

ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC.)



**SUBMISSION IN RESPONSE TO THE REPORT OF THE REVIEW OF THE
COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE ACT 2006 (WA)**

November 2014

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA ('ALSWA')

ALSWA is a community based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the Indigenous people of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

BACKGROUND

The Report of the Statutory Review of the *Commissioner for Children and Young People Act 2006* (WA) ('the Act') was tabled in Parliament on 20 August 2014. The Attorney General has allocated a three-month period for submissions to be provided in response to that Report.

ALSWA provided a submission to the Statutory Review of Act in February 2013. In that submission, ALSWA expressed strong support for the position of the Commissioner for Children and Young People ('the Commissioner') and for the Commissioner's independence from the Executive Arm of government. Other issues that were raised in the submission were:

1. That the Act should be amended to require government agencies to report regularly to the Commissioner in order to strengthen the Commissioner's monitoring function.
2. That the two key issues affecting Aboriginal children and young people—the overrepresentation of Aboriginal children and young people in the criminal justice system and the child protection system—should be the subject of special inquiries by the Commissioner pursuant to Part 5 of the Act.
3. That a permanent advisory committee on issues affecting Aboriginal children and young people should be established by the Commissioner.

SUBMISSION IN RESPONSE TO THE REPORT OF THE STATUTORY REVIEW OF THE ACT

The Report of the Statutory Review of the Act ('the Report') made a total of 16 recommendations with the majority of recommendations encompassing proposed amendments to the Act. This submission addresses those recommendations (for some recommendations no comment is made) and then discusses other issues concerning the Act and its operation in practice.

Recommendation 1

The Commissioner in consultation with the Under Treasurer, review the current Outcome Based Management Structure, including key performance indicators, to ensure they are appropriate and comprehensive.

ALSWA makes no comment in relation to this recommendation.

Recommendation 2

That section 9(2) of the Act be amended to clarify that the broad selection process applicable to the initial appointment of a Commissioner set out in subsections 7(2)(a) and (3) of the Act is not required to be complied with where an incumbent Commissioner is proposed to be reappointed.

ALSWA makes no comment in relation to this recommendation.

Recommendation 3

That section 14 of the Act be amended to give the Commissioner the power to appoint a person to act in the office of Commissioner for a period of less than 13 weeks in a year, to ensure that the position is appropriately filled during any short absences by the Commissioner.

ALSWA makes no comment in relation to this recommendation.

Recommendation 4

That consideration be given to amending Part 6 of the Act to provide that, in addition to annual reports and reports of special inquiries, it is only reports containing recommendations for change to any written law or procedure etc, or for the taking of other action that the Commissioner considers appropriate to safeguard and promote the wellbeing of children and young people (as referred to in section 46), that the Commissioner is required to provide in draft form to the Minister and table in Parliament.

Presently, under the Act, the Commissioner is required to provide draft reports to the Minister (Attorney General) and must include any comments made by the Minister in the final version of the report. Further, reports of the Commissioner are required to be tabled in Parliament. There is a degree of ambiguity in relation to the meaning of a 'report' for this purpose. Section 45 of the Act provides that a 'report' means an annual report; a report of a special inquiry; or a 'report on any inquiry, review or research conducted in the performance of the Commissioner's functions' or 'any other matter arising in the performance of those functions'. The Commissioner produces a wide range

of publications including issues papers, policy briefs, child-friendly publications for children, submissions, guidelines, reports and positions statements. In practice, the provisions under the Act have been interpreted as only requiring substantial reports and reports containing recommendations to be provided to the Minister and tabled in Parliament.¹ ALSWA agrees with the observation in the Report that if the Commissioner 'was required to refer all minor publications that could nevertheless constitute a 'report' to the Minister, it would potentially lead to inefficiencies in both the Commissioner's and Minister's offices, without any significant benefit to either in return'.² Accordingly, and in order to ensure that useful resources can be easily and quickly published on Commissioner's website, the ALSWA supports this recommendation.

