

CHAPTER 5

INCONSISTENCIES BETWEEN DOMESTIC JURISDICTIONS AND THE NEED FOR AGREED NATIONAL STANDARDS

Introduction

5.1 Although there was widespread acceptance that there were significant inconsistencies between domestic jurisdictions in a number of important policy areas, there was a range of views on how better coordination might be achieved and whether national standards were required.

Coordination of policies and programs

5.2 There is a wide range of Government bodies at Federal, State and Territory levels which have responsibilities relating to the implementation of the Convention. There is also a range of national coordinating and research-oriented bodies, ministerial councils, meetings of departmental officials at State, Territory and Federal levels and national advisory bodies.¹ For example, the Standing Committee of Attorneys-General has established a Working Party on Human Rights which is developing a coordinated approach to human rights and anti-discrimination legislation.²

5.3 It was argued that the spread of programs and services of special importance to children across a range of government agencies resulted in a lack of visibility, making it impossible to assess their impact on children's rights or to judge the adequacy of resources allocated overall³ and that it was hard to gauge the effectiveness and coverage.⁴

5.4 Many of the NGOs also commented on the lack of a focal point in government for coordinating the development and delivery of relevant policies and programs which impact on children and the inadequate arrangements for

1 *Australia's First Report under the Convention on the Rights of the Child*, December 1995, p. 19; *Australia's response to issues raised by the Committee on the Rights of the Child*, Office of International Law, Attorney-General's Department, August 1997, p. 3

2 *Australia's response to issues raised by the Committee on the Rights of the Child*, Office of International Law, Attorney-General's Department, August 1997, p. 3

3 Defence for Children International Australia, *op cit*, p. 11; Ozchild: Children Australia, Supplementary Submission No. 413a, p. S 3408

4 The United Nations Association of Australia, Submission No. 38, p. S 212

consultation with community groups.⁵ Concern was expressed about the confusion within the Federal bureaucracy as to who had responsibility for certain aspects of the Convention⁶ and the lack of coordination between the national coordinating and research oriented bodies.⁷ The Committee supports ACFOA's call for each Federal department or agency to identify the areas of their decision-making responsibilities that are relevant to the Convention and to make the information readily available to the community.⁸

5.5 The Youth Action and Policy Association (YAPA) also raised the issue of the lack of a coordinated approach across all levels of government.⁹ They suggested the main areas of inconsistency were in industrial relations, child protection, income support, education, Indigenous youth issues and young people from non-English speaking backgrounds, including new arrivals.¹⁰ YAPA believed that Federal, State and Territory bureaucracies failed to take a whole of government approach in the provision of services to meet the needs of young people.¹¹

5.6 The Australian Law Reform Commission believed that the fracturing of responsibilities under the Federal system often leads to 'inadequate, incomplete and inappropriate outcomes for families and children'.¹² The Child Health Council of South Australia commented that the Federal system causes a number of problems as the differences in State and Territory welfare laws and the legislative responsibilities of the Federal Government can cause inconvenience, confusion and distress when children and their families have to deal with both systems.¹³ Family Services Australia Ltd commented that there are different staff training standards in the care and protection services between jurisdictions which creates difficulties for overall compliance with the Convention.¹⁴

5.7 Barnardos Australia submitted that some services 'fall through the cracks', such as the removal of the Sole Parent benefit for twelve months when a child moves from their parents care to foster carers; or the childcare policy which

5 Defence for Children International Australia, *op cit*, p. 11

6 Medica, Transcript of Evidence, 9 July 1997, p. 915

7 National Children's and Youth Law Centre, Supplementary Submission No. 321a, p. S 2778

8 Australian Council for Overseas Aid, Submission No. 220, p. S 1455

9 Morey, Transcript of Evidence, 9 May 1997, p. 364

10 Youth Action and Policy Association, Submission No. 130, p. S 722

11 Morey, Transcript of Evidence, 9 May 1997, p. 364

12 Australian Law Reform Commission, Submission No. 382, p. S 21551

13 Child Health Council of South Australia, Supplementary Submission No. 151a, p. S 1004

14 Family Services Australia Ltd, Submission No. 482, p. S 2715

meets Federal Government objectives rather than addressing the needs of children and young people who do not have a family to support them.¹⁵ Another example was when a child with an acquired brain injury does not come within the provisions of mental health acts or a range of other areas and they slip between the cracks.¹⁶

5.8 The Australasian juvenile justice administrators, who have been developing administrative protocols on juvenile justice, found that while there are significant inconsistencies in terms of legislation, local requirements and needs, which made it difficult to develop legislation, work has been done on a set of processes, protocols and national standards that can become administrative guidelines for the States and Territories.¹⁷

5.9 The Children's Commissioner of Queensland emphasised the need for a strategic, holistic approach to implementing the Convention.¹⁸ Policy needs to be interpreted through administrative procedures across a wide range of functional areas.¹⁹ Therefore, there needs to be feed back on the effectiveness of government performance and administrative arrangements to ensure compliance in laws, policies and practice. The Committee accepts that in many areas there is still potential for greater cooperation and coordination.

Support for a national approach

5.10 A number of submissions expressed concern about the inconsistencies in legislation, policies and procedures across Australia and supported a strong and cohesive national approach. The Child Health Council emphasised that it was unacceptable for children's place of domicile to determine their legal and social status, their access to services and their treatment by systems.²⁰ It was argued that child protection and juvenile justice laws should be uniform throughout

15 Barnardos Australia, Submission No. 101, p. S 486

16 Boyd, Transcript of Evidence, 3 July 1997, p. 558

17 Keating, Transcript of Evidence, 3 July 1997, p. 551

18 Children's Commissioner of Queensland, Submission No. 25, p. S 131

19 *ibid*, p. S 130

20 Child Health Council of South Australia, Submission No. 151, p. S 1004

Australia.²¹ Ozchild added that it is absurd that a child living in the Northern Territory should be more likely to be incarcerated for a particular offence than a child living elsewhere in Australia.²²

5.11 The Human Rights Council of Australia commented that while Australia has a national agenda for multiculturalism, for the environment and for women, a national *Disability Services Act 1991*, national plans for physical infrastructure such as railways and ports, there is no national plan for children and children's services.²³ Mr Burdekin also stated that there are uniform national standards in relation to companies and securities law, taxation, fair trading and trade practices but not the most vulnerable people in our community.²⁴ Save the Children Australia commented that there is a need to make children visible in our national psyche in terms of care.²⁵

5.12 The Ethnic Child Care, Family and Community Services Co-operative Ltd called for a long term comprehensive Plan of Action with a coordinating body to oversee and monitor implementation which consulted with all stakeholders, had adequate resources and clarified the delineation of responsibilities for the implementation of the plan.²⁶ The *Australian Youth Policy 1993* recognised the need for a coordinated and cooperative policy framework across government agencies and the community to address the needs of Australian children.²⁷ The United Nations Committee on the Rights of the Child also asked the Australian Government about the national mechanism to coordinate all existing policies and programmes²⁸ and a comprehensive policy for children at the Federal level.²⁹

5.13 The benefits of developing a national approach included the opportunity to review the roles and responsibilities of stakeholders, identify areas of overlap and duplication, highlight inconsistencies between jurisdictions and provide a

21 Handshin, Transcript of Evidence, 4 July 1997, p. 711

22 Ozchild: Children Australia, Supplementary Submission No. 413a, p. S 3405

23 Human Rights Council of Australia Inc, Submission No. 122, p. S 614

24 Burdekin, Transcript of Evidence, 5 August 1997, p. 1285

25 Rose, Transcript of Evidence, 10 July 1997, p. 988

26 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 664

27 National Children's and Youth Law Centre, Supplementary Submission No. 321a, p. S 2777

28 Committee on the Rights of the Child Fifth Session, Pre-sessional Working Group, 27-31 January 1997, *Implementation of the Convention on the Rights of the Child, List of issues to be taken up in connection with the consideration of the initial report of Australia (CRC/C/8/Add.31)*, p. 1

29 United Nations Committee on the Rights of the Child, *Concluding observations: Australia (CRC/C/SR 403-405)*, 24-25 September 1997, p. 2

venue for discussion to develop a greater understanding of the difficulties in some jurisdictions.³⁰

5.14 The Human Rights and Equal Opportunity Commission suggested that the inconsistencies in Australian legislation could be addressed by a Commonwealth, States and Territories partnership which could develop national standards for the various aspects of children's services.³¹ The Human Rights Council of Australia commented that a coordinating rather than a coercive role could achieve consistency in areas related to children's welfare such as juvenile justice and child protection.³² It was suggested that national standards need not prevent the States from having legislative control and an ability to respond to local circumstances provided the legislation complied with national guidelines aimed at implementing the Convention.³³

5.15 Australia has progressed towards a national approach in some areas such as: the accreditation of long day care centres; draft model legislation which will enable the transfer of child protection orders and child protection proceedings between States and Territories; the safety screening of carers; and the model criminal code.³⁴ The Committee also notes that the Family Law Council is examining the interaction between the *Family Law Act 1975* and State and Territory child and family services legislation in relation to care, support and protection of children and the effectiveness of the current system.³⁵

5.16 Agreed protocols between the Commonwealth and the States and Territories have addressed some of the inconsistencies.³⁶ However, the concern was expressed that in some areas there is still a need for more consistency, such as in determining the need for separate legal representation which has not been provided in all circumstances because of financial constraints.³⁷

5.17 The Children's Commissioner of Queensland considered that the complementation and alignment between State, Territory and Federal

30 Department of Health and Family Services, Submission No. 137, p. S 871

31 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1949

32 Human Rights Council of Australia Inc, Submission No. 122, p. S 615

33 Fitzgerald, Submission No. 562, p. S 2980

34 Germanos-Koutsounadis, Transcript of Evidence, 9 May 1997, p. 370; Redman, Transcript of Evidence, 4 July 1997, p. 727; ACT Government, Submission No. 189, p. S 1302; Tasmanian Government, Submission No. 168, p. S 1114

35 Family Law Council, Submission No. 178, p. S 1190

36 *ibid*, p. S 1192

37 *ibid*

legislation is essential.³⁸ The Human Rights and Equal Opportunity Commissioner believed that there is a need for greater Commonwealth leadership in the development of national standards, coordination of policy development and nationwide monitoring of the service provision and other matters affecting children.³⁹

5.18 The Youth Legal Service of Western Australia commented that the coordination of youth services at the ministerial and upper departmental level may work well, but at the service delivery level, there are significant gaps in services.⁴⁰ It was argued that the same standards of benefits must apply across all States and Territories to prevent inequities where some children may be discriminated against and/or denied their full rights as human beings.⁴¹

5.19 To demonstrate the need for a coherent and consistent approach, the Australian Law Reform Commission provided the example of many agencies waiting until another department assumes responsibility for a child's needs such as a young homeless person who could be the responsibility of the State welfare agency, the Department of Social Security, the State juvenile justice agency, or the Family Court depending on the circumstances.⁴²

5.20 The Kids Help Line supported the need for uniform national standards particularly in the area of child protection as States have responsibility for most areas that impact on children's and young people's lives (eg education, health, juvenile justice, child protection, etc).⁴³ They suggested that children's rights are subject to local political pressures resulting in differences in the handling of children's welfare and rights, thus making it impossible to collect standardised national data for analysis of issues of concern to young Australians.⁴⁴ They suggested that a coordinated national approach would improve the status and well being of Australia's young without threatening 'States rights'.⁴⁵

5.21 The Department of Health and Family Services gave the example of the Council of Australian Governments review of government service provision in

38 Children's Commissioner of Queensland, Submission No. 25, p. S 130

39 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1869a

40 McDougall, Transcript of Evidence, 3 July 1997, p. 556

41 Queensland Council of Social Services Child Care Management Training and Support Unit, Submission No. 161, p. S 1089

42 Australian Law Reform Commission, Submission No. 382, pp. S 21551-m

43 Kids Help Line, Submission No, 148, p. S 981

44 *ibid*

45 *ibid*

1997 which involved all jurisdictions in developing efficiency and effectiveness indicators and reporting on performance. The process highlighted the inadequacy of current data collection processes and inconsistencies in performance within and across States.⁴⁶ It also drew acknowledgments of these shortcomings and commitments to improvement.⁴⁷

5.22 The National Aboriginal Youth Law Centre also supported the need for better coordination to address the difficulties arising from decisions at the Federal level which are at odds with State approaches in matters such as income and family support.⁴⁸ They gave the example of a student who is deemed to be dependent on the family income until the age of 25 years but whose parents can only receive income support from government for that young person up to 18 years of age.⁴⁹ After the age of 18 years, the young person may be able to access some benefits in their own right.

Concerns about a national approach

5.23 The West Australian Government stated that to assume that everything needs to be standard can be a problem.⁵⁰ The Tasmanian Government also commented that there are a number of national councils to progress these initiatives. However, it is important for each jurisdiction to have some flexibility to respond to local needs and circumstances.⁵¹ They believed that national legislation and national standards will potentially limit the States' flexibility.⁵²

5.24 The Salt Shakers expressed the concern that national standards may mean the lowest standards apply, such as the proposed changes to the age of consent.⁵³

46 Department of Health and Family Services, Submission No. 137, p. S 871

47 *ibid*

48 National Aboriginal Youth Law Centre, Submission No. 109, p. S 524

49 *ibid*

50 Van Soelen, Transcript of Evidence, 3 July 1997, p. 535

51 Tasmanian Government, Submission No. 168, p. S 1114

52 *ibid*

53 Salt Shakers, Submission No. 129, p. S 717

Mechanisms for coordinating policies relating to children

Ministerial committees and government working parties

5.25 The New South Wales Government supported greater joint planning and coordination between States and Territories and the Commonwealth in policy development and the continuation of regular formal consultation on matters affecting children through other Ministerial Standing Committees in addition to the Standing Committee on Attorneys-General.⁵⁴ It was submitted that there is already a lot of communication between the States and Territories in regard to the consistency of laws relating to child protection issues through interstate government department working groups that deal with policy and legislative responses to children.⁵⁵

Need for Federal legislation

Influence of conventions

5.26 There are a number of ways that the *Convention on the Rights of the Child* can form part of Australian law. Conventions can be used as an aid to statutory interpretation, an influence on the development of common law and as an influence on administrative law.⁵⁶ Recent cases like *Mabo v Queensland (No. 2)*⁵⁷, *Dietrich v The Queen*⁵⁸ and *Minister for Immigration and Ethnic Affairs v Teoh*⁵⁹ have commented on the relevance of treaties.

