minors or with parents. Do you have a view about the role this commissioner would play in this? Some submissions are suggesting that this commissioner should become the guardian. Quite a lot of submissions are suggesting that the immigration minister should no longer be the guardian, because there is a conflict of interest there, and that that role should be handed perhaps to the Minister for FaHCSIA. Can you provide some commentary for us about what the commission's view on this might be?

Ms Branson—For many years the Australian Human Rights Commission has argued that there is a conflict of interest in the minister for immigration being the guardian of unaccompanied children in detention while at the same time the minister is responsible for their detention and is the ultimate decision maker on the applications for asylum in Australia. This conflict of interest is not removed by delegation of guardianship responsibilities to officers from the minister's department. In these circumstances, the minister cannot advocate for the best interests of the children for whom he or she is guardian. Accordingly, we have long argued—and we do so today—that an independent and suitably qualified specialist should be appointed as the guardian of every unaccompanied child in immigration detention. We do not have a position on exactly who should take on this responsibility, but it is imperative that it be a person with specific expertise who is located, as I have said, as close as practicable to the facilities in which the child is detained. Consideration should be given, we suggest, to entering into arrangements with state and territory child protection agencies and the organisations who undertake guardianship responsibilities on their behalf. We do see the Commonwealth Commissioner for Children and Young People as someone who might play a coordinating role, but we do not argue that they should themselves be the guardian.

Senator BARNETT—The chair has asked some important questions already. I want to ask you, Ms Branson, about the role of the state and territory commissioners. I assume you believe they play an important role. I would like your confirmation of that. I also want to ask about the issue of duplication and red tape with having a further commissioner at the federal level and how that can be best dealt with from your perspective.

Ms Branson—I do agree that the state children's commissioners do play a valuable role. Of course, it is not the same role in every jurisdiction. Their particular statutes govern what they do, and they fill a range of

functions. In my capacity as the Human Rights Commissioner, I attend their meetings when I can, and we find that we have many interests in common. I do not believe that there would be unnecessary overlap between the roles of the proposed Commissioner for Children and Young People at the national level and the respective state commissioners. Indeed, I do not believe that they think so either, and I have had the benefit of reading their submission on this bill.

Senator BARNETT—Do you have any feedback to the DIAC submission? They have made a number of comments in their submission about the role of children in immigration detention centres, and in particular they have said that the Ombudsman and the Human Rights Commission can investigate complaints made by individuals with respect to administrative actions of Australian government officials and breaches of human rights. Do you agree with that, and do you think you are responding adequately or do you feel that more is necessary for you to respond adequately to meet those objectives set out in the DIAC submission?

Ms Branson—Both the Australian Human Rights Commission and the Ombudsman have legitimate concerns about the rights of children generally and in immigration detention. At the commission we can entertain complaints from children who are held in immigration detention but we do not believe that what we are able to do, with the resources we have, is adequate for all of the things that we feel can be done by a specialist and appropriately resourced Commonwealth commissioner for children and young people in this area. You would be aware that the commission has in fact done quite significant work around the rights of children including children in detention. You would be aware of the *A last resort* report and the commission has also done work around children involved in legal proceedings but, without a commissioner with a special focus solely on children and with resources that are dedicated to that purpose, the range of activities which I have outlined in my opening statement and set out in our submission cannot be done to the extent that I think children in Australia deserve to have them done.

Senator BARNETT—Thank you, Ms Branson.

Senator HANSON-YOUNG—Good morning, Ms Branson. I would like to tease out a little bit why you think in particular that we actually need a Commonwealth children and young people commissioner. We have heard from advocates for children's rights about the need for a specific voice for children and for independent oversight. But, from the perspective of the Human Rights Commission, surely these are things that you already consider and you are already reporting on and advocating to government over. Why do you believe we need a specific commissioner for children and young people?

Ms Branson—I think the first thing is that we all know that our children are our future and that they are also the vulnerable group in our society. They do not vote. Their capacity to advocate for themselves grows over time but it is very slight particularly for younger children. They are vulnerable and are deserving of protection. When we think about that we then reflect on the fact that we have the convention on the elimination of discrimination against women and we have supported it in Australia by the appointment of a sex discrimination commissioner. We have ratified the convention on the elimination of racial discrimination and we have strengthened our position in Australia by having a race discrimination commissioner. I can say the same across the board. We have got the disability area and our concern for social justice for the Aboriginal and Torres Strait Islander peoples. It is for that reason rather striking that, despite the special needs of children and their particular vulnerability and their special importance to our future, it is the one area where we do not have a commissioner dedicated exclusively to protecting their rights and advocating on their behalf. This commission would very much like to be able to do more in the area, and I believe we have done very important work in the area. It is very important that we go out to listen to children to establish forums in which their views can be heard to make sure that their voices are heard where government policy is formulated and where decisions are being made and to assure that their rights are respected and that they are active participants in decisions about their future. It is something that we could not at the moment endeavour to do at the level which I believe Australian children deserve.