Recommendation 5

That section 52(2) of the Act be amended to replace the word 'must' with 'may', to provide the Commissioner with a discretion as to the manner in which advisory committees are established.

The genesis of this recommendation is the lack of clarity in relation to the provisions under the Act concerning the establishment of advisory committees. Section 52(1) provides that subject to subsection (2), the Commissioner *may* establish advisory committee and reference groups. Section 52(2) provides that the Commissioner *must* establish advisory committees consisting of children and young people from a broad range of socio-economic and cultural backgrounds and age groups and that these committees should be established in regional areas and the metropolitan area. One interpretation is that these provisions mean that the Commissioner has discretion to establish an advisory committee but, if he or she elects to do so, the committee must be comprised of children and young people. The alternative interpretation (and the one adopted by the Commissioner) is that advisory committees of children and young people must be established but other advisory committees are discretionary.³

The Report observes that it 'is desirable that independent statutory office holders such as the Commissioner should have discretion over the manner in which they undertake consultation' and, therefore, recommends (as set out above) that the establishment of advisory committees comprised of children and young people should be discretionary.⁴ As a matter of principle, ALSWA agrees that the Commissioner should have discretion in regard to the establishment of advisory committees and reference groups.

ALSWA notes that the former Commissioner, Michelle Scott, appointed Ambassadors for children and young people in October 2012. These Ambassadors are well-known Western Australians who 'have a significant role in the community and commitment to supporting children and young people and their families'.⁵ Currently, there are four advisory committees of children and young people and the website states that advisory committees are made up of 'existing groups of children and young people'.

At a specific time, it may not be feasible or possible to establish a formal advisory committee of children and young people and ALSWA is confident that given the provisions of the Act,⁶ the

1 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 43.

2 Ibid 44.

3 Ibid 46.

4 Ibid 47.

5 <http://www.ccyp.wa.gov.au/content/Ambassadors-for-Children-and-Young-People.aspx>.

6 Section 4(c) provides that one of the principles under the Act is that the 'views of children and young people on all matters affecting them should be given serious consideration and taken into account'. Section 19(n) provides that one of the functions of the Commissioner is to 'consult with children and young people from a broad range of socio-economic backgrounds and age groups throughout Western Australia each year'. Section 20(e) provides that the Commissioner is to adopt work practices that 'ensure the Commissioner is accessible to children and young people' and 'encourage the participation of children and young people in decision-making by the Commissioner'.

Commissioner will continue to consult with children and young people and take their views into account. It is important to bear in mind that advisory committees are not the only mechanism for obtaining the views of children and young people and reliance on advisory committees alone may not necessarily result in a wide range of views being obtained.

In this regard, ALSWA welcomes the current consultation being undertaken with Aboriginal children. The Commissioner's website provides that consultations will be held throughout Western Australia including Kununurra, Fitzroy Crossing, Derby, Beagle Bay, Marble Bar, Newman, Kalgoorlie, Meekatharra, Albany, Esperance and Perth. An online survey is also being undertaken. ALSWA looks forward to considering the outcomes of this consultation process. It is also noted that the Commissioner has undertaken similar consultations with other groups of children and young people in the past (eg, children with disability).

As far as ALSWA is aware, the Commissioner has not established advisory committees or reference groups comprised of 'representatives of non-government agencies concerned with the rights, interests and wellbeing of children and young people'.⁷ The input from people who work with children and young people on a daily basis should not be underestimated. As recommended in its earlier submission for the review of the Act, and given the legislative expressed priority of Aboriginal children and young people, ALSWA strongly encourages the Commissioner to establish an advisory committee on issues affecting Aboriginal children and young people.⁸

ALSWA Recommendation 1

That the Commissioner should establish an advisory committee on issues affecting Aboriginal children and young people and this committee should be comprised of Aboriginal community representatives and representatives of non-government organisations that regularly work with Aboriginal children and young people.