5.27 At the time the Convention was ratified, treaties were not considered to form part of the domestic law unless legislated. In the *Teoh* case, Justices Mason and Deane found that the fact that a Convention has not been incorporated into domestic law did not mean that its ratification holds no significance for Australian law.⁶⁰ As a result of the *Teoh* decision, ratified

54 New South Wales Government, Submission No. 652, p. S3258

55 Elliot, Transcript of Evidence, 6 August 1997, p. 1299

56 International Law Teachers, The University of Melbourne, Submission No. 188, p. S 1291

57 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1

58 *Dietrich v The Queen* (1992) 177 CLR 292

59 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, p. 363

60 *ibid*

treaties will now have some effect⁶¹ even when treaties do not form part of the municipal law of Australia.⁶²

5.28 In the *Teoh* decision, Justices Mason and Deane considered the issues of procedural fairness and the 'best interests' clause of the Convention.⁶³ The *ratio decidendi* of the case was that in administrative matters, procedural fairness warranted consideration by the decision maker of the international conventions to which Australia is party when discretionary power is involved.

Ratification of a treaty especially one that sets up international standards to be applied by domestic courts in relation to basic human rights is more than "mere window dressing". It is a positive statement by the Executive to the international community and to the Australian community, that administrative decisions would be made in accordance with the terms of the treaty.⁶⁴

5.29 It was also argued in the case of *B & B* that the concept of children's rights was well established as Australia had acceded to the 1959 Declaration on the Rights of the Child; had adopted the 1924 Declaration of Geneva by the League of Nations; through Australia's participation in the development of the *Convention on the Rights of the Child*; made the Convention a schedule to the *Human Rights and Equal Opportunity Commission Act 1986*; the international acceptance of the Convention; the use of the Convention as a basis for change to the *Family Law Act 1975*; and the reference to the Convention in a number of cases.⁶⁵

5.30 After the *Teoh* decision, Senator Evans told Parliament that if courts gave treaties the force of domestic law upon ratification, there was a problem in democratic principle as a lot of treaties such as the *Convention on the Rights of the Child* have a certain impact on their face and the potential to reach 'into every nook and cranny'.⁶⁶ He argued that *Teoh* does not support a common

61 Ms Evatt stated that the Administrative Decisions (Effect of International Instruments) Bill 1995, "gives the message that we have no reasonable expectation that our government will comply with obligations that it has undertaken. I would be ashamed to have to say that at an international forum." Evatt E J Parliament of Australia, *Senate Hansard*, Reply to Ministerial Statement, per Senator Chamarette, 2 May 1996.

62 As per Mason C J and Deane J, re *Teoh*. Basic principle which Mason C J and Deane J, sup, saw as part of the wider Constitutional issue of the separation of powers. For another consideration of this, however, see Mason, A, "A New Perspective on Separation of Powers", Reshaping Australian Institutions, ANU Public Lectures, 25 July 1996

63 *Minister for Immigration & Ethnic Affairs v. Ah Lin Teoh* (1995) 183 CLR 273, per Mason C J and Deane J

64 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 9; see also Beltz C (1995) "The Teoh Case: Human Rights - What do Australians expect from the Government?" *Human Rights Defender* June 1995 No. 2, p. 11

65 *B v B* Full Court of the Family Court of Australia, Appeal No. NA 35 of 1996, pp. 151-4

66 Evans, Estimates Committee Hansard, Committee SFA, 13 November 1995, p. 238

sense interpretation of the principles of the legal system.⁶⁷ While supporting the basic principles of the Convention as sound, he added that Australia reserved the right to determine the extent to, and manner in which, those principles were applied in domestic law.⁶⁸

If there is any sort of potential enormous overreach to them, we reserve the right to not call them legal rules in our domestic system until such time as the parliament legislates them to become rules.⁶⁹

5.31 On 10 May 1995 the previous Government issued an Executive Statement setting aside the 'legitimate expectations' and introduced the Administrative Decisions (Effect of International Instruments) Bill 1995, however, this lapsed with the calling of an early election. On 25 February 1997, the Coalition Government issued a Joint Statement stating that it is the role of the Australian Parliament to implement our treaty obligations by changing Australian legislation and reiterating the view that ratification of a treaty does not give rise to 'legitimate expectations' in administrative law.⁷⁰ The Administrative Decisions (Effect of International Instruments) Bill 1997 was introduced and is still before Parliament.

5.32 The Catholic Commission for Justice, Development and Peace commented that bureaucrats and government departments hold a lot of power in decision making and policy making in matters such as social welfare, education, health, the legal system and at a national level, refugees and immigration and should consider the international human rights conventions that Australia has ratified.⁷¹

5.33 Those supporting the *Teoh* decision believed that the Government's reaction seeking to override the decision, through legislation to set aside the 'legitimate expectation', was regrettable.⁷² Defence for Children International considered that the Government's position was an embarrassment to Australia's integrity as an international citizen and that this would have far-reaching repercussions for Australia's international influence.⁷³

67 *ibid*

68 *ibid*, p. 236

69 *ibid*

70 Downer A and Williams D, Joint Statement The Minister for Foreign Affairs and the Attorney General and Minister for Justice *The Effect of Treaties in Administrative Decision Making*, 25 February 1997, p. 1

71 Curran, Transcript of Evidence, 9 July 1997, p. 882

72 Children's Interests Bureau Board South Australia, Submission No. 327, p. S 1805

73 Defence for Children International, Submission No. 120, p. S 593

5.34 The International Law Teachers, University of Melbourne, argued that it is difficult to reconcile the Government's response to the *Teoh* decision with Australia's commitments to the Convention. They submitted that not requiring an administrator to consider the Convention in the decision making process is inconsistent with the obligation to 'undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention'.⁷⁴ It was suggested that if legislation implementing the Convention had been in place, there would have been no need for the 'legitimate expectation' doctrine.⁷⁵

5.35 The National Children's and Youth Law Centre believed that the weight of authority supported the view that treaties only required legislative implementation if they affect private rights and that *Teoh* has affirmed this view and is therefore at odds with the joint statements of Evans and Lavarch and Downer and Williams.⁷⁶ They added that if the application of domestic law was contrary to international law then the international law obligations were breached⁷⁷ and this was a component the *Teoh* decision.⁷⁸

5.36 National Legal Aid expressed the opinion that common law maintains the position that the *Teoh* logic must prevail and in the absence of statutes must consider the provisions of all national treaties relevant to our operation.⁷⁹ It was suggested that the implications are possibly a reconsideration of the effect of every ratified, but non-legislated treaty upon administrative decision-making.⁸⁰

5.37 Ms Rayner commented that the case merely asserted that as a matter of natural justice and procedural fairness, Federal Government officers must consider Australia's international human rights obligations, or give notice to an affected person if they intended not to do so.⁸¹ The National Children's and Youth Law Centre argued that legitimate expectations do not provide substantive protection because protection afforded by procedural fairness is

74 International Law Teachers, The University of Melbourne, Submission No. 188, p. S 1293

75 *ibid*

76 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 5

77 Article 27 of the *Vienna Convention on the Law of Treaties* 1969

78 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 6

79 Staniforth, Transcript of Evidence, 29 April 1997, p. 129

80 'Legal Practice Briefing; Attorney-General's Legal Practice', *Attorney-General's Department*, No. 18, 24 April 1995

81 Rayner, Submission No. 223, p. S 1475

only procedural and does not compel the decision maker to come to a particular outcome.⁸²

5.38 Another important aspect of the *Teoh* decision was that it showed that the administrative decision did not necessarily affect the child in the first instance.⁸³ McHugh also commented that this approach could mean that the best interests of the child should be taken into account in all decisions such as the sentencing of a parent, or the assessment of income tax.⁸⁴

5.39 The Chairman of the United Nations Committee of Economic and Social Rights commented, in relation to the Administrative Decisions (Effect of International Instruments) Bill 1995, that it was difficult to give effect to Australia's obligations under the Convention by excluding them from the routine and expected purview of administrative decision makers.⁸⁵ Professor Alston also stated that it was unlikely that the United Nations Human Rights Committee or the Committee on the Rights of the Child would find the legislation compatible with Australia's international obligations.⁸⁶

5.40 The United Nations Committee on the Rights of the Child in its concluding observations on Australia commented that:

The Committee is concerned that although the Convention on the Rights of the Child has been declared a relevant international instrument under the Human Rights and Equal Opportunity Act 1986, which enables the Commission to refer to the Convention when it is considering complaints, this does not give rise to legitimate expectation that an administrative decision will be made in conformity with the requirements of that instrument.⁸⁷

5.41 Jones and Marks believed that the proposed legislation was a fundamental breach of faith by the Government to Australian citizens and the international community who believed that Australia assumed its treaty obligations in good faith.⁸⁸ Concern was also expressed that the legislation may

82 *Attorney-General (NSW) v. Quin* (1990) 176 CLR 1 cited in National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 12

83 National Legal Aid, Submission No. 106, p. S 511

84 Dissenting comments by McHugh in *Minister for Immigration & Ethnic Affairs v. Ah Lin Teoh* (1995) 183 CLR 273

85 Alston P and Chian M (1995) *Treaty Making and Australia: Globalization vs. Sovereignty*, Sydney p.132 cited in Australian Council for Overseas Aid, Submission No. 220, p. S 1461

86 *ibid*

87 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 2

88 Jones and Marks, Submission No. 91, p. S 440

also invalidate a number of other pieces of legislation which depend on the treaty's power for their validity.⁸⁹

5.42 It was also suggested that the *Teoh* judgement has perhaps had less ramifications than ministers believed it might. It is likely that the precedent will be largely confined to the human rights treaties that Australia has signed.⁹⁰ Dr Cronin commented that she looked at 200 cases which cited *Teoh*, and with the exception of only two, the cases used *Teoh* as the authority for the proposition that conventions are not law and therefore did not need to be followed.⁹¹ In other cases it was considered that the whole question of there being a legitimate expectation was met by having a review right.⁹²

5.43 Since the *Teoh* decision in 1995 some deportation cases have been decided in favour of the parent remaining in Australia as being in the best interests of the children.⁹³ In other cases, however, it was decided that on balance, the consideration of the best interests of the child and the welfare of the community, that in the light of the applicants criminal record, there was insufficient justification to prevent deportation.⁹⁴

5.44 The Committee believes the continued debate over the *Teoh* decision has the potential to damage Australia's international reputation and the matter needs to be settled as a matter of priority. The Committee also believes, however, that in making administrative decisions, government officials need to consider relevant international treaties. To achieve this, a preferred approach would be to ensure that bureaucrats are aware of the relevant treaties and their appropriate application to Australia's legal and administrative arrangements.

5.45 Irrespective of the passage or otherwise of the 'anti-*Teoh*' legislation and whether Australia is legally bound to consider the Convention in its administrative decisions, there is a moral obligation to do so in appropriate circumstances. Accordingly, the Committee believes that there is a need to ensure that the relevant agencies are aware of the Convention and the appropriate situations in which it must be applied.

89 Rayner, Transcript of Evidence, 29 September 1997, p. 1560

90 *Teoh*, per Mason C J and Deane J, also 'Legal Practice Briefing; Attorney General's Legal Practice', *Attorney-General's Department*, No. 18, 24 April 1995

91 Cronin, Transcript of Evidence, 5 August 1997, p. 1172

92 *ibid*

93 For example *Lam v. Minister for Immigration and Multicultural Affairs* No. N96/364 AAT No. 11936; *Vaitaiki v Minister for Immigration and Ethnic Affairs* No. NG 542 of 1997 FED No. 5/98

94 For example *Salameh v. Minister for Immigration and Ethnic Affairs* No. NG 889 of 1995; *Omar v. Department of Immigration and Multicultural Affairs* No. VG 569 of 1997

Federal legislation on the Convention on the Rights of the Child

5.46 The Joint Statement by the Minister for Foreign Affairs and the Attorney-General reiterated that under the Australian Constitution, the Executive Government has the power to enter into treaties but it is for the Australian Parliaments to incorporate treaty obligations into Australian legislation.⁹⁵ Under the separation of powers in a bicameral Westminster System, treaties which affect private rights have provisions which require modification of common law or statute, which require the vesting of additional powers in the Crown or which impose additional financial obligations on the Government, must receive assent of the legislature by the passage of necessary legislation.⁹⁶

5.47 Historically, Australia's representatives in international treaty negotiations have been instructed to make representations on the basis of existing Australian Federal, State and Territory law to ensure that there was no conflict and reservations were included if this was the case.⁹⁷ It was suggested that Australia attempted to make international instruments compatible with domestic legislation rather than reforming Australian law, or employing treaties to shift Constitutional power from the States to the Commonwealth.⁹⁸

5.48 The Attorney-General's Department commented that the Government takes seriously its obligations under the Convention but often relies on State and Territory law and practice to meet Australia's international obligations.⁹⁹ In cases where practices in a State were not consistent with the Convention, the Government has sought State cooperation to modify or amend these practices.¹⁰⁰

5.49 At the time of ratification the Federal Government believed that Australian legislation complied with the Convention. The Minister for Foreign Affairs and Trade told the Senate that:

ratification simply means that Australia is a state party to the convention. It does not change the law in Australia one jot or tittle. If the law in Australia is to be changed, that must be by way of an action in the parliaments of the

95 Joint Statement, The Minister for Foreign Affairs and the Attorney General and Minister for Justice, *The effects of treaties in administrative decision-making*, 25 February 1997.

96 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 6

97 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, p. S 1269

98 *ibid*

99 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3353

100 *ibid*

Australian people. That is a most important matter to emphasise in relation to this Convention on the Rights of the Child.¹⁰¹

5.50 The Government stated that it did not propose to implement the *Convention on the Rights of the Child* by enacting the Convention as domestic law because the general approach was to ensure that domestic legislation, policies and practices complied with the Convention prior to ratification.¹⁰²

5.51 The National Children's and Youth Law Centre believed that Australia has made limited commitment via the Attorney-General's declaration on 22 December 1992, that the Convention is an international instrument relating to the human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Act 1986* pursuant to Section 47(1).¹⁰³ This enables complaints to be made to the Commission in respect to Federal legislation and practices and for the Human Rights and Equal Opportunity Commission to inquire into and report on issues relevant to the Convention. This also gave the Commission the responsibility for promoting the understanding and acceptance of the Convention and reporting on possible breaches.¹⁰⁴

5.52 The International Law Teachers, University of Melbourne, were of the view that the mechanism under the *Human Rights and Equal Opportunity Act 1986* was not properly described as a 'complaints mechanism'¹⁰⁵ as the High Court has not supported the view that inclusion in a schedule has any effect on Australian domestic law.¹⁰⁶ It was argued that in the absence of implementing legislation, there are no justiciable rights for Australian children under the Convention.¹⁰⁷

5.53 The International Law Teachers, University of Melbourne, also questioned the Government's 'general approach' by pointing out that this was not used in the Commonwealth *Race Discrimination Act 1975* and the *Sex*

101 Tate M, Minister for Justice and Consumer Affairs, Questions Without Notice, United Nations Convention on the Rights of the Child, *Senate Hansard*, 18 December 1990, p. 5863

102 *Australia's Report under the Convention on the Rights of the Child*, December 1995, p. 2

103 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 5

104 *ibid*

105 Under section 47(10) of the Act, the Commonwealth Attorney General may declare an international instrument ratified by Australia to be 'an international instrument relating to human rights and freedoms for the purposes of the Act. Such a declaration brings the listed instrument within the scope of the functions of the Human Rights and Equal Opportunity Commission.