Senator HANSON-YOUNG—In order to be able to fulfil those needs, you would just not be able to have a commissioner incorporated? So you would not be able to just incorporate that role into the work that your commission is already doing? You are saying there needs to be specific value put on that, is that right?

Ms Branson—Were a commissioner appointed as part of the Australian Human Rights Commission and were that appointment accompanied by funding to support the work of the commissioner, this commission could most certainly do it. What we do not have now is a capacity to stretch our existing resources to provide this area with the level of attention I think it deserves while maintaining at an appropriate level our other statutory obligations.

Senator HANSON-YOUNG—Would you be able to outline for us specific breaches of the Convention on the Rights of the Child that you believe currently exist in Australia—if any?

Ms Branson—I think one of the ones that are of concern is the right of children to be heard and participate in the decision making affecting them. There is no structural process in Australia whereby there is an officer or some other person who has a responsibility to make sure that they are alert to what children and young people are thinking on critical issues and then advocating for them in a way that gets their voices heard. Another critical area, which I think this committee will not need me to draw to its attention, is the rights of children in immigration detention. We now have, I think, roughly a thousand children detained in our immigration facilities. We are very pleased with the announcement that the minister will move to remove large numbers of those from detention facilities, but this is a serious breach of the rights of children. The convention tells us that children should only be held in detention as a last resort and then for the shortest possible time. I think juvenile detention facilities around Australia are also an issue of significant concern. We have recently seen press reports about ACT facilities, and South Australian facilities have been a concern for a very considerable amount of time. We and, as I know, many others have very serious concerns about the rights of Indigenous children in this country, in particular their right to live safely and free from violence and their right to education and to be able to access acceptable health facilities. We are concerned broadly with the rights of children in remote and rural Australia and particularly with their economic, social and cultural rights generally.

Senator HANSON-YOUNG—In relation to the issues surrounding asylum seeker and refugee children, the chair has outlined that there are differing views about who should be the legal guardian. I want to hear specifically from you on this: do you believe that the ‘conflict of interest’ that exists is a perceived or an actual conflict of interest in the current context where the guardian is also the minister responsible for the determination of the child’s detention and, in the case of offshore processing, of even whether they can apply for a protection visa?

Ms Branson—I believe it is an actual conflict with very real dimensions.

Senator HANSON-YOUNG—Are you aware that the immigration department’s submission to this inquiry argues that they believe it is simply a perceived conflict of interest? Indeed, they argue in their submission—and we are about to hear from them—that there is no need for any independent oversight, that everything is able to be managed in house. What would be your response to that?

Ms Branson—Our firm belief is that there is an actual conflict of interest and that it is not managed by delegating the minister’s powers to officers who are ultimately answerable, through the head of the department, to the minister. There is a very large number of children currently in immigration detention and we believe that they are all entitled to a guardian who can individually consider their particular circumstances. We cannot forget the unaccompanied minors. I believe that, because of the particular way the act is drafted, some of them are actually in Australia without guardians at all.

Senator HANSON-YOUNG—A number of the other submissions to this inquiry have argued that in the objects of the bill we should include specific reference to those groups of children who are more at risk or of a higher particular vulnerability such as Indigenous children, children with disabilities, refugee and asylum seeker children and children who are under state care. Would you be supportive of a specific mention in the objects of the bill of the different groups of vulnerability that children may come under?

Ms Branson—Before I answer that question could I just go back and expand slightly on my previous answer. In referring to unaccompanied minors in detention, I was of course referring to young Indonesian youths who have come to Australia as crew on boats carrying those seeking asylum. Also, there are children left as orphans following the tragic incident of the boat breaking up on the coast of Christmas Island. Some of those are the ones that I mentioned who are without a guardian at all. So the whole issue of guardianship for children in detention in Australia is a very critical one.