Recommendation 6

While the review notes that opinions among some stakeholders are divided on this issue, on the basis of the submissions to the review, the operation of the Act to date and consistency with legislation in place in other jurisdictions, the review recommends that the age range within the Act remain unaltered.

ALSWA understands the basis for this recommendation given that the legal age of majority is 18 years and the Convention on the Rights of the Child (to which the Commissioner is legislatively required to consider) applies to persons under the age of 18 years. Having said that, it is highlighted that many issues considered by the Commissioner will also have relevance to young adults (eg, strategies in relation to excessive alcohol consumption by children and young people). As the report states, the definition of children and young people under the Act has never prevented the Commissioner from 'advocating for young adults where necessary'.⁹ ALSWA agrees that there is nothing to preclude the Commissioner from making observations in the course of undertaking his or her functions in relation to persons under the age of 18 years about matters that impact on young adults and the appropriateness of particular initiatives or proposals for young adults.

⁷ Section 52(3) of the Act provides that the 'membership of advisory committees should include representatives of non-government agencies concerned with the rights, interests and wellbeing of children and young people'.

⁸ See further discussion under Recommendation 7.

⁹ Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 51.

Recommendation 7

That the Act should not be amended to mandate the creation of Deputy Commissioners for Aboriginal and Torres Strait Islander children and young people, who should remain a priority of the Commissioner him or herself under the Act.

The Report explains that there has been an ongoing debate about whether there should be a Deputy Commissioner for Children and Young People with responsibility for issues in relation to Aboriginal children and young people. This option was originally recommended by the Gordon Inquiry; however, it was not adopted when the Act was enacted. The primary rationale for the establishment of a Deputy Commissioner for Aboriginal children and young people is the significant issues facing Aboriginal children and young people and their particular vulnerability. The opposing view is that issues concerning Aboriginal children should not be assigned to a Deputy Commissioner; instead they should remain the focus and responsibility of the Commissioner. When considering these arguments it is important to acknowledge that the Act provides that in performing the Commissioner's functions, the Commissioner must 'give priority to, and have special regard to, the interests and needs' of Aboriginal and Torres Strait Islander children and young people (as well as children and young people who are vulnerable or disadvantaged for any reason).¹⁰ The Report highlights that this provision 'elevates the needs and interests of these groups of children and young people to the highest level under the Act'.¹¹

The Report also notes that submissions received for the review of the Act expressed different views. The recommendation of ALSWA for a permanent advisory committee on issues affecting Aboriginal children and young people was expressly referred to and the Report observed that:

*One means of ensuring that the Commissioner remains in an ongoing position to advocate for and address the needs and interests of Aboriginal and Torres Strait Islander children would be through the formation of an advisory committee with representatives of non-government agencies concerned with the rights, interests and wellbeing of Aboriginal and Torres Strait Islander children and young people.*¹²

It is also explained that the Act does not prevent the Commissioner from appointing a Deputy administratively subject to the necessary funding being available. Overall, the Report concludes that the Act should not mandate the appointment of a Deputy Commissioner for Aboriginal children and young people.

The Report does not refer to two recent relevant developments in other jurisdictions. Following the Queensland Child Protection Commission of Inquiry, the Queensland Commissioner for Children and Young People and Child Guardian ceased operation on 30 June 2014 and was replaced with the Queensland Family and Child Commission.¹³ Section 11 of the *Family and Child Commission Act 2014* (Qld) provides for two Commissioners and one is to be appointed as the principal Commissioner. It further provides that at least one of the two Commissioners must be an Aboriginal or Torres Strait Islander person. Currently, it appears that only an interim principal Commissioner has been appointed.

In mid-2013, a Commissioner for Aboriginal Children and Young People was appointed in Victoria under the *Commission for Children and Young People Act 2012* (Vic). Pursuant to s 11 of that Act a

¹⁰ See s 20(1) of the Act.