106 The High Court has preferred to use international standards in the development of common law: *EPA v Caltex* (1993) 68 ALJR 127, 135; *State of Western Australia v The Commonwealth ('the Native Title Case')* (1995) 128 ALR 1, 64

107 International Law Teachers, The University of Melbourne, Submission No. 188, p. S 1294

Discrimination Act 1984 and commented that the reliance on a prior review of legislation is not appropriate as some legislation passed subsequent to Australia's ratification of the Convention has raised concerns.¹⁰⁸ They cited the examples of the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* in Western Australia, the *Crime Amendment Act 1993* in Victoria, the *Juvenile Justice Amendment Act (No. 2) 1996* in the Northern Territory and the *Juvenile Justice Legislation Amendment Act 1996* in Queensland.¹⁰⁹ They added that:

It is strongly arguable that the move towards a punitive model that sees as its overriding objective in the punishment of offenders and their removal from the community, to the neglect of their rehabilitation and reintegration within it, fails to consider the primacy of the 'best interests' of the child as required under Article 3 of the Convention.¹¹⁰ This is especially so in those pieces of legislation imposing a mandatory sentence on child offenders.¹¹¹

5.54 In relation to the *Crime (Child Sex Tourism) Amendment Act 1994*, while the Commonwealth does not have general Constitutional responsibility in the area of criminal law, the legislation could proceed under the external affairs power in relation to matters which occur outside Australia and which affect Australia's international relations and through Australia's obligations under the *Convention on the Rights of the Child*.¹¹²

5.55 Australia's Report stated that:

The legal ramifications of the ratification of the CRC domestically would seem to be that it gave power to the Commonwealth to legislate in some areas that would otherwise be matters for the sovereign States. The extent to which this is so remains unexplored ... Where children's rights are currently endangered and may be better protected by Commonwealth legislation formed on the basis of the CRC, such legislation ought to be welcome to those who are concerned about the interests of children.¹¹³

5.56 It was suggested that the introduction of appropriate legislation could be a mechanism to clarify some of the misinterpretations in relation to the *Convention on the Rights of the Child*. BoysTown Link Up believed that any legitimate concerns arising from the terms of the Convention can be dealt with

108 *ibid*, pp. S 1294-5

109 *ibid*, p. S 1295

110 This is especially so given that the perceived increase in youth crime is not supported by the facts, with the rate per thousand of youth population being processed by the juvenile justice system remaining largely stable between 1979-80 and 1990-91: C Cuneen and R White, *Juvenile Justice: An Australian Experience*.

111 International Law Teachers, The University of Melbourne, Submission No. 188, p. S 1295

112 Williams, *House of Representatives Hansard*, 3 May 1994, p. 79

113 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, pp. S 1269-70

by implementing legislation at the Federal level.¹¹⁴ Tonti-Filippini *et al* commented that this could make it clear that the rights of the child are fully protected when the family unit is fully protected and the parents exercise their duties and responsibilities within the family unit.¹¹⁵

Legislation on the rights of the child similar to other human rights legislation, such as the anti-discrimination legislation, would afford the opportunity for the Commonwealth Parliament to affirm the role of a child's family and the importance of parental duties and responsibilities, and their authority, in the first instance, to make judgements for the protection of the rights and dignity of the child.¹¹⁶

5.57 Some of the submissions opposing the Convention and the intervention of the Commonwealth in State and Territory jurisdictions still requested Federal legislation in relation to specific areas such as sexual exploitation of children overseas.¹¹⁷

5.58 It was suggested that all legislation in Australia should be reviewed in light of the recent legislative changes that breach the Convention, or which reflect a lack of respect for the Convention.¹¹⁸ Ms Evatt believed that an assessment should be made of each provision of the Convention to ensure the Australia's legislation, policies and procedures comply.¹¹⁹ The Committee believes that there should be a systemic analysis to assess existing Federal, State and Territory legislation for consistency with the Convention.

The need for umbrella Federal legislation

5.59 The Victorian Council of Civil Liberties was of the view that the *Convention on the Rights of the Child* was one of the few international instruments which Australia has ratified but failed to give effect to in the form of national domestic legislation and to establish a mechanism to promote compliance with it.¹²⁰

114 BoysTown Link Up, Supplementary Submission No. 136a, pp. S 3443, S 3449

115 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, pp. S 1272-3

116 *ibid*, p. S 1279

117 For example, Endeavour Forum, Submission No. 8, p. S 26

118 Baker, Transcript of Evidence, 6 November 1997, pp. 46-7

119 Evatt, Transcript of Evidence, 17 April 1998, pp. 1565-6

120 O'Reilly, Transcript of Evidence, 10 July 1997, p. 1028

5.60 The National Children's and Youth Law Centre submitted that in April 1996 the *ad hoc* approach to legislation in Australia meant that there were 235 laws which directly impact on children and young people in Australia notwithstanding the lack of an overarching code, act or entity to protect children's rights as a national level.¹²¹

In Australia the history of human rights law has been problematic, not because of the instruments themselves, but because they have been selectively applied by Commonwealth and State Governments. Through Commonwealth law founded on the external affairs power, that selectivity has also restricted State law.¹²²

5.61 In relation to the possible introduction of Federal legislation, Professor Triggs commented that the Convention represents a widely based international view of the rights of the child which incorporated and articulated in legal terms much wider aspirations from earlier years which the Federal Parliament ought to implement to give proper effect through legislation.¹²³ While it is difficult to translate these aspirations into legal standards which meet the common objectives this has been done in the past in relation to the racial discrimination convention for example.¹²⁴

5.62 A number of submissions asserted that the best way to ensure implementation of the Convention was through legislation and that Australia had an obligation to do so.¹²⁵ It was suggested that it is essential that the Convention is incorporated more broadly in domestic legislation to attain consistent and coordinated policy formulation, planning and service delivery; to establish the Convention as the benchmark set by the international community; and to enhance the rights of the child that cannot be achieved without legal standards and sanctions.¹²⁶ It was argued that implementing legislation would address the need for existing law to be consistent with the provisions of the Convention.¹²⁷ The Scripture Union of Australia called for the introduction of

121 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 17

122 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, p. S 1259

123 Triggs, Transcript of Evidence, 10 July 1997, p. 1015

124 *ibid*

125 For example, Youth Affairs Network of Queensland, Submission No. 415, p. S 2485; Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 665; Australian Early Childhood Association, Submission No. 394, p. S 2209

126 Children's Interests Bureau Board South Australia, Submission No. 327, p. S 1806

127 International Law Teachers, The University of Melbourne, Submission No. 188, pp. S 1290, 1298

legislation and argued that the current approach is piecemeal with no overall legislative structure within which to pursue the Convention ideals.¹²⁸

5.63 Professor Triggs commented that there was an advantage in umbrella legislation in that it required the use of quite broad language which can be interpreted in different ways by the States' administrative, legislative and judicial arms. Cooperative efforts can ensure that the interpretation of the provisions were acceptable within a Federal system.¹²⁹ Because of the potential political consequences of introducing umbrella legislation which clearly impinges in State and Territory jurisdictions there needs to be a strategy whereby the States can be encouraged, through cooperative federalism, to meet Australia's international obligations.¹³⁰

5.64 Clause 26 of the *Vienna Convention on the Law of Treaties* imposes an obligation to implement treaties in 'good faith'. BoysTown Link Up suggested that Australia has a moral obligation to give effect to the rights outlined in the Convention.¹³¹ BoysTown Link Up also believed that the legislation is a move away from Australia's position where treaties are ratified simply to make Australia appear to be a good international citizen without the intention of complying with conventions.¹³² The Youth Advocacy Centre also cited paragraph 203 of Australia's Report which states that:

... entering into an international treaty does not raise a legitimate expectation that government decision makers will act in accordance with the treaty prior to its enactment into domestic Australian law...¹³³

5.65 It was suggested that the failure to introduce legislation was problematic because domestic laws and practices did not comply with the Convention prior to ratification and continue not to do so and there is no way of ensuring that new laws and practices coming into operation will comply with the Convention.¹³⁴ The NGOs believed that the absence of legislation means that it is possible for existing or future governments at the Federal, State and Territory

128 Scripture Union of Australia Inc, Submission No. 19, p. S 78

129 Triggs, Transcript of Evidence, 10 July 1997, p. 1016

130 *ibid*

131 BoysTown Link Up, Supplementary Submission No. 136a, p. S 3447

132 BoysTown Link Up, Submission No. 136, p. S 843

133 *Australia's First Report under the Convention on the Rights of the Child*, December 1995, p. 45

134 BoysTown Link Up, Supplementary Submission No. 136a, p. S 3446

levels to contravene the Convention provisions and enable governments to abrogate their responsibilities.¹³⁵

5.66 Concerns were raised by those opposed to the Convention that the introduction of legislation at the national level could undermine the rights of parents.¹³⁶ It was argued that the current legal infrastructure was adequate to address the needs of children provided it was properly administered.¹³⁷ The Committee notes that the role of the Queensland Children's Commission includes the promotion of the principle that parents and legal guardians have the primary responsibility for the upbringing of children.¹³⁸

5.67 It could equally be argued that the introduction of Federal legislation would be required to go through the normal democratic processes during which it could be ensured that parental authority is not undermined. It was suggested that if legislation is introduced to implement the Convention then there will need to be a lot of community discussion about how various standards are interpreted in the Australian context.¹³⁹

5.68 Caroline Chisholm Centre for Health Ethics commented that the introduction of Federal legislation could also act as a catalyst for community discussion and change.¹⁴⁰ The Parliament will determine which direction any changes may take but the Convention is a useful tool to initiate a process of change.¹⁴¹ It was suggested that the introduction of legislation to implement the Convention would enable the community to have input into the process.¹⁴²

5.69 The introduction of legislation would enable clarification of Australia's position and parent's rights and responsibilities in relation to the Convention.¹⁴³ It would also clarify the administrative implications of the Convention and lead to increased procedural fairness.¹⁴⁴ While the 'spirit of the treaty' should be observed there is no requirement that Parliament implement the exact terms of

135 Defence for Children International Australia, *op cit*, p. 11; Medica, Transcript Evidence, 9 July 1997, p. 918

136 Francis, Submission No. 3, p. S 9

137 Country Women's Association of Western Australia, Submission No. 20, p. S 81; Morrison, Transcript of Evidence, 29 April 1997, p. 202

138 *Children's Commissioner and Children's Services Appeals Tribunal Act 1996*

139 Bayes, Transcript of Evidence, 28 April 1997, p. 90

140 Caroline Chisholm Centre for Health Ethics, Supplementary Submission No. 66a, p. S 2553

141 *ibid*

142 Purcell, Transcript of Evidence, 10 July 1997, p. 996

143 Grant, Transcript of Evidence, 4 August 1997, p. 1129

144 Frankovits, Transcript of Evidence, 9 May 1997, p. 355

the treaty.¹⁴⁵ Mr Burdekin believed that incorporating the Convention into Federal law and the development of national standards would not be easy, but it would not be impossible.¹⁴⁶

5.70 The Victorian Council of Civil Liberties suggested that umbrella legislation even if it is minimalist, would indicate some ownership, as there are currently so many different bodies with legislative control over various aspects of children's lives and no one has overriding responsibility.¹⁴⁷

5.71 In November 1994 and March 1997 the Joint Standing Committee on Foreign Affairs, Defence and Trade recommended legislation for the incorporation of the Convention into domestic law.¹⁴⁸ The Government response to the 1994 report stated that the matter would be further considered.¹⁴⁹ Subsequent to the recommendation, however, the Committee notes that there has been substantial improvement in some aspects of State and Territory legislation which support the principles in the Convention.

5.72 The external affairs power under Section 51(xxix) of the *Commonwealth of Australia Constitution Act 1900* provides scope for the introduction of Federal legislation to implement international treaties.¹⁵⁰ Mason J, Murphy J and Brennan J were all of the view that the existence of an international treaty made the matter one of international concern and therefore could be considered appropriate for inclusion as Federal legislation.¹⁵¹

5.73 Jones and Marks commented that Australia must develop a sense of nationhood as it moves to the 21st century and give primacy to our international obligations as Australia's position on the world stage should have one identity. Therefore, they suggested that any objection to Federal legislation in the name

145 Rothwell D (1993) 'The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits', *Adelaide L R* 15: 223 cited in BoysTown Link Up, Supplementary Submission No. 136a, p. S 3449

146 Burdekin, Transcript of Evidence, 5 August 1997, p. 1291

147 Edwards, Transcript of Evidence, 10 July 1997, p. 1037

148 Joint Standing Committee on Foreign Affairs, Defence and Trade *The Human Rights and Equal Opportunity Commissioner and the Commonwealth Ombudsman: Report on Public Seminars 20 and 25 September 1996*, March 1997, Recommendation 1, p. ix and Joint Standing Committee of Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to promote and Protect Human Rights*, November 1994, Recommendation 40, p. 154

149 Schacht, The Australian Government Response to the Joint Standing Committee of Foreign Affairs, Defence and Trade Report, *A Review of Australia's Efforts to promote and Protect Human Rights*, Senate Hansard, 29 November 1995, *Committees Reports: Government Responses*, p. 4241

150 *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1

151 *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, pp. 222, 236 and 253 respectively and *Commonwealth v Tasmania* (1983) 158 CLR 1 pp. 125, 171 and 219 respectively and Deane J at pp. 258-9 cited in Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1878

of States' rights must be rejected as an antiquated idea that is 'undemocratic and oxymoronic'.¹⁵²

5.74 Professor Charlesworth and Mr McCorquodale commented that States' rights should not prevent the Commonwealth from implementing the Convention because of the important forms of protection it affords children. They submitted that no State should have the right to breach the rights of children, therefore disputes over Federal powers should not impinge on the observance of such basic rights.¹⁵³

5.75 Notwithstanding the need for standardisation between jurisdictions, the Creche and Kindergarten Association of Queensland commented that it would be counter productive if the use of the 'head of power' caused disharmony between the State and Federal governments.¹⁵⁴ Mr Kaye suggested that the Commonwealth does not have to take a legislative stick to the States but could be proactive in meetings of Australian Attorneys-General to encourage coordinated efforts. If the Commonwealth were seen to impose a solution upon the States this could have undesirable consequences.¹⁵⁵

5.76 There was concern that an attempt by the Federal Government to legislate in relation to the Convention may be seen by the State and Territory Governments as an intrusion into their jurisdictions and could therefore be highly divisive and have an adverse impact on the effective implementation of the Convention. The States administer important elements of the Australian legal system, operate much of the public infrastructure and have responsibility for many of the matters relevant to the *Convention on the Rights of the Child*. Usually the Federal Government relies on the States and Territories to implement international treaties in the areas of their responsibility, if this is the most effective way to implement Australia's international obligations. A cooperative approach therefore may have many advantages particularly as it helps avoid duplication of expenditure and infrastructure.