Coming to your later question, we think it would be valuable to articulate in the bill particular groups of children in Australia who have a particular need for a commissioner who can listen to them and advocate on their behalf. However, it would be important that nothing were done that limited the capacity of the commissioner to respond to new and developing situations affecting children in Australia. And it is very critical for us to remember that it is all children in Australia, not just those from particular vulnerable groups, who have the right to be heard and are entitled to be treated with respect and who, for that reason, would benefit from the appointment of a commissioner for children and young people.

CHAIR—Thank you for your evidence today and for the submission from the Australian Human Rights Commission.

[11.42 am]

BOERSIG, Dr John, Assistant Secretary, Human Rights Branch, Attorney-General's Department

McKENZIE, Ms Cate, Group Manager, Women and Children's Policy Group, Department of Families, Housing, Community Services and Indigenous Affairs

WILSON, Ms Karen, Branch Manager, Children's Policy, Department of Families, Housing, Community Services and Indigenous Affairs

POPE, Ms Kate, Principal Advisor (FAS), Citizenship, Settlement and Multicultural Affairs, Department of Immigration and Citizenship

SOUTHERN, Dr Wendy, Deputy Secretary, Policy and Program Management Group, Department of Immigration and Citizenship

CHAIR—Welcome to the hearing. I remind you that the Senate has resolved that an officer of a department of the Commonwealth should not be asked to give opinions on matters of policy and shall be given a reasonable opportunity to refer questions asked of the officer to superior officers or the minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

We only have a submission from the Department of Immigration and Citizenship. I invite you all to make opening statements. Does the Department of Immigration and Citizenship have an opening statement?

Dr Southern—We do not have an opening statement.

CHAIR—Does FaHCSIA have an opening statement?

Ms McKenzie—No, we do not.

CHAIR—Does the Attorney-General's Department have an opening statement.

Dr Boersig—No, we do not.

Senator HANSON-YOUNG—I will start with the Department of Immigration and Citizenship. We are going through an inquiry whose purpose is to tweak the proposal and come up with amendments and so on. It seems from your submission that your overall objection to the idea of the establishment of a Commonwealth children's and young person's commissioner is that you believe that there does not need to be that independent oversight. Could you explain why you think that is the case and provide evidence to support it?

Dr Southern—Thank you for the question. As we have set out in our submission to you we have explained that we believe there are oversight bodies which currently exist within the Commonwealth which can undertake the functions that are described in relation to the children's commissioner. We were very interested to hear the Human Rights Commission discussion earlier in relation to the role that they see it could play and indeed that it could be incorporated as part of their functions. We absolutely sign up to the need for scrutiny of these matters but believe that the existing bodies are able to conduct the functions that you describe as oversight.

Senator HANSON-YOUNG—What is your response to the criticism in the case of the review of the detention of children that the Ombudsman can conduct a review after six months. There is no direct impetus on the minister or even the department to change anything based on that direct advice from the Ombudsman. Then any advice or review of that position does not need to be made public until that child has been in detention for over two years. It has been argued and put to us very strongly in this committee that that is totally inadequate as a function of transparency and oversight. If that is the oversight that you refer to—and it is on page 2—it has been argued that that is inadequate.

Dr Southern—Apart from the reporting that we do to the Ombudsman on individuals who have been in detention for periods of time, the Ombudsman has the capacity to visit detention centres and undertake own motion reviews which he does on a regular basis. I think it is incorrect to say that there is no impetus for the minister or the department to respond to the recommendations that the Ombudsman makes in responding to our six-month review.

Senator HANSON-YOUNG—'Act on' were my words.

Dr Southern—Sorry, to act on them in relation to recommendations he makes on our six-monthly review reports and subsequent reports. The department takes those recommendations very seriously and builds them

into the case management of clients who are in detention for long periods of time. The more public reporting that occurs after the two-year reports clearly rolls those recommendations into it and indicates the action that the department has taken. We would hope, as we are reporting to the Ombudsman and as he is making recommendations back to us on those six-monthly reports, that we are gradually working through that caseload.

Senator HANSON-YOUNG—Do you think that in the context of our obligations—and perhaps the Attorney-General’s Department would like to respond to this—that it is appropriate that a child can be in immigration detention for six months before there is a required independent oversight or review of that situation?

Dr Southern—I will not go to the appropriateness, if you like, but rather—

Senator HANSON-YOUNG—The point is about whether it is appropriate or not. Your submission argues that there is already appropriate scrutiny and transparency. I want to know whether you believe that it is appropriate that a child can be detained for six months before there is any independent oversight or review of that situation for that child.