¹¹ Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 57.

¹² Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 54–57.

¹³ See <http://www.qfcc.qld.gov.au/home/our-commissioner>.

principal Commissioner is to be appointed on a full time basis and under s 12 an additional Commissioner may be appointed on either a full-time or part-time basis. There is nothing in the legislation specifically referring to a Commissioner for Aboriginal children and young people. In mid-2013 the inaugural Commissioner for Aboriginal Children and Young People (Victoria) was appointed.¹⁴

ALSWA agrees that it is important for *the* Commissioner to retain the responsibility for and priority on issues affecting Aboriginal children and young people. There is potential that if these issues are delegated to a deputy, the perception of their importance will be diminished. Having said that, ALSWA believes that there is greater scope within the current framework to ensure that issues in relation to Aboriginal children and young people are constantly at the forefront of the Commissioner's activities. ALSWA strongly recommends the establishment of an advisory committee as outlined above and also recommends that a special advisor should be appointed on a full time basis to provide the Commissioner with expert advice and assistance in relation to the key issues affecting Aboriginal children and young people in this state (in particular, the high proportion of Aboriginal children and young people in the justice system and the child protection system). This would appropriately recognise the special and different needs of Aboriginal children without detracting from their priority status within the Commissioner's functions.

ALSWA takes this opportunity to reiterate its earlier suggestion that a special inquiry should be conducted under the Act in relation to the unacceptably high level of overrepresentation of Aboriginal children in the justice and child protection systems in this state. It is suggested that such an inquiry could consider both issues concurrently bearing in mind the considerable number of Aboriginal children who are simultaneously subject to both justice and child protection intervention.

ALSWA Recommendation 2

That the Commissioner should appoint a suitably qualified special advisor on issues impacting Aboriginal children and young people

Recommendation 8

The feasibility of the Cabinet referral process being used as a mechanism to help ensure that the Commissioner has been consulted in relation to significant policies and legislation that impact on the wellbeing of children and young people be raised with the Cabinet Secretary.

Section 19(g) of the Act provides that one of the functions of the Commissioner is to 'monitor and review written laws, draft laws, policies, practices and services affecting the wellbeing of children and young people'. Further, s 19(l) provides that the Commissioner's functions include to 'consider, and make recommendations in relation to, any written laws, draft laws, reports, policies, practices, procedures or other matters relating to the wellbeing of children and young people that are referred to the Commissioner by the Minister or the Standing Committee'.

These are important functions because they ensure that new laws and policies are specifically examined to evaluate their impact on children and young people. In a number of instances, proposed changes to law and/or policy will be discussed in the public arena and, therefore, the Commissioner will have the opportunity to make appropriate comments and submissions. In contrast, some draft laws (Bills) will first become publicly available when they are tabled in Parliament. Although ALSWA

14 <http://www.cyp.vic.gov.au/aboutus/our-commissioners.htm>.

assumes that relevant government agencies would seek the views of the Commissioner when considering new laws or policies that clearly impact upon children and young people, for many proposed laws and policies the potential impact on children and young people (and, in particular, on Aboriginal children and young people) will not always be apparent to all agencies. As highlighted in the Commissioner's legislation guidelines:

Children and young people are sometimes invisible to policy makers and legislators, especially when proposals are not specifically directed to children and young people. Many policy and legislative proposals apply to both adults and children and there is always the potential for proposals that are solely directed towards adults to impact negatively upon children and young people.

It is important to consider the impact of any new proposal upon children and young people and ensure that their perspective is considered. Children and young people do not have the right to vote and are not always consulted by policy makers. Yet, children and young people are frequent users of state and local government services (for example, public transport, sport and recreation facilities, schools, hospitals, health facilities and justice services).¹⁵

These guidelines are designed to encourage government agencies to consider the impact of proposed laws and policies on children and young people; however, there is no requirement for them to do so.