5.77 The Australian Law Reform Commission also argued that:

Legislating under all the relevant heads of federal power would result in a limited and fragmented outcome. Only those areas over which the Commonwealth has specific power to legislate could be incorporated. Many important areas of essentially State responsibility (for example juvenile

152 Jones and Marks, Submission No. 91, p. S 439

153 Charlesworth and McCorquodale, Submission No. 92, p. S 448

154 Creche and Kindergarten Association of Queensland, Submission No. 81, p. S 397

155 Kaye, Transcript of Evidence, 4 August 1997, p. 1079

justice, education and care and protection) may not be effectively covered. The external affairs power option, on the other hand, would be comprehensive but could lead to considerable difficulty of interpretation and application given the nature of the obligations under CROC. As an ordinary piece of legislation the CROC provisions could also be overridden by later inconsistent federal legislation.¹⁵⁶

5.78 Some suggested that the Convention could be incorporated verbatim into Australian law.¹⁵⁷ The Australian Law Reform Commission, however, believed that while the Convention sets an achievable standard, it is not written in a form that is very directly amenable to conversion into legislation.¹⁵⁸ The Committee does not believe that Federal legislation which follows the Convention verbatim would be appropriate given the variety of interpretations in relation to some sections of the Convention. We believe that, if the preparation of Federal legislation is attempted, greater emphasis can be placed on the role of the family without decreasing the rights given to children. It was suggested that:

... the federal government has to be in there in some overarching policy guidance sense of either having a role of coordinating policy, giving best standards and best practices that will ultimately impact on children, and certainly giving some national leadership in the way that matters translate then directly into rights and entitlements to children.¹⁵⁹

5.79 The Human Rights Commissioner agreed that the Convention is inappropriate for direct enactment in Australian law and the role of the Federal Government was to establish the framework under which the Convention operates.¹⁶⁰ The Queensland Government commented that it may be over optimistic to attempt to mandate the Convention through legislation even though the States support the sentiments embodied in the Convention.¹⁶¹

5.80 The Northern Territory Government added that uniform legislation can pose problems in terms of service delivery and that sometimes economies of scale means that some programs are not easily provided to remote communities.¹⁶² Ms Jones gave the view that umbrella legislation at the Federal level is not going to resolve the issues as they are much more complex than

156 Australian Law Reform Commission, Submission No. 382, p. S 2155i

157 Turner, Transcript of Evidence, 14 August 1997, p. 1424

158 Cronin, Transcript of Evidence, 5 August 1997, p. 1169

159 *ibid*, p. 1170

160 Sidoti, Transcript of Evidence, 5 August 1997, p. 1170

161 Culbert, Transcript of Evidence, 6 August 1997, p. 1308

162 Nicholson, Transcript of Evidence, 6 November 1997, p. 4

that.¹⁶³ Ms Boland also suggested that one piece of legislation cannot deal with all matters relating to children.¹⁶⁴

5.81 It was argued that what was needed was a programmatic approach to the implementation of human rights rather than a legalistic one:

Ratifying governments are encouraged to develop programs which practically address the many aspects of the lives of children rather than simply putting legislation into place. It does not take the simplistic notion of 'giving' children certain rights which they might then pursue through the courts. It does have a legal content of course (as we have seen in the Teoh case) but the full import of the convention does not lie in the courts.¹⁶⁵

5.82 If the Government incorporates the Convention into Australian law, consideration must be given to whether the law applies only to government or shall extend to individuals and private institutions.¹⁶⁶ The Australian Law Reform Commission (ALRC) referred to the *Race Discrimination Act 1975* incorporating the *Convention on the Elimination of All Forms of Racial Discrimination* and the *Sex Discrimination Act 1984* incorporating *Convention on All Forms of Discrimination Against Women* which cover the actions of private parties as well as those of government agencies.¹⁶⁷ The ALRC added that the Convention covers much more than not being discriminated against and there would be significant difficulties in covering the private sector and individuals when incorporating this Convention into legislation.¹⁶⁸ They suggested that special purpose legislation would be a more effective approach.¹⁶⁹

5.83 The Committee does not support the introduction of umbrella Federal legislation which covers all matters included in the Convention. We believe that as a matter of urgency, the Commonwealth Government should thoroughly review its legislation to ensure that it is consistent with State and Territory legislation and does not have inconsistencies such as those outlined below in relation to reproductive health matters. The Committee also believes that the governments should work at a national approach through the Standing Committee of Attorneys-General.

163 Jones, Transcript of Evidence, 5 August 1997, p. 1200

164 Boland, Transcript of Evidence, 5 August 1997, p. 1281

165 Caritas, Submission No. 167, p. S 1112

166 Australian Law Reform Commission, Submission No. 382, pp. S 2155i-j

167 *ibid*, p. S 2155j

168 *ibid*

169 *ibid*

Other Federal legislation

Sex Discrimination Act 1984

5.84 The Committee was given examples of cases where Commonwealth legislation has been employed in a manner where it was considered not to be in the child's best interest. In recent cases in Queensland, South Australia and Victoria in relation to access to reproductive technology, the Commonwealth *Sex Discrimination Act 1984* was found to be in conflict with State legislation such as the Victorian *Infertility Treatment Act 1995*, which attempted to protect the rights of children and affirm the principle that the welfare and interests of the child were paramount.¹⁷⁰

5.85 Another approach that was suggested was the introduction of specific legislation such as the child protection legislation to ensure minimum standards are met across Australia in a manner similar to the national mental health strategy.¹⁷¹ A package of legislation could deal with the various aspects of the rights of the child.¹⁷² For example, a number of submissions supported the introduction of legislation to establish a Commissioner for Children. Another area where it was suggested that the Commonwealth might implement legislation is in relation to the operation of Australian companies overseas covering issues such as the use of child labour or environmental damage which may impact on children.¹⁷³ These are discussed in more detail later in the Report.

5.86 Dr Cronin suggested introducing specific legislation would also have a symbolic function.¹⁷⁴ ACFOA believed that legislation could address the principles of non-discrimination, the child's best interests and the right to be heard in all decision making.¹⁷⁵

5.87 Dr Piscitelli added that legislation often provided a strong platform for changing public opinion and advancing children's issues.¹⁷⁶ Mr McCorquodale

170 Human Rights and Equal Opportunity Commission : *Sex Discrimination Act 1984* (Commonwealth), Hearing Between MW, DD, TA and AB, and the Royal Women's Hospital, Fremasons Hospital, State of Victoria, *Reasons for the Decision of Inquiry Commissioner Ms Antonia Kohl* 5 March 1997 cited in Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, p. S 1269

171 McDonald, Transcript of Evidence, 10 July 1997, p. 972

172 Charlesworth, Transcript of Evidence, 29 April 1997, p. 177

173 Crighton, Transcript of Evidence, 10 July 1997, p. 952

174 Defence for Children International Australia, *op cit*, p. 11

175 Australian Council for Overseas Aid, Supplementary Submission No. 220a, p. S 2588

176 Piscitelli, Transcript of Evidence, 1 May 1997, p. 325

commented that children's rights incorporated in the Commonwealth's *Family Law Reform Act 1975* in 1995 have been accepted.¹⁷⁷

5.88 The Committee accepts that in some areas the introduction of specific legislation may be the most appropriate approach but this would need to be addressed on a case by case basis and in many instances would require the cooperation of the State and Territory governments. The Committee believes that if this approach were deemed to be appropriate, that this would be preferable to the introduction of umbrella legislation.

Scrutiny of legislation

5.89 Australian Law Reform Commission was of the view that there are still significant areas of Australian law and practice that do not conform with *Convention on the Rights of the Child*.¹⁷⁸ The ALRC gave the examples of the New South Wales *Children (Parental Responsibilities) Act 1994*, *Child Welfare Act 1947* and the *Criminal Code Amendment Act (No. 2) 1996* in Western Australia, the *Juvenile Justice Legislation Amendment Act 1996* in Queensland, and the *Juvenile Justice Amendment Act (No. 2) 1996* in the Northern Territory.¹⁷⁹

5.90 The ALRC believed that there should be a comprehensive review of all relevant legislation to ensure it complied with the *Convention on the Rights of the Child* and that all future legislation should be scrutinised before enactment.¹⁸⁰ Ms Evatt added that Australia has an ongoing obligation to assess on a continuing basis whether our laws, policies and practices are in conformity with the provisions of the Convention and whether there may be some areas where our laws and policies need to be brought into line.¹⁸¹

5.91 It was suggested that the terms of reference of both the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances be amended to include a requirement to examine whether changes to Australia's legislation were in compliance with the specific terms of the

177 McCorquodale, Transcript of Evidence, 29 April 1997, p. 171

178 Australian Law Reform Commission, Submission No. 382, p. S 2155c

179 *ibid*, pp. S 2155c-d

180 *ibid*, p. S 2155g

181 Evatt, Supplementary Submission No. 5a, p. S 1564

*Convention on the Rights of the Child.*¹⁸² The ALRC commented that the use of parliamentary scrutiny committees to ensure legislative compliance with the Convention was desirable because it placed an explicit onus for ensuring compliance on the elected representatives in Parliament and those within Government who are involved in policy formulation and legislative implementation.¹⁸³ It was suggested that parliamentary scrutiny would reduce the risk of compliance with international obligations being deflected by competing demands.¹⁸⁴

Policy compliance with legislation

5.92 The Australian Law Reform Commission also argued that there were situations in which the legislation complied with the Convention but the practice does not meet minimum standards.¹⁸⁵ Ms Rayner believed that there is little point in attempting umbrella legislation when there is no consistent policy on children across portfolio areas,¹⁸⁶ while Mr Burdekin emphasised the issue of resources.¹⁸⁷ ACFOA agreed that the implementation of legislation will not resolve all of the issues pertaining to young people in Australia and that consideration will need to be given to the existing approach and resourcing levels.¹⁸⁸

5.93 The Human Rights Commissioner commented that 'full compliance' is not necessarily achieved through incorporation into Australian law as compliance requires administrative action and legislative action only where appropriate.¹⁸⁹ He considered the application of national standards more appropriate than merely enacting legislation.¹⁹⁰

5.94 The Association of Children's Welfare Agencies New South Wales also cautioned against an excessive judicial approach which would not solve the problem without dealing with social values and attitudes of our society and they

182 Joint Standing Committee on Foreign Affairs and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, Parliament of the Commonwealth of Australia, November 1994, p. 53; this was also supported by Jones and Marks, Submission No. 91, p. S 441

183 Australian Law Reform Commission, Submission No. 382, p. S 2155h

184 *ibid*

185 *ibid*, p. S 2155d

186 Rayner, Transcript of Evidence, 29 September 1997, p. 1546

187 Burdekin, Transcript of Evidence, 5 August 1997, p. 1292

188 Australian Council for Overseas Aid, Supplementary Submission No. 220a, p. S 2588

189 Sidoti, Transcript of Evidence, 5 August 1997, p. 1175

190 *ibid*, p. 1171

also noted that community education is a slow process.¹⁹¹ It was suggested that legislation will not make people better parents and should be confined to criminal offences.¹⁹² It was suggested that legislation on its own would not be sufficient. There needed to be infrastructure and processes to enable it to work.¹⁹³ It is not just about law, it is law, practice and policy.¹⁹⁴

5.95 The community may be prepared to accept national standards dealing with measures that protect children, such as freedom from abuse; freedom from violence; and even standards that go to their development, whether they be disabled or otherwise. The Committee believes, however, there would be strong opposition if Parliament were to enact legislation which overrode the ability of States and Territories to prescribe penalties for offences that those State and Territory legislatures have thought would be conducive to the protection of the community.

5.96 The Committee does not believe that the introduction of umbrella Federal legislation is the best approach to implement this Convention and that other mechanisms could be more effective particularly those based on State and Territory cooperation. The emphasis should be on enforcing and improving existing legislation rather than creating more at the Federal level.

5.97 The Committee believes that more emphasis should be placed on educative programs and monitoring and that an additional layer of legislation is inappropriate in many circumstances where there is already adequate legislation at the State and Territory level.

Changes to the Constitution

5.98 The Children's Interests Bureau Board South Australia recommended that any revision of the Constitution should make specific reference to the status of the rights of children in Australian Society.¹⁹⁵ The Australian Law Reform Commission commented that this approach has been suggested for general human rights treaties but there could be many legal problems in implementing the broadly based set of rights set out in the Convention.¹⁹⁶

191 *ibid*, p. 1151

192 Francis, Submission No. 3, p. S 9

193 Alford, Transcript of Evidence, 1 May 1997, p. 239

194 Wight, Transcript of Evidence, 1 May 1997, p. 266

195 Children's Interests Bureau Board South Australia, Submission No. 327, p. S 1807

196 Australian Law Reform Commission, Submission No. 382, p. S 2155i

5.99 The Australian Constitution can only be changed by a referendum and history would indicate that it would therefore be doubtful that the change would be accepted by the Australian people. The Committee does not believe that it is necessary to amend the Constitution to implement the *Convention on the Rights of the Child* and that little benefit could be gained from this approach.