Dr Southern—The review that occurs after a child or any other detainee has been in detention for six months is a report from us to the Ombudsman. In the period before that we have processes which involve the individual case management of all clients.

Senator HANSON-YOUNG—Internally?

Dr Southern—Internally and there is a high level of scrutiny within the department of how the cases are being managed. Yes, the external scrutiny takes place at six months for a formal report but as I said the Ombudsman has the capacity at any time to visit detention centres—those visits happen regularly—and to report on own motion inquiries, so the capacity is there for the Ombudsman to do that at any time.

Senator HANSON-YOUNG—But the minister or the department are not required, are they, to act on the direct recommendations of the Ombudsman’s reports?

Dr Southern—I do not believe it is a requirement.

Senator HANSON-YOUNG—No, it is not. So they can report, you can respond, but if the recommendation is that a child should not be in detention, it is simply a toing and froing. There is no legal requirement for the department or the minister to act on the advice of the Ombudsman.

Dr Southern—Correct.

Senator HANSON-YOUNG—From the perspective of the Attorney-General’s Department, do you believe that, under the obligations Australia has as a signatory to the UN Convention on the Rights of the Child, six months can go by, where a child is in detention for six months before any required review into that child’s detention takes place? Is that a breach of our obligations under the Convention on the Rights of the Child?

Dr Boersig—The convention is implemented throughout Australia in a range of ways. In that context, I do not think I can give you a specific answer at this stage to your question.

Senator HANSON-YOUNG—Do you believe that it is appropriate, as the department of immigration argues, that there is an appropriate level of scrutiny as required under the UN convention?

Dr Boersig—I would not say anything different from what has been provided to you by that department.

Senator HANSON-YOUNG—So you cannot give a judgment as to whether or not that is appropriate?

Dr Boersig—I would not provide that opinion at this stage, no.

Senator HANSON-YOUNG—Going back to your official submission to this inquiry, you put forward an argument that there is appropriate scrutiny, that there is appropriate transparency, that no extra oversight needs to happen and that detention of children is a last resort. Could you please give me an example of where the detention of children has not been the first resort?

Dr Southern—As you know, the government’s policy in relation to—

Senator HANSON-YOUNG—I am not asking about policy; I am asking about specific examples of where that statement, as written in your submission, has been implemented.

Dr Southern—No, I cannot think of a specific example, but that is not to say that there are not any. Rather, the policy around detention, as you know, is that people are detained while identity, security and health matters

are being resolved. We certainly attempt to make that the shortest possible time, but those processes do take time.

Senator HANSON-YOUNG—Do you believe that the policy, as detailed in your submission, of detention as a last resort, is the current situation?

Dr Southern—It is the current policy.

Senator HANSON-YOUNG—Is it the current practice?

Dr Southern—Yes, under the policy.

Senator HANSON-YOUNG—No. There is a very big difference between a piece of policy and what actually happens. What we have had submitted to us in this inquiry is that this is simply policy on a bit of paper, that it is not what happens on a day-to-day occurrence when a child arrives and is taken into immigration detention on Christmas Island. Where is an example? You have just said you cannot think of an example where detention has not been the first resort.

Dr Southern—No.

Senator HANSON-YOUNG—Therefore, detention as the last resort may be policy but it is not actually being put into practice, is it?

Dr Southern—All of the department's guidelines are prosecuted around the policy that it is a last resort, but as I said earlier, families and individuals, including children, are detained while we work through the identity, health and security matters.

Senator HANSON-YOUNG—Do you believe, then, that there is a breach of the policy or that the policy is mismatched to the practice—the need to process people's claims in this way?

CHAIR—I am not sure, Senator Hanson-Young, that the officers are the right people to answer questions about the policy and whether it has been breached.

Senator HANSON-YOUNG—I keep asking what the practice is, and they keep coming back to me with policy.

Dr Southern—The practice reflects the policy, Senator.

Senator HANSON-YOUNG—But it does not, does it? Because you cannot give me an example where the practice has reflected the policy.

Dr Southern—You asked me for a specific example earlier and, as I said, I cannot give you one.

Senator HANSON-YOUNG—No, because that does not exist.

Dr Southern—I am quite happy to take that on notice.