The Report considered whether the Act should require government agencies to refer all draft policies and legislation that impact on children and young people to the Commissioner for comment but concluded that this would be 'resource intensive for agencies and the Commissioner'.¹⁶ Instead, the report observed that 'the Cabinet Secretariat could perform a quality assurance role, to ensure that the Commissioner has been consulted in relation to high level policies and legislation that impact on children and young people'.¹⁷

While ALSWA supports this recommendation, it is of the view that it does not go far enough. Although it is vital that government agencies consult with the Commissioner early in the development of new policies and legislation (and the above recommendation will support this), the input received from the Commissioner will not necessarily be available in the public arena. When Bills are tabled in Parliament for debate, members of Parliament (who are not part of Cabinet) will not be privy to the information provided by the Commissioner. ALSWA recommends a more transparent and accountable process so that every Bill is accompanied by a legislative impact statement outlining the potential consequences of the draft legislation for children and young people.¹⁸ Bearing in mind resourcing constraints for the Commissioner, it is suggested that such a legislative impact statement would not necessarily always have to be prepared by the Commissioner but it should indicate whether the Commissioner has been consulted and the Commissioner's views (if any). If, as the Report states, agencies are already required to 'consult with relevant stakeholders in the course of developing proposals that are to be submitted for Cabinet's consideration' (and that for proposed policies and laws that will impact children and young people this would include consultation with the Commissioner), a requirement for a legislative impact statement to accompany all Bills would not result in any noticeable impact on resources. Instead, it is a mechanism to ensure that the process already undertaken is available to all members of Parliament and to the public in general.

Further, given the special priority of Aboriginal children under the Act and the unacceptably high level of involvement of Aboriginal children in the justice and child protection systems, it is recommended

¹⁵ Commissioner for Children and Young People, *Improving Legislation and Policy for Children and Young People* (January 2013) 7.

¹⁶ Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 59.

¹⁷ Ibid.

¹⁸ It is noted that this was recommended in the Legislative Council, *Final Report of the Select Committee on Advocacy for Children* (2004) iv.

that the legislative impact statement should also include a statement about the potential impact of the draft legislation on Aboriginal children.

ALSWA Recommendation 3

That the Public Sector Commission issue a directive to all government agencies that when preparing draft legislation, a statement outlining the potential impact on children and young people be prepared and that this statement include whether the Commissioner has been consulted and the views of the Commissioner (if any). Further, the legislative impact statement should include a statement about the potential impact(s) on Aboriginal children.

Recommendation 9

That the term of office of the Commissioner (5 years and eligible to be reappointed once) under section 9 of the Act remain unchanged.

ALSWA makes no comment on this recommendation.

Recommendation 10

That the Act be amended to ensure that the Commissioner's complaints related functions in sections 19 and 23 of the Act are inclusive of complaints made by an adult acting in good faith on behalf of a child or young person.

ALSWA supports this recommendation because it is well understood that children and young people are often reluctant to initiate complaints and are more likely to disclose issues to a trusted adult than complain directly to a government agency. Children and young people must be supported to make complaints and enabling adults to lodge complaints on behalf of a child or young person will assist in this regard.

Recommendation 11

That clause 3 of schedule 1 of the Act, regarding the Working with Children (Criminal Record Checking) Act 2004, be repealed.

ALSWA agrees with the view expressed in the Report that the function of administering the Working with Children Check scheme is not an appropriate task for the Commissioner and would likely divert attention away from the Commissioner's advocacy and monitoring functions. Accordingly, ALSWA supports this recommendation.

Recommendation 12

The Commissioner should be given appropriate powers under the Act to provide a child abuse complaints support function that consists of:

- *Education and outreach programs for children and young people about how to disclose any child abuse that occurs while they are in the care of a government agency or service provider*
- *Receiving complaints from children and young people, or adults acting in good faith on their behalf, about abuse alleged to have occurred in a government agency or service provider*

- Referring such complaints to the relevant investigative authority/s
- Providing information and referrals to children and young people in relation to the support services available for victims of child abuse and their families
- Monitoring the way in which government agencies deal with complaints of child abuse referred by the Commissioner or otherwise received by them

The Commissioner should not have a role in investigating the substance of individual complaints that are received.