Office for Children, Children's Commissioner and/or Ombudsman

5.100 A significant number of the submissions that favoured the Convention called for a permanent office or commissioner to monitor compliance with the Convention and suggested a variety of roles and models. The evidence revealed that although many specified a children's commissioner or Office for Children or ombudsman, in fact the form adopted was not paramount as long as the outcome was a system that protected children's rights and well being.

Office for Children

5.101 A number of submissions supported an Office for Children. The National Council for the Prevention of Child Abuse, a Federal advisory committee, has recently recommended an Office for Children at the Federal level.¹⁹⁷ The Australian Association of Paediatric Teaching Centres suggested that the problems cannot be addressed by enhancing existing systems because that has been tried and there are still problems such as the appalling rate of immunisation in Australia.¹⁹⁸

5.102 It was suggested that an Office for Children could facilitate the coordination of health policies with factors such as education, income and family arrangements, and with social and legal requirements; collaboration, monitoring, reviewing and suggesting improvements promoting the principles embodied in the Convention; monitoring and reporting on compliance with the Convention; and advocacy for children.¹⁹⁹ Other functions suggested for the Office for Children included the consideration of proposed legislative changes, reviewing existing legislation, an educative role, monitoring compliance with

197 Professor Kim Oates, Head of the National Council for the Prevention of Child Abuse, Interview of radio Sydney 2BL with James Valentine, 3 March 1998, Transcript of discussion on the National Council on the Prevention of Child Abuse, p. 2

198 Goodier, Transcript of Evidence, 3 July 1997, p. 626

199 Australian Association of Paediatric Teaching Centres Submission No. 10, p. S 35; *Policies 1997, Office for Children*, p. 3; Supplementary Submission No. 10a, p. S 2284; Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1040; O'Reilly, Transcript of Evidence, 10 July 1997, p. 1030

legislation, providing advice for governments and research.²⁰⁰ Judge Jackson believed that an Office for Children could link with the States and Territories and the different portfolios of the Commonwealth Government.²⁰¹ The New Zealand Children's Commissioner commented that such an office could also have a coordinating role which could disperse information.²⁰²

5.103 Currently, the Human Rights and Equal Opportunity Commission's tasks include: research in areas relevant to children's rights; public education and other activities to promote an understanding and acceptance of children's rights; and the monitoring of Australia's compliance with the Convention.²⁰³ The Commission has conducted a number of inquiries such as the National Inquiry into Homeless Children, the National Inquiry into Children and the Legal Process and the National Inquiry into the Human Rights of People with Mental Illness.²⁰⁴

5.104 The Australian Association of Paediatric Teaching Centres believed that while parents have rights over and responsibilities for their children, when parents abrogate their responsibilities by abusing or neglecting their children, there is a need for an advocate to protect the rights of children.²⁰⁵ The Association contended that existing arrangements are not adequate and that an Office for Children is an appropriate improvement to the current system.²⁰⁶

5.105 Save the Children Australia suggested a children's commissioner, a national agenda and an office for children, because improved coordination would assist welfare agencies who are currently working in isolation and competing for resources.²⁰⁷ They believed that this enhanced:

... the powerlessness of those working for children in the child protection industry. This lends power to abusers and it lends power to people who do not value children or have little value for them, but there is a cost to that lack of networking and connection. It is poor business sense for each of us to research and promote parts of an overall solution.²⁰⁸

200 The Australian Association of Paediatric Teaching Centres, *Policies 1997, Office for Children*, p. 4

201 Jackson, Transcript of Evidence, 3 July 1997, p. 585

202 McClay, Transcript of Evidence, 28 May 1998, p. 1605

203 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1872

204 *ibid*

205 The Australian Association of Paediatric Teaching Centres, Supplementary Submission No. 10a, p. S 2283

206 *ibid*

207 Herring, Transcript of Evidence, 10 July 1997, p. 979

208 *ibid*, p. 980

5.106 The response to questions on existing consultative arrangements, was that the Federal Government was currently frequently engaging with the State and Territory governments and the non-government organisations in consultations in relation to the two protocols.²⁰⁹ There is also intergovernment consultation through the Ministerial Meeting on Human Rights and the non-government organisations forum.²¹⁰ The Attorney-General's Department attempts to address concerns raised in correspondence and in addition the Human Rights and Equal Opportunities Commission has a function in promoting the Convention.²¹¹ This is clearly inadequate.

5.107 The Committee supports the view of the New South Wales Government that in each portfolio area there already exists adequate mechanisms to determine and implement nationally consistent approaches on matters affecting children. What is needed in areas where this has not occurred, is the political will to do so. The role of the coordinating agency may include the identification of available resources in the community and duplication of service provision.²¹² There is a need for agencies and government departments in health, disabilities, education, community development, family, youth affairs and legal services to work together in order to reduce duplication and enable access.²¹³ The Committee believes that such a mechanism could assist in overcoming inconsistencies between portfolio areas.

5.108 The Joint Standing Committee on Treaties believes that the role of an Office for Children should be to ensure that the activities of the Federal Government are optimally placed to assist the States and Territories in the implementation of their policies and to ensure that those policies are consistent with Australia's interpretation of its responsibilities under the Convention.

5.109 The National Children's and Youth Law Centre believed that an Office for Children must be able to participate vigorously in all stages of policy development or have its views reflected in government legislation, policy and programs affecting children.²¹⁴ It was suggested that an Office for Children or children's commissioner was needed as a voice for children because they are a very vulnerable group and because of the lack of coordination at the national

209 Lamb, Transcript of Evidence, 28 April 1997, p. 9

210 Sheedy, Transcript of Evidence, 28 April 1997, p. 11

211 *ibid*, p. 12

212 Giglio, Transcript of Evidence, 9 May 1997, p. 379

213 Early Childhood Alliance, Submission No. 166, p. S 1109

214 National Children's and Youth Law Centre, Supplementary Submission No. 321a, p. S 2783

level in relation to the programs and services for families and for children.²¹⁵ The Youth Action and Policy Association believed that the approach should be legislative and organisational and should be monitored.²¹⁶ They suggested that one of the problems was the development of legislation and programs in isolation, often with departments competing, services being duplicated and limited evaluation of programs.²¹⁷

5.110 Young Media Australia commented on the frustration of children's groups trying to make their voice heard about any aspect of the Convention and supported the call for an Office for Children to provide representation for the child at the highest levels of government.²¹⁸ An Office for Children hosted by the Prime Minister could ensure that children's rights are a priority and there is coordination across portfolio areas.²¹⁹

5.111 It was suggested that the establishment of an agency for children would not necessarily cost more in terms of resources if it achieved greater coordination of policies.²²⁰ Information is being gathered at the national level under auspices of the ministerial councils and State coordinating bodies, the subcommittee of community services, information security departments and groups such as the Institute of Family Studies.²²¹ It was suggested that a small office could seed other agencies to perform functions and to focus on the rights of children and report to Parliament.²²² Ms Rayner believed that there should be a mechanism across all government portfolios which was backed by the authority of the Prime Minister and required the cooperation of all government departments in dealing with children's policy issues.²²³

5.112 The Victorian Council of Civil Liberties also supported an Office for Children within the Department of Prime Minister and Cabinet.²²⁴ The Australian Catholic Social Welfare Commission suggested either the

215 Gledhill, Transcript of Evidence, 9 May 1997, pp. 412-3

216 Morey, Transcript of Evidence, 9 May 1997, p. 365

217 *ibid*

218 Biggins, Transcript of Evidence, 4 July 1997, p. 773

219 Rayner, Submission No. 223, p. S 1476

220 Germanos-Koutsounadis, Transcript of Evidence, 9 May 1997, p. 378

221 Elliot, Transcript of Evidence, 6 August 1997, p. 1305; Culbert, Transcript of Evidence, 6 August 1997, p. 1306

222 Rayner, Transcript of Evidence, 29 September 1997, p. 1552

223 Rayner, Submission No. 223, p. S 1476

224 O'Reilly, Transcript of Evidence, 10 July 1997, p. 1029

Department of Health and Family Services or the Department of Prime Minister and Cabinet could potentially have a coordinating role.²²⁵

5.113 The benefits of an Office for Children as a statutory authority attached to the Department of Prime Minister and Cabinet include the focus on coordination of service delivery and establishment of a focus on children and public policy relating to children.²²⁶

5.114 The Child and Youth Health Council of South Australia also supported the establishment of a small advisory mechanism to coordinate policy.²²⁷ The example was given of the Children's Interests Bureau in South Australia which has a proven track record in influencing government policy and community attitudes in a way which is child sensitive.²²⁸

5.115 The Australian Catholic Social Welfare Commission also suggested the establishment of an interdepartmental committee to develop, co-ordinate and monitor a whole of government children's policy.²²⁹ Ms Rayner agreed that an interdepartmental committee could identify the issues needed to promote children's well being as an interim measure.²³⁰ In her experience, departments did not consider the rights of the child as a priority in administrative, infrastructure and other matters:

... the administrative instructions would make an enormous difference if they are unambiguous - that you must think about the rights of a child in what you do; and this is not just child protection legislation we are talking about, it is all portfolios.²³¹

5.116 An Office for Children could implement administrative arrangements to monitor compliance of legislation, policies and practice with the Convention. It was suggested that the role of the Office for Children should include protecting the rights of children in relation to planning proposals, statutory reporting, identifying breaches, strengthening the legal position and security of children, preventing conflict between children and society and community education on children's rights.²³² This approach could provide leadership in promoting the

225 Cooney, Transcript of Evidence, 29 April 1997, p. 194; Harrigan Transcript of Evidence, 29 April 1997, p. 194

226 O'Reilly, Transcript of Evidence, 10 July 1997, p. 1036

227 Wigg, Transcript of Evidence, 4 July 1997, p. 691

228 Family Services Australia Ltd, Submission No. 482, p. S 2715

229 Australian Catholic Social Welfare Commission, Submission No. 124, p. S 649

230 Rayner, Transcript of Evidence, 29 September 1997, p. 1546

231 *ibid*, p. 1548

232 Australian Association of the Welfare of Child Health Inc, Submission No. 412, pp. S 2465-6

Convention and ensuring that children are heard in relation to matters that affect them.²³³

5.117 The Queensland Government believed a Federal Children's Commissioner would work well if it dovetailed with the States and Territories and avoided duplication.²³⁴ Such an Office could show leadership and signal the Government's priority on ensuring the rights of all children. The Office would have formal responsibility for monitoring children issues and scrutinising the government's activities and reporting to Parliament on children's issues, compliance with the Convention and its performance.²³⁵ It should be a statutory body with a high public profile and influence in government circles.²³⁶

5.118 It was argued, however, that an Office for Children within the Department of Prime Minister and Cabinet may be subjected to political pressure, could not undertake the independent monitoring functions, and that a unit within the bureaucracy might become a campaigner for government policy rather than an advocate for children and young people.²³⁷

5.119 The Committee believes that at the Federal level the most important need is to improve the coordination of the various portfolios in order to implement the Convention nationally and effectively monitor our progress in compliance. Therefore, the Committee supports the establishment of an Office for Children as a statutory authority attached to the Department of Prime Minister and Cabinet. The Committee sees the main purpose of this office as facilitating coordination and providing advocacy on children's issues.

5.120 We believe that the role and functions of the independent statutory authority should:

- ensure that all legislation, policy and practices support the family as the natural environment for the development and well being of children with parents having the primary role and responsibility in raising children;
- develop a national strategy and work with the States and Territories on improved coordination on policies affecting children;

233 Australian College of Paediatrics, Submission No. 97, p. S 472

234 Culbert, Transcript of Evidence, 6 August 1997, p. 1300

235 Australian Early Childhood Association, Submission No. 394, p. S 2212

236 Bendall, Transcript of Evidence, 9 May 1997, p. 421

237 Action for Children, Supplementary Submission No. 387a, p. S 3416

- ensure Federal departments to incorporate the principles of the Convention into their policies, programs and practice and act a voice for children to government;
- develop mechanisms to assist the coordination of Federal Government polices, programs and practice;
- identify and encourage research on children's issues;
- provide leadership and coordination in the development of national standards in consultation with the States and Territories;
- consult with community organisations and children and young people in relation to issues affecting;
- monitor programs and initiative for compliance with the Convention;
- coordinate the development of models of best practice for services and or programs relevant to children;
- liaise with the Federal, State and Territory complaints handling agencies and to facilitate cooperation in respect to matters extending beyond the limits of an individual state and territory jurisdiction;
- report to Parliament on the status of children in Australia;
- encourage and facilitate public debate and community awareness on matters relating to children;
- monitor performance of Australia's international obligations to children;
- establish a mechanism for public reporting on breaches and compliance with the *Convention on the Rights of the Child*;
- preparation of Australia's report to the United Nations Committee on the Rights of the Child; and
- investigate appropriate processes to enhance the opportunities for contribution by non-government organisations and young people to Australia's reports to the United Nations Committee on the Rights of the Child.

Independence of an Office for Children

5.121 It was suggested that the Office must be independent, and should be a systematically and structurally guaranteed means by which children's needs and rights can be put on the public agenda.²³⁸ It should be an independent body with a wide ranging brief covering any area of policy or practice affecting young people.²³⁹

5.122 A decision needs to be made as to whether this Office would be attached to a Government department or in some way linked to a relevant Minister. If there is a relationship with a Department or Minister then the independence of the Office may be questioned. The New Zealand Children's Commissioner commented that public confidence in the commissioner as an independent person is very important.²⁴⁰ He added that an advantage was that there is more access to the Minister than a Parliamentary officer may have.²⁴¹ The disadvantage of a complete separation is that the Office may not be privy to cabinet documents and other internal government documentation and consultations.