Senator HANSON-YOUNG—If you could take that on notice, that would be very interesting, because I have not seen it in practice.

Dr Southern—Okay.

Senator HANSON-YOUNG—In your submission you outline the argument that there are already adequate measures and checks in place to cover the welfare, rights and protection of children in immigration detention. How can you argue that there is appropriate oversight when we have seen example after example of situations where people's rights have been breached, where they have been unfairly detained and where taxpayers' dollars have been spent on compensation? Where is the evidence that there is appropriate oversight? And give me an example of where appropriate oversight has actually worked.

Dr Southern—Again, Senator, you are talking about examples whose specifics I am not aware of. If we had them here, perhaps we could discuss them further. Yes, there have been cases in the past where—usually as a result of court action or complaints to the Human Rights Commission—compensation has been paid. But, in my view, that is part of scrutiny happening.

Senator HANSON-YOUNG—So we have to wait till we do the wrong thing?

Dr Southern—No. There is a continuum, if you like, and occasionally it does happen after the event and it is as a result of scrutiny that comes in from the Ombudsman, the Human Rights Commission or, in some cases, the courts. What we are saying is that there are a number of mechanisms in place, both external scrutiny and processes that exist within the department, that are directed towards ensuring that cases are dealt with appropriately and that all efforts are made to resolve the cases, in an immigration sense, as soon as possible.

Yes, there could be additional scrutiny from a children's commissioner, or possibly not—and, should such a commission be established, obviously the department would work with such a commissioner. We were simply making the point that there are mechanisms to scrutinise the actions of the department at the moment, and they operate effectively.

CHAIR—Senator Barnett, have you got any questions?

Senator BARNETT—Yes, I do.

CHAIR—Senator Hanson-Young, I am just going to go to Senator Barnett, because I think he has to go in about 10 minutes.

Senator HANSON-YOUNG—Sure, but I have not finished.

CHAIR—No, I understand that.

Senator BARNETT—I think it is good if we interact a bit here, because I just want to get some clarity from the other departments as well. We have DIAC's submission; thank you for that. Do DIAC support the bill?

Ms McKenzie—At the moment, our major engagement in the consideration of a national children's commissioner is through the National Framework for Protecting Australia's Children. That national framework was signed off by the Commonwealth and the states and territories. There was an implementation plan agreed for the first three years. One of the priority projects that were listed in that implementation plan was the consideration of a national commissioner for children, and that consideration is ongoing.

Senator BARNETT—And is that a COAG type arrangement—federal and state?

Ms McKenzie—The National Framework for Protecting Australia's Children was agreed by COAG.

Senator BARNETT—So does your federal minister have a position on this matter as yet? Have you been instructed accordingly?

Ms McKenzie—We have provided advice to the minister. We have iterated around that advice. But my understanding is that, at this moment, we have not been informed of the minister's decision.

Senator BARNETT—As to whether you support the bill or otherwise?

Ms McKenzie—Yes. We are interested in the outcome of this inquiry.

Senator BARNETT—I am just trying to get it so that I am in the picture here. So you have not received advice from the minister as to the support or otherwise for the bill? Right. Does the Attorney-General's Department have a view?

Dr Boersig—That is the same position.

Senator BARNETT—Is there anything going on in the A-G's department similar to FaHCSIA in regard to protecting the rights of children? Are there any SCAG arrangements happening that we do not know about?

Dr Boersig—No. We are working with FaHCSIA on the issue.

Senator BARNETT—Going back to FaHCSIA, is there a consultation process regarding this arrangement? And when do you expect the key decision makers to come back for a further view with respect to the merit or otherwise of such an appointment?

Ms McKenzie—As I have mentioned, there is an implementation plan around the national children's commissioner. This implementation plan goes for the first three years of the national framework. The first three years are up in September next year, so we would expect the issue to have been resolved over the period of those three years. In the implementation plan, one of the key milestones was that the Commonwealth bureaucracy would provide advice to government by the end of 2009. In actual fact we did not provide that advice until early 2010 and since then there has been consideration around this issue.

Senator BARNETT—Can you provide to the committee further and better particulars regarding this implementation plan and the views of the various stakeholders with respect to the merit of the appointment of a children's commissioner?