Recommendation 13

That the Commissioner's jurisdiction in undertaking the child abuse complaints support function extend to 'government agencies' and 'service providers' as those terms are currently defined in the Act.

Recommendation 14

That the Commissioner's jurisdiction in providing the complaints support function supplement and not duplicate the role of other relevant agencies in receiving and referring disclosures of alleged physical, sexual, emotional, or psychological abuse and neglect.

Recommendation 15

That the Act be amended to provide a specific power for the Commissioner to refer complaints received in the course of performing his or her functions to the relevant investigative or other government agency.

Recommendation 16

That the Act be amended to protect persons from civil and criminal liability when raising concerns with the Commissioner, in good faith, about the wellbeing of a child or young person.

Presently, the Commissioner's functions in relation to complaints are:

- 'to monitor the way in which a government agency investigates or otherwise deals with a complaint made by a child or young person and the outcome of the complaint';¹⁹ and
- 'to monitor the trends in complaints made by children and young people to government agencies'.²⁰

Further, s 23 of the Act makes it clear that the Commissioner is not to investigate individual complaints; however, this does not preclude the Commissioner from:

- (a) providing a child or young person or his or her family with information about government and non-government programs and services; or
- (b) referring a child or young person or his or her family to such programs or services; or
- (c) investigating or otherwise dealing with any matter affecting the wellbeing of children and young people generally which is raised through a matter relating to a particular child or young person.

¹⁹ See s 19(d) of the Act.

²⁰ See s 19(e) of the Act.

This makes it clear that the Commissioner may ‘investigate or otherwise deal with a systemic matter that is raised through an individual complaint’.²¹

The terms of reference for the review of the Act required consideration of whether the Act should be amended to enable the Commissioner to “operate as a ‘one-stop shop’ for any complaint concerning child abuse regardless of the public sector agency that the matter relates to, as per recommendation 2 of the Inquiry into St Andrew’s Hostel’.²² The Inquiry into St Andrew’s Hostel conducted by the Hon Peter Blaxell (‘the Blaxell Inquiry’) recommended that the state government develop a ‘robust child focussed central complaints system that is a one-stop shop for any complaint concerning child abuse regardless of the public sector agency that the matter relates to’ and that the one-stop complaints system should:

- promote and enable complaints to be made by a range of avenues including the use of technology;
- accommodate regional areas by having regular visitor programs;
- be able to receive complaints about programs and services run or contracted by public sector agencies;
- provide independence from the agency subject to the complaint;
- facilitate referrals of complaints to appropriate existing agency and oversee the referral and the outcome;
- provide or facilitate support for the individual making the complaint; and
- ensure persons making a complaint are protected from civil and criminal liability.²³

The Commissioner’s 2013–2014 Annual Report indicates that the Commissioner has undertaken a number of activities as part of the existing complaint monitoring function. In 2013 the Commissioner updated the complaint guidelines – *Are You Listening? Guidelines for Making Systems Accessible and Responsible to Children and Young People*. Further, a seminar was held in relation to these guidelines. The Annual Report also states that a survey of 28 government agencies indicated some ‘encouraging trends in the development of child-friendly complaints systems’ including greater use of the Commissioner’s guidelines and an increase in the number of children and young people making complaints.²⁴

The review of the Act considered the potential for an expanded role for the Commissioner in regard to complaints about child abuse. The key issues raised were:

- *whether the Commissioner should have any role in receiving complaints of child abuse by a government officer from individual children and young people and adults acting on their behalf*
- *if so, whether the Commissioner should have power to investigate the complaints received*
- *if so, whether the Commissioner should have power to investigate the complaints received only in exceptional circumstances*
- *in monitoring the way in which complaints are dealt with by other agencies, whether the Commissioner should have a role in assessing the merits of an agency’s outcome in relation to a complaint referred to or otherwise received by it.*²⁵

21 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 77.