5.123 The New Zealand Children's Commissioner suggested that one option would be to make the Commissioner an officer of the Parliament thus making a clear distinction between the Commissioner and the department whose practices are to be monitored including in relation to funding arrangements.²⁴²

5.124 Burnside suggested that it is clear from the New Zealand, Sweden and Norway, and existing Australian models, in particular the Children's Interests Bureau South Australia and the Commission for Children in Queensland, that there needs to be an independent body rather than one that is answerable to a minister and funded by a department.²⁴³

5.125 UNICEF also saw the role of a commissioner as independent from government with their funding, functions and status determined by Parliament, accountable to Parliament and comparatively unconstrained by political interference, free to criticise government legislation, policy and resource commitments to children and possibly with powers to investigate and to report to Parliament.²⁴⁴

238 Australian Early Childhood Association, Submission No. 394, p. S 2216

239 Bendall, Transcript of Evidence, 9 May 1997, p. 421

240 McClay, Transcript of Evidence, 28 May 1998, p. 1604

241 *ibid*, p. 1612

242 *ibid*, p. 1604

243 Bendall, Transcript of Evidence, 9 May 1997, p. 421

244 UNICEF, Submission No. 156, p. S 1062

Attorney-General's Department

5.126 The Standing Committee on Community Affairs in May 1995 recommended the establishment of a child and youth bureau within the Attorney-General's Department to monitor Australia's compliance.²⁴⁵ However, the Department commented that there are no plans within the portfolio to establish an office to coordinate and monitor the implementation of the Convention at the national level.²⁴⁶ Also it was submitted that HREOC already monitors the implementation to a limited extent and the Government relied on this information and that provided by NGOs, State and Territory governments and Federal agencies to prepare the compliance reports.²⁴⁷

Individual complaints mechanism

5.127 One of the matters where there were differing views was in relation to whether a Federal office/commissioner should hear individual complaints. The Committee does not believe that this is an appropriate function for a Federal Office for Children as this role could overshadow the focus on policy coordination and advocacy. Judge Jackson supported the view that there needs to be a separate complaints mechanism.²⁴⁸ Ms Evatt cited the New Zealand experience where it has been demonstrated that a small agency with an advocacy role can achieve a lot, while not needing the same resources as one that deals with complaints.²⁴⁹

5.128 The existing functions of Human Rights and Equal Opportunity Commission (HREOC) that are relevant to children's rights include:

- investigating complaints about the practices of the Commonwealth that may be inconsistent with children's rights;
- investigating complaints of discrimination in employment and occupation on the grounds of age;
- preparing guidelines for the avoidance of acts and practices that may be inconsistent with children's rights;

245 Jackson, Submission No. 16, p. S 63

246 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3355

247 *ibid*

248 Jackson, Transcript of Evidence, 3 July 1997, p. 587

249 Evatt, Transcript of Evidence, 9 May 1997, p. 404

- examining existing or proposed laws to ascertain their consistency or otherwise with children's rights; and
- intervening in court proceedings that involve children rights.²⁵⁰

5.129 While violations of human rights are not illegal under the *Human Rights and Equal Opportunity Act 1986*, a complaints process is in place which reports to Parliament.²⁵¹ In 1996-97 there were 9 complaints to HREOC relying on the Declaration on the Rights of the Child and 11 complaints relying on the *Convention on the Rights of the Child*.²⁵² In addition, complaints can be made under the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*, or complaints involving issues such as health, education and social welfare may be lodged with specialised bodies at the Commonwealth, State and Territory levels.²⁵³

5.130 A number of submissions recommended the establishment of a children's ombudsman/commissioner within the Human Rights and Equal Opportunity Commission.²⁵⁴ The Australian Law Reform Commission believed that at the Federal level, complaints should be dealt with by independent statutory bodies such as the Human Rights and Equal Opportunities Commission or the Commonwealth Ombudsman.²⁵⁵ It was suggested that this option would maintain its independence from Government and could deal with any oral complaints from children.²⁵⁶

5.131 The Attorney-General's Department suggested that the Government's recent restructuring of HREOC would provide greater flexibility to enable the commissioners to deal with broader human rights issues such as those relating to children.²⁵⁷ The Attorney-General's Department added that the new structure of a President and 3 Deputy Presidents will send a clear message that the Commission has the responsibility for ensuring the observance of all human

250 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1872

251 Attorney-General's Department, Submission No. 133, p. S 774

252 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3357

253 *ibid*

254 For example, ECPat Australia, Submission No. 13, p. S 52; Davis, Transcript Evidence, 9 July 1997, p. 827; Sheppard, Transcript of Evidence, 1 May 1997, p. 300; Youth Affairs Council of South Australia, Submission No. 158, p. S 1075; Scott, Transcript of Evidence, 5 August 1997, p. 1153

255 Australian Law Reform Commission, Submission No. 382, p. S 2155k

256 Rose, Transcript of Evidence, 10 July 1997, p. 981; Sheppard, Transcript of Evidence, 1 May 1997, p. 300

257 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3354

rights and remove the perception, that there must be a separate commissioner appointed for each group such as children or the aged.²⁵⁸

5.132 Ms Rayner commented that with the emphasis on sex, race and disability, a children's commissioner within HREOC competing for scarce resources would not be effective.²⁵⁹ The National Children's and Youth Law Centre also expressed their concern in relation to the limited funding for HREOC affecting the capacity for this body to deal effectively with children's issues in addition to its existing responsibilities, and called for a separately funded body with a mandate to deal with children issues.²⁶⁰

Ombudsman

5.133 There was also a call for an agency or ombudsman, independent from the State and parents, to care for the rights and interests of children.²⁶¹ The role of the Ombudsman is primarily investigating complaints and reporting malpractice in administration in government and quasigovernment agencies.

5.134 The National Children's and Youth Law Centre argued that the Commonwealth and State ombudsmen already deal with complaints by or about children and effective procedures are already in place.²⁶² They saw the role of the Commissioner as being much broader than the traditional ombudsman and being proactive rather than reactive.²⁶³

5.135 It was suggested, however, that currently children have poor access to complaints mechanisms and conciliation services and lack channels for voicing their opinions and being officially consulted.²⁶⁴ Where complaints mechanisms were available, young people believed the process took too long and too much effort and they did not pursue it even when supported by appropriate agencies.²⁶⁵ Any complaints mechanism focusing on children's rights should also be accessible to parents to strengthen the ways they support and empower

258 *ibid*, p. S 3358

259 Rayner, Transcript of Evidence, 29 September 1997, p. 1552

260 National Children's and Youth Law Centre, Supplementary Submission No. 321a, p. S 2785

261 Evatt, Submission No. 5, p. S 17; Medica, Transcript Evidence, 9 July 1997, p. 916

262 National Children's and Youth Law Centre, Supplementary Submission No. 321a, p. S 2785

263 *ibid*, Annexure 2, p. 17

264 Community Services Australia, Submission No. 154, S 1024

265 Boyd, Transcript of Evidence, 3 July 1997, p. 569

their children.²⁶⁶ Children may not be aware that there are also complaints mechanisms available at the Federal level.

5.136 The Committee believes that the Government should assess the current situation with the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman to determine the most effective and accessible avenue for children's complaints to be heard and undertake any necessary changes to ensure there are adequate avenues through which children's complaints can be pursued.

Children's commissioner

5.137 The suggestions for the role and functions of the commissioner were in many cases similar to those outlined in this Report for an Office for Children and are therefore not repeated here. It was suggested the role of the commissioner should also deal both with individual cases and juvenile issues; have judicial powers to order warrants for the arrest for child abusers; initiate proceedings on behalf of children; and intervene in proceedings which involve children.

5.138 It was also argued that the children's commissioner should provide a right of appeal against perceived injustices by State departments in individual cases.²⁶⁷ The Family Support Services Association of New South Wales suggested, however, that there are protective services and children's advocates within the State system and that it would not be necessary to duplicate these at the Federal level.²⁶⁸

5.139 It was suggested that if community consultation was taken seriously then the big push by community based groups for a children's commissioner or for an office for children should be considered.²⁶⁹ UNICEF Australia believed that to monitor and promote children's rights effectively, a commissioner for children must be able to influence law, policy and practice to ensure compliance and promote awareness of rights; challenge individual breaches of rights and encourage or undertake research including public inquiries.²⁷⁰ It was also

266 Community Services Australia, Submission No. 154, S 1024

267 Ginn, Transcript of Evidence, 5 August 1997, p. 1233

268 Findlay-Barnes, Transcript of Evidence, 9 May 1997, p. 415

269 Medica, Transcript Evidence, 9 July 1997, p. 918

270 UNICEF, Submission No. 156, p. S 1051

suggested that a Federal commissioner would be supported by an office for children, a minister for children and a national agenda on children.²⁷¹

5.140 It was submitted that the commission/office should be financially and politically independent, be accessible, close to decision makers, work within government and non-government and should be proactive as well as reactive. It was suggested that the commission should report directly to Parliament.²⁷² UNICEF Australia also stressed the importance of a commissioner being appointed after formal consultation with independent children's organisations; provide a vehicle for children's voices; have an exclusive focus on children; and have certain statutory powers and authority.²⁷³

5.141 It was suggested that the circumstances where the Commissioner would initiate proceedings on behalf of children and intervene in proceedings which involve children should be matters with a large public interest concern or there was no one else who dealt with it.²⁷⁴

State, Territory and Federal commissioners

5.142 There was also considerable support for a network of offices for children/commissioners at Federal, State and Territory levels.²⁷⁵ Ms Evatt suggested that it would be an improvement to have a counterpart in each State as a framework to oversee implementation of the Convention.²⁷⁶ The benefits of this approach would include the provision of the infrastructure to coordinate and focus on children's issues²⁷⁷ and the accessibility of representatives for children throughout Australia.²⁷⁸

5.143 There are already a number of models internationally and existing in the States which may serve as appropriate models

271 Flavell, Transcript of Evidence, 6 August 1997, p. 1362

272 O'Reilly, Transcript of Evidence, 10 July 1997, p. 1031

273 UNICEF, Submission No. 156, p. S 1050

274 Bendall, Transcript of Evidence, 9 May 1997, p. 423; Findlay-Barnes, Transcript of Evidence, 9 May 1997, p. 413

275 For example, Children's Commissioner of Queensland, Submission No. 25, p. S 160; Australian Association of Paediatric Teaching Centres, Submission No. 10, p. S 34; Wight, Transcript of Evidence, 1 May 1997, p. 248; Alford Transcript of Evidence, 1 May 1997, p. 229; Community Services Australia, Submission No. 154, S 1023

276 Evatt, Transcript of Evidence, 9 May 1997, p. 403

277 Alford, Transcript of Evidence, 1 May 1997, p. 229

278 Sheppard, Transcript of Evidence, 1 May 1997, p. 300

Queensland model

5.144 The Queensland Commissioner for Children was established under the *Children's Commissioner and Children's Services Appeals Tribunal Act 1996* with bi-partisan support.²⁷⁹ The Queensland Government has established a Children's Commissioner to consolidate mechanisms for appeal of administrative decisions made under children's service legislation. The Commissioner's role also includes research and advocacy for children,²⁸⁰ the investigation of complaints of paedophilia and child abuse and:

... monitoring of the provision of children's services and suggesting ways of improving their quality, adequacy and effectiveness; receiving, assessing and investigating complaints about the delivery of children's services and alleged offences involving children; establishing a program of official visitors to residential facilities for children; establishing tribunals to hear appeals of reviewable decisions under the Adoption of Children Act 1969, the Child Care Act 1991 and the Children's Services Act 1965; and cooperating with the Queensland Police and the Australian Bureau of Criminal Intelligence and other relevant authorities in their endeavours to eradicate sexual abuse of children, child pornography and child sex tourism.²⁸¹

5.145 Those critical of the model believed it responded to the needs of Queensland children in a limited way because it focuses on children who are in, or who may become involved in, the child protection systems, and that children have no recourse under this legislation in relation to the juvenile justice or education systems.²⁸² Concerns were also expressed about the level of bureaucracy, and the lack of adequate funding.²⁸³ It was suggested this model presented a total avoidance of the concept of children's rights and that:

There has not been a recognition of the very broad range of issues and areas in which children are disadvantaged and disempowered. It also implies a policy and political agenda in relation to children which is judgemental and draws a distinction between the 'deserving' and the 'undeserving'.²⁸⁴

5.146 Questions have also been raised in relation to the link with the Department, the reference of complaints to other bodies such as the police, the

279 Children's Commissioner of Queensland, Submission No. 25, p. S 128

280 Premier of Queensland, Submission No. 144, p. S 947

281 Alford, Transcript of Evidence, 1 May 1997, p. 224

282 Youth Affairs 'A Children's Commissioner for Queensland the cutting edge proves blunt' *Alternative Law Journal* 22(1): 38-40, p. 38

283 Beddoe, Transcript Evidence, 10 July 1997, p. 959; Edwards, Transcript of Evidence, 10 July 1997, p. 1031; O'Reilly, Transcript of Evidence, 10 July 1997, p. 1031

284 Youth Affairs, *op cit*, p. 38

selection criteria for the Commissioner's position, the ministerial discretion in tabling reports and the charging of a fee on application.²⁸⁵ Notwithstanding these limitations there was concern expressed that the Commissioner had broad powers of investigation into all matters affecting children which was another form of State intrusion into family life.²⁸⁶

Tasmanian model

5.147 The Tasmanian *Children, Young Persons and Their Families Act 1997* includes provision for a children's commissioner whose functions include conducting inquiries into and providing advice on any matter relating to health, welfare, care, protection and development of children as well as monitoring compliance with the Convention by a number of government and non-government agencies.²⁸⁷ The Commissioner is independent of the Department of Community and Health Services, but responsible to the Minister for Community and Health Services.²⁸⁸

New South Wales model

5.148 Subsequent to the report by the New South Wales Legislative Council Standing Committee on Social Issues an Office for children and Young People has been established within the Premier's Department.²⁸⁹ The Office provides policy advice to the Premier; coordinates the development of policies and programs which impact on children and young people and promotes the Convention.²⁹⁰ The Office is also a focal point for organisations through which their views on children's issues can be conveyed to the Government.²⁹¹

5.149 In response to the Wood Royal Commission on paedophilia and child protection, New South Wales has also established a Child Protection Enforcement Agency, developed improved Interagency Guidelines for the Protection Intervention, joint investigations of criminal abuse by the police and Department of Community Services to minimise trauma for children, a revision

285 *ibid*

286 Endeavour Forum, Victorian Coordinator, Submission No. 15, p. S 59

287 Tasmanian Government, Submission No. 168, p. S 1115

288 *ibid*

289 NSW Legislative Council Standing Committee on Social Issues (1996) *Inquiry into Children's Advocacy* Report No. 10, September 1996, Recommendation 31

290 New South Wales Government, Submission No. 652, p. S 3259

291 *ibid*

of the *Children (Care and Protection) Act 1987*, are considering the establishment of a Children's Commissioner and a number of other initiatives.²⁹²

New Zealand's Commissioner for Children model

5.150 A Commissioner for Children was established in New Zealand in 1989 under the *Children, Young persons and their Families Act 1989* before the Convention was ratified.²⁹³ Section 410 of the Act provides for the appointment of a Commissioner for Children and the functions of the office are specified as:

- (a) To investigate any decision or recommendation made, or any act done or omitted, under this Act in respect to any child or young person in that child's or young person's personal capacity;
- (b) To monitor and assess the policies and practices of the Department [of Social Welfare] and of any other person, body or organisation exercising or performing any function, duty or power conferred or imposed by or under this Act, in relation to the exercise or performance of any function, duty power conferred or imposed by or under this Act;
- (c) To encourage the development, within the Department, of policies and services designed to promote the welfare of children and young persons;
- (d) To undertake and promote research into any matter relating to the welfare of children and young persons;
- (e) To inquire generally into, and report on, any matter, including any enactment or law, or any practice or procedure, relating to the welfare of children and young persons;
- (f) To receive and invite representations from members of the public on any matter relating to the welfare of children and young persons;

292 *ibid*, Appendix, pp. 1-3

293 McClay, Transcript of Evidence, 28 May 1998, p. 1601

- (g) To increase public awareness of matters relating to the welfare of children and young persons;
- (h) On the Commissioner's own initiative or at the request of the Minister, to advise the Minister on any matter relating to the administration of the Act;
- (i) To keep under review, and make recommendations on, the working of this Act.