Ms McKenzie—I think you have already talked to a number of key people who are involved in the national framework. The national framework is a trilateral governance mechanism. It has the Commonwealth government and the state and territory governments, but it also has non-government representatives from the Coalition of Organisations Committed to the Safety and Wellbeing of Australia's Children. I think that about 20 or 30 of your submissions came from organisations that are involved with that coalition, and I know you

were talking to Families Australia yesterday and they act as the coordinator for that coalition. So I think you have a reasonable spread of views. In addition to that, we have spoken to the children's commissioners and guardians about some of the issues that they have raised in their submission in terms of duplication and the importance of getting clarity around these kinds of issues.

Senator BARNETT—That is the particular concern I have. Have you got an answer to that, in terms of avoiding duplication, red tape, extra cost and overlap in the roles of the federal and state and territory commissioners?

Ms McKenzie—I think that is very much an issue that needs to be addressed in the design of the detail of the model. We would argue that one of the key things to be sorted through is to understand exactly what the model is. In looking at the national children's commissioner, there are a range of different issues that can come up. One that I know was also raised with you yesterday was the question of whether it should be a rights based model or a public health and wellbeing based model.

Senator BARNETT—And what do you think?

Ms McKenzie—At this stage, the department does not have a view. Rather, we understand that you can look at various positions along the continuum from it being a rights based model right the way through to it being a public health and wellbeing based model. And you get different advantages and disadvantages out of the various models.

Senator BARNETT—Dr Boersig, did you have a view in addition to that or are you simply noting and acknowledging what has been said?

Dr Boersig—Acknowledging what has been said.

Senator BARNETT—Frankly, I am finding that very frustrating. Let me put it right upfront with you. I would like you to take on notice to talk to your minister about whether you are entitled to provide us with a view as to the issue of regulation, red tape and overlap. I would like to know your views on the best way to design such a model which would avoid all that. If we are going to proceed down this track, I want that to happen. I would like to ask each of the witnesses at the table to come back to this committee with your views on the preferred model so that we avoid duplication overlap. We are getting views from different people but frankly you are in the hot seat. You are here as witnesses. You have a whole department. You have talked to all your state and territory colleagues so you must have a view. I am asking you to take on notice to talk to your—that is very important.

Ms McKenzie—We will take that on notice.

Senator BARNETT—Thank you.

CHAIR—Ms McKenzie, can I clarify that you are saying that model is being discussed and designed as part of the implementation of the National Framework for Protecting Australia's Children?

Ms McKenzie—The framework covers a range of issues. It has 70 actions and is meant to be ongoing for 12 years. There were 11 priorities. One of the priorities was to look at the role of a national children's commissioner because it had been raised by stakeholders in the consultation leading up to the framework.

CHAIR—Are we asking you to give us something that would pre-empt work currently being done?

Ms McKenzie—I am happy to take it on notice to try to give you as much as we possibly can. It may well be just an analysis of the areas of duplication and possible ways through. Maybe that is as far as we can provide.

Senator BARNETT—If you could do that, that would be a lot better than what we have at the moment. We would like to look at the different options and models, and at your preferred way. If you cannot do that, just give us the options we can look at, and likewise with each of the witnesses at the table. That would be of usefulness to the committee in my view.

CHAIR—Given that the Human Rights Commission and a number of other advocates have for a number of years now put the view that there is an actual conflict of interest between the role of the minister for immigration in being the guardian of children as well as the determiner of the outcome of their situation—is that under review? Is that section of the Migration Act and the guardianship act under review?

Dr Southern—We are certainly discussing options with the minister. We recognise, as we stated in our submission, that there is a perceived conflict of interest in relation to his responsibilities under the Migration Act.

CHAIR—So there is an actual conflict of interest, it is not a perception?

Dr Southern—Our evidence in our submission was that it was a perceived conflict of interest. We recognise that this is a real issue and we are working through options with the minister.

CHAIR—Why do you think it is perceived rather than an actual? He does actually have a guardianship role and he is a determiner of their conditions. It is an actual conflict, is it not?

Ms Pope—This is an opinion within the rules—

CHAIR—I am asking you to give me your interpretation of his role under the acts.

Ms Pope—My view would be that it is an actual conflict of interest if it plays out as a challenge for him to make a decision under either of those pieces of legislation and they are in direct conflict. I am not aware of where he has been actually faced with that conflict, which is why we would describe it as ‘perceived’—in the sense that it could come to that—but I am not aware of a situation where there has been that direct conflict.

CHAIR—Why? Because there has not been a decision of the courts or it has not been tested?