22 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 70.

23 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 72.

24 Commissioner for Children and Young People, *Annual Report 2013–2014* (2014) 22–24.

25 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 81.

Submissions to the review indicated support for a child focussed complaints support function because of the Commissioner's priority of engaging children and young people and the office's independence from government agencies.²⁶ The opposing view was that a complaints support function may negatively impact on the Commissioner's important advocacy functions and, further, that there are existing mechanisms available for dealing with individual complaints.²⁷

The Report concluded that it would not be appropriate to 'confer a complaints handling or investigation role on the Commissioner' because this would 'risk causing duplication and confusion with the existing mechanisms for investigation of complaints of child abuse, and impede the efficiency and effectiveness of those processes'.²⁸ The various existing mechanisms for investigation complaints of child abuse are discussed in the Report and include the Western Australia Police, the Department for Child Protection and Family Support and the Corruption and Crime Commission.²⁹

As set out in the above recommendation, the Report proposes a child abuse complaints *support* function for the Commissioner with the primary purpose of ensuring 'that children and young people in the care of a government agency have a trusted avenue in which they can raise their concerns, and help ensure that those concerns are heard and reviewed appropriately'.³⁰ It is also emphasised that the Commissioner's focus should be on children and young people living away from home so that there is a 'source of independent advice and information about how to make a complaint against a public sector body or officer in whose care they have been entrusted'.³¹

In relation to the specific components of the recommended complaints support function, the Report states:

- **Education and awareness raising about how to make a complaint:** This proposed function would involve 'educating children and young people about reporting abuse, advertising and making more accessible the appropriate avenues for complaint, and monitoring how complaint handling agencies deal with disclosures of child abuse'.³² Further, the Commissioner should visit government facilities that care for children in order to build relationships and confidence. The Report concluded that for this purpose, legislative powers of entry to government and other residential facilities is unnecessary; noting that under s 37 of the Act the Commissioner has powers of entry in relation to a special inquiry.
- **Complaints receipt and referral:** The Report concludes that the complaints support function should include receiving disclosures of child abuse and referring them to the relevant investigative agency.³³ This power should include receiving complaints in relation to public sector programs and services run or contracted by public sector agencies (the current definitions of 'government agency' and 'service provider' under the Act being considered appropriate for this purpose – see Recommendation 13 above).
- **Range of complaints:** The Report recommended (Recommendation 14 above) that the range of complaints concerning child abuse include physical and sexual abuse, emotional and psychological abuse and neglect (consistent with meaning of harm under the *Children and Community Services Act 2004* (WA)).³⁴

26 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 77.

27 Ibid 79.

28 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 86.

29 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 83–84.

30 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 87.

31 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 88.

32 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 89.

33 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 90.

34 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 92.

- **Power of referral:** The Report recommends that the Act be amended to provide a specific power for the Commissioner to refer complaints received in the course of performing his or her functions to the relevant investigative or other government agency (Recommendation 15 above).
- **Protections for disclosers:** It is recommended that the Act be amended to provide that persons who raise concerns with the Commissioner, in good faith, about the wellbeing of a child or young person be protected from civil and criminal liability (Recommendation 16 above).
- **Support for children and young people:** The Report recommends that the complaint support function include the provision of information and assistance in relation to counselling services and criminal justice support services for victims of child abuse and noted that the Western Australian Aboriginal Advisory Council submitted to the review that the complaint support function must be culturally appropriate for Aboriginal children and young people.³⁵ In particular, the Council argued that there needs to be consultation with Aboriginal people in relation to the design of the service and that the service must be appropriate for regional and remote areas.
- **Monitoring the way government agencies deals with complaints received or referred.** Section 22 of the Act currently empowers the Commissioner to obtain information from any government agency (as well as service providers) and this would enable 'the Commissioner to obtain information from government agencies and service providers about the way a complaint is being dealt with, such as in relation to the status and outcome of the complaint. The Commissioner would then be in a position to advocate on behalf of the complainant if concerned about the way a complaint is being dealt with'.³⁶ It was also noted that some agencies may be subject to confidentiality requirements in this regard; however, the Corruption and Crime Commission indicated to the review that it would be willing to provide information to the Commissioner in relation to the investigation of a complaint once it was finalised. The potential actions for the Commissioner in response to a review of the outcome of a complaint would be to report concerns to Parliament or, if the matter revealed systemic issues, the Commissioner could examine the issues by way of a special inquiry.