5.151 The Commissioner can receive complaints and has an educative role and provides advice to the government on the compliance of its public policy with the Act under which the office was established and, more broadly, the Convention.

5.152 The main principles relate to enhancing the well being of families and the children, assist families in caring for children, to provide for children in need.²⁹⁴ The Commissioner's role is to investigate individual complaints, identify issues from those complaints and to advocate to benefit children collectively.²⁹⁵ Other activities include promoting research and coordinating and consulting with public and private agencies in relation to processes and policies for children.²⁹⁶

5.153 In relation to the absence of a mandate to prosecute, the Commissioner commented that they can only recommend. However, this can be effective as the media can play an important role in embarrassing the Government.²⁹⁷

Other models

5.154 A number of other countries have established Commissioners for Children including Austria, Belgium, Canada, Costa Rica, Denmark, Finland, Germany, Guatemala, Iceland, Israel, Luxembourg, New Zealand, Norway, Peru and Sweden and other are considering this option.²⁹⁸ It was suggested that Australia was in the position to lead the Asia Pacific region in the promotion and protection of the human rights of children by establishing an independent commissioner for children.²⁹⁹

294 *ibid*, p. 1602

295 *ibid*

296 *ibid*, pp. 1602-3

297 *ibid*, pp. 1603, 1616

298 UNICEF, Submission No. 156, p. S 1050

299 *ibid*

5.155 The Norwegian children's commissioner was established as an ombudsman but is now a position through which opinion and public knowledge is channelled and is broader than the complaints model.³⁰⁰ The Norwegian Commissioner also scrutinises every piece of legislation destined for Parliament.³⁰¹

5.156 Other approaches include a children's parliament in Switzerland where children have input into factors that affect them.³⁰² In Vietnam, Committees for the Protection and Care of Children have been established which meet to review achievements.³⁰³ Tunisia has produced a 'code de la protection de la femme' which is a set of guiding principles that go beyond the articles of the Convention.³⁰⁴ The Victorian Council of Civil Liberties suggested a national advocacy project which would enable children to be represented and enable them to give effect to their rights.³⁰⁵

5.157 Dr Funder considered that the establishment of a commissioner for children would have symbolic value but added that this is not the only way to advocate children's well being and protect them from harm and protect their rights within the society and to represent them.³⁰⁶ Further, the Australian Catholic Social Welfare Commission cautioned that the establishment of a children's commissioner should not be accompanied by a huge bureaucracy as the responsibility for children is largely located in State and Territory jurisdictions.³⁰⁷

Opposition to a children's commissioner/office/ombudsman

5.158 A number of submissions opposed the introduction of either an office for children within the Department of Prime Minister and Cabinet, an ombudsman or a children's commissioner.³⁰⁸ The West Australian Government argued that the establishment of these positions at the Commonwealth level would result in

300 Funder, Transcript Evidence, 9 July 1997, p. 874

301 Alford, Transcript of Evidence, 1 May 1997, p. 230

302 Antrum, Transcript of Evidence, 5 August 1997, p. 1138

303 Christian Children's Fund of Australia Ltd, Submission No. 651, p. S 3254

304 Kilmartin, Transcript Evidence, 9 July 1997, p. 875

305 O'Reilly, Transcript of Evidence, 10 July 1997, p. 1029

306 Funder, Transcript Evidence, 9 July 1997, p. 874

307 O'Connor, Transcript of Evidence, 29 April 1997, p. 188

308 For example, Ashford, Transcript of Evidence, 3 July 1997, p. 531; Western Australian Government, Submission No. 402, p. S 2254; Call to Australia, Submission No. 179, p. S 1202; Salt Shakers, Supplementary Submission No. 129a, p S 2358

duplication and unnecessarily require a lot of monitoring and reporting.³⁰⁹ The Endeavour Forum commented on the additional tax burden on families of funding a bureaucracy in Canberra. It supported the role of churches and the local community in caring for families and the adequacy of existing legislation.³¹⁰

5.159 Ms Rayner did not recommend the establishment of a children's commissioner because her experience has shown that agencies and governments develop a perception that they are constantly being criticised. She suggested that commissioners are attacked by departments who are underfunded and envy the resources.³¹¹ She argued for the consideration of the rights of children in Government decision making and the inclusion of the rights and responsibilities of and towards children in government economic and structural planning.³¹²

5.160 A number of groups opposed the establishment of a children's commissioner or office for children on the grounds that it would interfere in the operation of the families that are working adequately.³¹³ The Australian Family Association commented that a children's commissioner who oversighted the interests of children under parental care would be an insult to, and intrusion into, the family.³¹⁴

We have no objection to the establishment of new institutional means of oversighting the care of children who are wards of the state or otherwise in the care of the state (eg. in detention) ... But most children are in the care of their parents. The State should only intervene directly with such children when they are at risk of real abuse or neglect.³¹⁵

5.161 Concerns were expressed that the introduction of a children's commissioner would enable parental decisions to be overruled and would provide a further opportunity for the State to interfere in family life.³¹⁶ Focus on the Family suggested that the emphasis should be on assisting families to perform their roles and functions.³¹⁷

309 Ashford, Transcript of Evidence, 3 July 1997, p. 533

310 Francis, Transcript of Evidence, 10 July 1997, p. 1011

311 Rayner, Transcript of Evidence, 29 September 1997, p. 1551

312 *ibid*, p. 1545

313 Phillips, Transcript of Evidence, 4 July 1997, p. 799; McCormack, Submission No. 417, p. 1; Smyth, Transcript Evidence, 4 August 1997, p. 1105; Barich, Transcript of Evidence, 3 July 1997, p. 644

314 The Australian Family Association Western Australia Division, Submission No. 39, p. S 221

315 *ibid*

316 Boyd, Transcript Evidence, 9 July 1997, p. 903

317 Muehlenberg, Transcript of Evidence, 10 July 1997, p. 1043

... both articles 18 and 29 talk of a state's right to supervise parents. The state, in article 19, is to promote a recognition of the common responsibilities of parents, which may not agree with the general public's idea on such responsibilities. The state and the parents may not agree. Article 29, which deals with education, states that individuals are free to establish educational institutions subject to standards laid down by the state.³¹⁸

5.162 The Child Health Council of South Australia, however, believed that a commissioner for children would not put a wedge between children and their parents, as similar offices have successfully worked with parents and not against them, for the benefit of children.³¹⁹ Also the Committee notes that one of the roles of the Queensland Children's Commissioner is to promote the principle that parents or legal guardians have the primary responsibility for the upbringing of children.³²⁰

5.163 The Committee believes that if an Office for Children were established in the Department of Prime Minister and Cabinet and an appropriate complaints mechanism were developed with the Human Rights and Equal Opportunity Commission and/or the Commonwealth Ombudsman's Office, then a separate children's commissioner would not be necessary. We acknowledge, however, that the Government may see it as more appropriate to combine all of these functions within an independent commission for children. A commission for children could be a viable alternative to the above approach provided all of the above functions were included and adequate resources were made available for its operation.

Other mechanisms for policy and program coordination

Parliamentary options

Parliamentary Committee on children and parents

5.164 On 30 April 1997 the then Queensland Minister for Families, Youth and Community Care, Mr Kev Lingard MLA, announced the establishment of a committee of the Parliament on children and parents which would have a major

318 Boyd, Transcript Evidence, 9 July 1997, p. 903

319 Child Health Council of South Australia, Supplementary Submission No. 151a, p. S 2384

320 Youth Affairs 'A Children's Commissioner for Queensland the cutting edge proves blunt' *Alternative Law Journal* 22(1): 38-40, p. 38

role in monitoring Queensland compliance with the *Convention on the Rights of the Child*.³²¹

5.165 The Committee is aware, however, that the Federal Parliament already has a number of committees that can deal with children's issues such as the inquiry into child care by the Senate Standing Committee on Community Affairs. The JSCT Committee does not see the establishment of a separate parliamentary committee on children and parents as the most appropriate mechanism at the Federal level for monitoring the implementation of the *Convention on the Rights of the Child*.

Minister for Children

5.166 There was also some support for a minister for children.³²² Contact Inc suggested a three tier system with minister, commissioner and ombudsman.³²³ The National Children's and Youth Law Centre believed that although a minister for children would provide a voice in Parliament and possibly in Cabinet, they would be bound by the political party and political loyalties.³²⁴

Experience has shown that designated Ministers for Children or for Youth have little influence on government policies. They are usually low in the ministerial hierarchy and the important decisions are made by the portfolios responsible for service delivery: education, health and community welfare.³²⁵

5.167 Further, appointing a minister for children may encourage agencies currently responsible for policies and programs for children to abandon them believing that someone else would be responsible for them.³²⁶

5.168 The Joint Standing Committee on Treaties does not support the appointment of a minister for children in the Federal Parliament as we believe that there is substantial benefit in having the minister for families deal with children's issues in that context. The Committee is concerned that by separating the portfolios of children and families at that level may create a number of

321 Alford, Transcript of Evidence, 1 May 1997, p. 224

322 For example, Jeremy, Submission No. 87, p. S 418; Defence for Children International, Submission No. 120, p. S 595; World Vision Australia, Submission No. 135, p. S 805

323 Kingwill, Transcript of Evidence, 9 May 1997, p. 450

324 National Children's and Youth Law Centre, Supplementary Submission No. 321a, p. S 2784

325 *ibid*

326 The Report to the Minister for Family Services by Moira Rayner, Chair of the Board of NCYLC, on behalf of the Institute of Family Studies (December 1994) cited in National Children's and Youth Law Centre, Supplementary Submission No. 321a, p. S 2984

difficulties and that proposal does not support the spirit of the *Convention on the Rights of the Child*.

Office for Family

5.169 The Australian Catholic Social Welfare Commission suggested an Office of Family because the best way to address children's rights was to address some of the disadvantages facing Australian families.³²⁷ The Australian Family Association (Western Australian and ACT Branches) also supported the introduction of an Office of Family.³²⁸ The ACT Branch believed the office could incorporate the rights and responsibilities of all members of the family and children could be protected within the family context.³²⁹ They supported an office of the status of family which would address the needs of children rather than an office which may further fragment families.³³⁰ It was submitted that the office of the child conceptually removed from the family.³³¹

5.170 The Committee notes that the role of the Children's Commissioner in Queensland emphasises the child in the family context.³³²

We would be very much concerned about the suggestions that there be appointed a children's ombudsman or a special children's commissioner, for example, because we really think that continues to undermine the role of the family. Certainly there could be a family commissioner or a family ombudsman.³³³

5.171 Some witnesses believed that the interests of children should be a separate entity because families can include issues such as caring for the elderly.³³⁴ It was argued that while the interests of families and children do coincide on some issues they often diverge and it would be difficult for an Office of Family to give effective separate representation to children.³³⁵ There

327 Cooney, Transcript of Evidence, 29 April 1997, p. 184

328 Barich, Transcript of Evidence, 3 July 1997, p. 648; The Australian Family Association (ACT Branch), Submission No. 113, p. S 552

329 The Australian Family Association (ACT Branch), Submission No. 113, p. S 552

330 Duncan, Transcript of Evidence, 29 April 1997, p. 216

331 Egan, Transcript of Evidence, 3 July 1997, p. 651

332 Culbert, Transcript of Evidence, 6 August 1997, p. 1313

333 Eastwood, Transcript of Evidence, 3 July 1997, p. 614

334 Castell-McGregor, Transcript of Evidence, 4 July 1997, p. 702; Wigg, Transcript of Evidence, 4 July 1997, p. 702

335 National Children's and Youth Law Centre, Supplementary Submission No. 321a, p. S 2784

may be situations where the problems that a child has are related to problems in the family, but the majority of families would be fighting for the rights of the child.³³⁶ It was suggested that an Office of Family may have a different focus to one for children which should give priority to children.³³⁷

5.172 The Australians Against Child Abuse commented that if children are included with adults then their needs are not prioritised.³³⁸ The infrastructure must recognise and advocate for children as there is a tendency for adults to take over to the detriment of children's issues.³³⁹ There are many families where the parents are not prepared to be the guardians and advocates for the interests of their children and there are many families who do not know how to advocate for themselves.³⁴⁰ Ms Lonnon suggested that:

There are times when a child's rights may be in opposition to the family and they do need protecting from the family. They may be in opposition to the school and they do need protecting from the system, from the law enforcement organisation or something. I do not think just having an office for the family would cover the wide range of circumstances where children would need it.³⁴¹

5.173 The Family Support Services Association of New South Wales believed that the title should at least contain children and families as there are families that do not have children and there should be a focus on children.³⁴² Ms Rayner was of the view that the title must have 'child' in it otherwise we talk about family in an amorphous sort of way which makes us feel warm and wonderful.³⁴³ At the International Year of the Family conference in Adelaide, the discussion groups agreed that there should be a commissioner for children.³⁴⁴

Bill of Rights

336 Lonnon, Transcript of Evidence, 5 August 1997, p. 1242

337 Jones, Transcript of Evidence, 5 August 1997, p. 1199; Bendall, Transcript of Evidence, 9 May 1997, p. 422

338 Tucci, Transcript of Evidence, 10 July 1997, p. 1069

339 Flavell, Transcript of Evidence, 6 August 1997, p. 1368

340 *ibid*, pp. 1368-9

341 Lonnon, Transcript of Evidence, 5 August 1997, p. 1242

342 Findlay-Barnes, Transcript of Evidence, 9 May 1997, p. 414

343 Rayner, Transcript of Evidence, 29 September 1997, p. 1549

344 Finlason, Transcript of Evidence, 5 August 1997, p. 1267

5.174 The Child Health Council supported the introduction of a Bill of Rights as an important mechanism to protect individual human rights and freedoms.³⁴⁵ Dr Piscitelli believed, however, that a children's bill of rights would be superfluous as we already have the Convention.³⁴⁶