Ms Pope—I am not aware of a time when he has had to make a decision or has been faced with a conflict under both pieces of legislation—in other words, seeing them in direct conflict and having to deal with that conflict.

CHAIR—But the fact that the possibility is there, is that not reason enough to disaggregate them both?

Ms Pope—That goes to the question of a perceived conflict of interest, which we have acknowledged. We have advised that we are working on ways to manage that.

CHAIR—Senator Hanson-Young, do you have just a couple more questions?

Senator HANSON-YOUNG—Yes, specifically on this area. So the reason that you believe a conflict of interest is perceived as opposed to actual is that it has never been challenged?

Ms Pope—No. What I said was that I am not aware of a point in time when the minister has had to directly face that conflict. That is what I am saying.

Senator HANSON-YOUNG—So, in the detention of a child for six months before anyone external is required to review their case, you do not believe there is any conflict of interest when the person who is meant to be looking out for their welfare is the same person who has allowed them to remain in detention because they are also the person who determines that that child stay there? In regard to the 450 unaccompanied minors that are currently in detention, you do not see that that is a conflict?

Ms Pope—I am not an expert on all of the details of this, Senator, but what I was thinking about was a case where the legislation requires the minister to make a decision under either of those acts that is in direct conflict. That is what I was referring to. I am sorry if what I said was misleading.

Senator HANSON-YOUNG—The policy says, as Dr Southern said earlier, that the detention of a child should be as a last resort. When we have an immigration minister who is detaining 450 unaccompanied minors but is also supposedly their guardian, surely he is carrying out just one part of his role. When it is not actually in line with the policy, who is advocating for those children that the policy be upheld—that detention is a last resort and not a first resort? Where is the advocacy from their guardian claiming that that policy has been breached?

Ms Pope—Senator, I do not think there is a lot of value in an argument over whether the conflict is perceived or actual. We have certainly acknowledged that there is a perceived conflict of interest and that we are working to resolve that. It has been acknowledged publicly and in our submission that that is an issue that needs to be resolved.

Senator HANSON-YOUNG—In acknowledging that this is a problem, what are the options that are on the table? If you do not want a Commonwealth children’s commissioner to be that guardian, what are the options? What advice are you giving? Who are you speaking to?

Ms Pope—One thing that I would like to clarify is that we are not saying we object to the appointment of a Commonwealth commissioner for children. That was not the intent of our submission. It was really to say that, if that were to happen, these are some of the things where there would be workability issues from our perspective. As you know, there is not a resolved Commonwealth view about a commissioner. We were not intending to make a statement about our support or otherwise for such a position in the submission we made. Rather, we wanted to say that the layers of oversight, as discussed earlier, are one issue, and we have outlined

two or three other issues that we would need to resolve if that legislation went ahead and such a position was created. So I am not seeking an argument over whether or not there ought to be a children's commissioner. In terms of potential solutions, we are looking at a range of possibilities and are in discussions with the minister about those. At the moment, I am not at liberty to discuss them.

Senator HANSON-YOUNG—Have you sought advice from child welfare experts as to where they believe the guardianship of these children should sit?

Ms Pope—We are not quite so advanced that we would be formally seeking that advice in a public sense, because we have not taken the discussion with the minister far enough yet to be in that position. But we have sought and taken some informal advice from practitioners in the field, yes.

Senator HANSON-YOUNG—How many people are in your advisory committees and councils? I know there are various levels—some that report to the minister, and some that report just to you and you decide whether to pass on the information. How many advisers do you formally have in place who have expertise in child welfare and protection?

Dr Southern—I do not have that detail to hand, but I am very happy to take that question on notice.

Senator HANSON-YOUNG—Could you take that on notice, please.

Dr Southern—Yes.

Senator HANSON-YOUNG—That would be very helpful. I want to clarify that, while your submission argues that the conflict of interest is simply a perceived conflict of interest, you are not wedded to that position.

Ms Pope—We agree that there is a perceptive conflict of interest that needs to be resolved. I do not feel in a position to debate actual versus perceived. If we solve perceived—

Senator HANSON-YOUNG—To you it does not matter. If it is perceived that is enough of a problem.

Ms Pope—If we resolve the perceived conflict of interest we will have resolved any actual conflict of interest, if it exists.

Senator HANSON-YOUNG—Okay.

CHAIR—We do not have any more questions for you. I thank you all for coming today and for making yourselves available. I thank all the witnesses who appeared yesterday and today.

Committee adjourned at 12.16 pm