The Report notes that a number of stakeholders, including the Commissioner, emphasised that the recommended child abuse complaints support function needs to be appropriately resourced.³⁷

In relation to the above recommended child abuse complaints support function, the Attorney General stated in Parliament when the Report was tabled that:

Following due consideration, including of the interim report of the commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, which was released on 30 June 2014, I am pleased to advise that the government has provided its in-principle support to each of the recommendations. While the government is supportive of recommendation 12, full implementation of the proposed child abuse complaints support role will be deferred to allow for the final recommendations of the royal commission to be taken into account. The work of the commissioner to help to protect children from sexual abuse is important, and in the interim the commissioner will implement outreach programs for children and young people to educate them about how to disclose child abuse and who to contact. In particular, the commissioner

35 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 93.

36 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 95.

37 Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006* (2013) 96.

*will work with government and non-government agencies in developing relevant strategies to complement and strengthen work already being carried out in this area.*³⁸

ALSWA is supportive of the Commissioner's current initiatives designed to encourage and support children and young people to lodge complaints against government agencies. However, it highlights that the current legislative provisions stipulate that one of the functions of the Commissioner is to monitor the way in which government agencies investigate or deal with complaints and *the outcomes* of those complaints. This existing function is not restricted to complaints about child abuse. ALSWA is of the view that there should be a higher priority on this aspect of the complaint function because it is vital that government agencies are held to account in regard to not only the way in which they investigate a complaint (eg, timeliness, procedural fairness, regular contact with the complainant about the progress of the investigation) but also the outcomes (eg, whether the complaint has been resolved to the satisfaction of the complainant, whether the investigation found any misconduct or unlawful behaviour by a government employee or contractor and what action, if any, was taken in response to that behaviour). A full analysis of the entire complaint process would enable appropriate reforms to improve complaint systems and to reduce the incidence of inappropriate or illegal behaviour against children and young people.

Accordingly, ALSWA supports Recommendations 12-16 above and is also of the view that it is unnecessary to wait until the Royal Commission into Institutional Responses to Child Abuse publishes its final report. The Royal Commission is not due to end until 2017. Furthermore, ALSWA submits that the complaints support function should not be limited to 'child abuse'. Although the proposed definition of child abuse is broad (encompassing physical and sexual abuse, emotional and psychological abuse and neglect), there will be incidents of inappropriate behaviour by public sector employees or contractors that may not strictly constitute child abuse but nevertheless should be subject to the same regime (eg, racist comments by police officers or detention staff to Aboriginal children and young people). Bearing in mind the suggested task of conducting regular regional visits, it will be especially important in regional and remote areas for Aboriginal children and young people to feel that they can make a complaint to the Commissioner (and receive the necessary support and referrals) about any misconduct or inappropriate behaviour by people employed by government agencies and contractors.

ALSWA Recommendation 4

That the above recommended complaints support function (and associated recommendations) cover any complaint about unlawful or inappropriate behaviour or misconduct against a child by a person employed by a government agency or service provider

³⁸ Western Australia, Parliamentary Debates, Legislative Council, 20 August 2014, 5333 (Hon Michael Mischin, Attorney General).