Australian Children's Charter

5.175 BoysTown Link Up suggested domestic legislation in the form of a Charter of Children's Rights.³⁴⁷ The charter was developed in addition to the Convention to deal with Australian conditions; because the Convention is not part of Australia's law; and there is the need for a comprehensive policy to provide a national consistency in children's laws; and because of the vulnerability of children.³⁴⁸

National Children's agenda

5.176 Australia has a national action plan for human rights and a number of submissions supported the development of a national agenda for children.³⁴⁹ It was suggested that an agenda for children should be coordinated by the Commonwealth in conjunction with the States and Territory governments, non-government organisations, children and young people.³⁵⁰ It was emphasised

345 Castell-McGregor, Transcript of Evidence, 4 July 1997, p. 700; Child Health Council of South Australia, Submission No. 151, p. S 1005

346 Piscitelli, Transcript of Evidence, 1 May 1997, p. 327

347 BoysTown Link Up, Submission No. 136, p. S 839

348 Manning F (1996) *Children's Rights* NSW Parliamentary Library Research Service, Briefing Paper No 17/96, p. 18

349 For example, Community Services Australia, Submission No. 154, p. S 1023; Scott, Transcript of Evidence, 5 August 1997, p. 1151; Family Support Services Association of NSW Inc, Submission No. 149, p. S 985; Jackson, Transcript of Evidence, 3 July 1997, p. 585; Germanos-Koutsounadis, Transcript of Evidence, 9 May 1997, p. 370; Save the Children Fund Australia, Submission No. 80, p. S 390; Burnside, Submission No. 94, p. S 450; Family Support Services of NSW Inc, Submission No. 100, p. S 482; Defence for Children International, Submission No. 120, p. S 595; Human Rights Council of Australia Inc, Submission No. 122, p. S 618; Australian Catholic Social Welfare Commission, Submission No. 124, p. S 649; BoysTown Link Up, Submission No. 136, p. S 845; Clarke, Transcript Evidence, 9 July 1997, p. 926; World Vision Australia, Submission No. 135, p. S 805; Australian Council for Overseas Aid, Submission No. 220, p. S 1455

350 Cooney, Transcript of Evidence, 29 April 1997, p. 193

that a national agenda for children should be developed in consultation with children.³⁵¹

5.177 The Children's Commissioner of Queensland recommended that Australian governments commit themselves to compliance with the Convention as it recognises the basic right of the child to a family.³⁵² Kids Help Line believed the Federal Government's reluctance to put the Convention on the national agenda contravened Article 42 and that the Convention can be promoted and implemented in a family-friendly manner as children's rights and parent's rights are not mutually exclusive.³⁵³ The Family Support Services Association of New South Wales suggested the Federal Government lead the development of a national policy framework and a national agenda for action for children and families.³⁵⁴

5.178 Save the Children commented that the lack of a national Agenda or an Office for Children meant that the energy directed at upholding or protecting the rights of children is piecemeal which they suggested enhanced the powerlessness of those working for children and gave power to abusers and those who do not value children.³⁵⁵ They added that it is poor business sense to have services compete for resources, funding and support.³⁵⁶

5.179 The Committee believes that the development of a national agenda for children would help coordinate policies, programs and practices and should be given priority by the Office for Children.

Child impact statements

5.180 Some submissions supported the introduction of child impact assessments on all government decisions that impact on children including proposed legislation, existing and new policy and programs.³⁵⁷ It was suggested that child impact statements would be an effective mechanism for implementing the

351 Bendall, Transcript of Evidence, 9 May 1997, p. 419; Scott, Transcript of Evidence, 5 August 1997, p. 1151

352 Children's Commissioner of Queensland, Submission No. 25, p. S 159

353 Kids Help Line, Submission No. 148, p. S 980

354 Gledhill, Transcript of Evidence, 9 May 1997, p. 412

355 Save the Children Fund Australia, Supplementary Submission No. 80a, p. S 2339

356 *ibid*

357 UNICEF, Submission No. 156, p. S 1053; World Vision Australia, Submission No. 135, p. S 809; Community Services Australia, Submission No. 154, pp. S 1024-5; Ozchild: Children Australia, Supplementary Submission No. 413a, p. S 3403; Jones, Transcript of Evidence, 5 August 1997, p. 1199; Jones and Marks, Submission No. 91, p. S 441; Burnside, Submission No. 94, p. S 456

Convention through better policy coordination.³⁵⁸ The Executive Council of Australian Jewry believed that child impact statements are a matter of social justice.³⁵⁹

5.181 Community Services Australia called for impact statements to be tabled in Parliament or publicly displayed before legislative and policy decisions are made.³⁶⁰ The example was given of the Norwegian Government which reports on the impact of the budget on children and World Vision Australia suggested Australia should follow this approach.³⁶¹

5.182 It was argued that this process should ensure that there are no unintended consequences for children who might be secondary parties to legislation aimed at adults.³⁶²

5.183 Department of Social Security doubted the benefits in introducing child impact statements as programs are already presented in terms of their financial and other impacts.³⁶³ Although acknowledging that this may prompt an automatic consideration of the impact on children, the Attorney-General's Department expressed the concern that this may add another layer of administration which may be complicated if there was also a requirement to consult with children.³⁶⁴ The Department explained that the Cabinet Handbook specifically requires consultation with specific portfolios on issues affecting particular client groups when preparing submissions.³⁶⁵

Family impact statements

5.184 The Council for National Interest suggested all legislative or regulatory action and administrative decisions should be tested before implementation and supported the introduction of Family Impact Statement accompanying Cabinet submissions.³⁶⁶ The Australian Family Association (ACT Branch) favoured

358 Community Services Australia, Supplementary Submission No. 154a, p. 2387; Alice Springs Youth Affairs Coordination Committee, Submission No. 182, p. S 1228

359 Executive Council of Australian Jewry, Submission No. 105, p. S 504

360 Community Services Australia, Submission No. 154, p. S 1025

361 World Vision Australia, Submission No. 135, p. S 809

362 Association of Children Welfare Agencies, Submission No. 281, p. S 1690

363 Stanton, Transcript of Evidence, 28 April 1997, p. 63

364 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3357

365 *ibid*

366 Council for National Interest, Submission No. 85, p. S 406; Whitely, Transcript of Evidence, 3 July 1997, p. 630

family impact statements³⁶⁷ although the Western Australian Branch had some concerns about the definition of family but saw this as a potential mechanism to accommodate the needs of children.³⁶⁸

5.185 Department of Employment, Education, Training and Youth Affairs commented that there is no formal arrangement to prepare family impact statement but the impact on families was assessed during policy formulation where appropriate.³⁶⁹

5.186 While the Committee believes that the analysis of the impact of policies, programs and proposed legislation on families is important, it considers that this is the role of the Minister and Department of families and not necessarily primarily the role of the Office for Children.

Ministerial council

5.187 Ms Jones suggested a ministerial council similar to that used for corporations law.³⁷⁰ The council could develop a national agenda for children, national legislation and appoint a supervisory body at the Federal level equivalent to the Australian Securities Commission.³⁷¹

Charter of family rights and responsibilities

5.188 The Council for the National Interest suggested a Charter of Family Rights and Responsibilities to include protection for the unborn and the inalienable right of parents to raise their children.³⁷²

Standing Committee of Attorneys-General

5.189 The National Children's and Youth Law Centre suggested that this Committee could assist in the standardisation of implementation of the Convention nationally.³⁷³

367 Morrison, Transcript of Evidence, 29 April 1997, p. 220

368 Egan, Transcript of Evidence, 3 July 1997, p. 649

369 Department of Employment, Education, Training and Youth Affairs, Supplementary Submission No. 111a, p. S 2343

370 Jones, Transcript of Evidence, 5 August 1997, p. 1199

371 Jones and Marks, Submission No. 91, p. S 440

372 Council for the National Interest, Submission No. 85, p. S 411

Joint Standing Committee on Treaties

5.190 It was suggested that there may be a role for the JSCT in monitoring the implementation of the Convention and that the children's commissioner could report to this committee.³⁷⁴ Given the number of international treaties considered by this Committee, we do not consider that adequate resources could be allocated to this task and therefore this may not be the most effective approach.

National Action Plan on Human Rights

5.191 The Victorian Council of Civil Liberties suggested that the national action plan on human rights should be reissued and this should include the *Convention on the Rights of the Child*.³⁷⁵

The Committee's views

5.192 Evidence to the Inquiry provided a number of examples of successful and substantial cooperation and coordination between the various government and non-government agencies. The Committee believes, however, that in many areas there is still potential for greater cooperation and coordination. There is a need for a strategic, holistic approach to successfully implement this Convention. Policy needs to be interpreted through administrative procedures across a wide range of functional areas. Therefore, there is a need for adequate feed back on the effectiveness of government performance and administrative arrangements to ensure compliance in laws, policies and practice particularly in areas where there may be inconsistencies between Federal, State and Territory initiatives.

5.193 The Committee supports ACFOA's call for each Federal department or agency to identify the areas of their decision making responsibilities that are relevant to the Convention and to make the information readily available to the community.

Recommendation 18

373 National Children's and Youth Law Centre, Supplementary Submission No. 321a, p. S 2780

374 Castell-McGregor, Transcript of Evidence, 4 July 1997, p. 699

375 O'Reilly, Transcript of Evidence, 10 July 1997, p. 1032

The Joint Standing Committee on Treaties recommends that the Government request that the relevant departments and agencies identify their decision-making responsibilities in relation to the *Convention on the Rights of the Child* and make this information readily available to the community.

5.194 The Committee believes that there is some capacity to achieve many of the principles incorporated in the Convention through developing better coordination and the strengthening of existing agencies and structures. The Committee sees the coordination of programs and policies as a matter of priority.

Recommendation 19

The Joint Standing Committee on Treaties recommends that the Government request that all relevant bodies address the inconsistencies within Australia in relation to matters that impact on children's rights, responsibilities and services.

Recommendation 20

The Joint Standing Committee on Treaties recommends that the Government review its policies and practices to reduce inconsistencies between portfolios in relation to the provision of programs and services for children and young people.

5.195 The Committee does not support the introduction of umbrella Federal legislation which covers all matters included in the Convention. We believe that as a matter of urgency that the Commonwealth Government should thoroughly review its legislation to ensure that it is consistent with State and Territory legislation and does not have inconsistencies such as those outlined below in relation to reproductive health matters. Also, the Committee believes that governments should work at a national approach through the Standing Committee of Attorneys-General.

Recommendation 21

The Joint Standing Committee on Treaties recommends that the Government request the Standing Committee of Attorneys-General to review the existing legislation, policies and practices at Federal, State and Territory levels for compliance with the *Convention on the Rights of the Child*.

5.196 The Committee was given example of cases where Commonwealth legislation has been employed in a manner where it was considered not to be in the child's best interests. In recent cases in Queensland, South Australia and Victoria in relation to access to reproductive technology, the Commonwealth *Sex Discrimination Act 1984* was found to be in conflict with State legislation such as the Victorian *Infertility Treatment Act 1995*, which attempted to protect the rights of children and affirm the principle that the welfare and interests of the child was paramount.

5.197 It was suggested that the use of parliamentary scrutiny committees to ensure legislative compliance with the Convention would reduce the risk of compliance with international obligations being deflected by competing demands. The Committee notes that the Senate Scrutiny of Bills Committee should take into account these matters in its deliberations.

5.198 The Committee believes the continued debate over the *Teoh* decision has the potential to damage Australia's international reputation and the matter needs to be settled as a matter of priority.

Recommendation 22

The Joint Standing Committee on Treaties recommends that the consideration of the Administrative Decisions (Effect of International Instruments) Bill 1997 recommence as a matter of priority.

5.199 Irrespective of the passage or otherwise of the 'anti-*Teoh*' legislation and whether Australia is legally bound to consider the Convention in its administrative decisions, there is a moral obligation to do so in appropriate circumstances. Accordingly, the Committee believes that there is a need to ensure that the relevant agencies are aware of the Convention and the appropriate situations in which it must be applied.

Recommendation 23

The Joint Standing Committee on Treaties recommends that the Government take the necessary steps to ensure relevant officials are aware of pertinent international treaties in making decisions.

5.200 It was suggested that the community needed an agency outside the formal government bureaucracy to which it could go almost as a one-stop shop regarding children's issues. Although the Committee appreciates the importance of the argument for a separate commissioner/office, on balance, the Committee believes that in order to ensure that the Office for Children has a substantial influence in the Government decision making processes the office

must have access to Cabinet and other relevant documents and interdepartmental consultations. Accordingly, the Committee believes that an Office for Children should be established as an independent statutory authority attached to the Department of Prime Minister and Cabinet, which is funded by, and reports directly to Parliament.

Recommendation 24

The Joint Standing Committee on Treaties recommends that the Government establish an Office for Children as an independent statutory authority attached to the Prime Minister's portfolio to promote the vitality and importance of the family as the basic unit in society, which is responsible for the growth and the development of our nation's children, while recognising the need for government support for families and those children whose well being may be under pressure due to problems confronting the family.

Recommendation 25

The Joint Standing Committee on Treaties recommends that the role and functions of the Office for Children should:

- **ensure that all legislation, policies and practices support the family as the natural environment for the development and well being of children with parents having the primary role and responsibility in raising children;**
- **develop a national strategy and work with the States and Territories on improved coordination of policies affecting children and their families;**
- **encourage Federal departments to incorporate the principles of the *Convention on the Rights of the Child* into their policies, programs and practices and act a voice for children to government;**
- **consider the potential impact of Government policies, programs and proposed legislation on children and their families;**
- **develop mechanisms to assist the coordination of Federal Government policies, programs and practice;**
- **identify and encourage research on children's issues;**

- **provide leadership and coordination in the development of national standards in consultation with the States and Territories;**
- **consult with community organisations, children and young people in relation to issues affecting them;**
- **monitor programs and initiatives for compliance with the Convention;**
- **coordinate the development of models of best practice for services and/or programs relevant to children;**
- **liaise with the Federal, State and Territory complaints handling agencies and to facilitate cooperation in respect to matters extending beyond the limits of individual State or Territory jurisdictions;**
- **report to Parliament on the status of children in Australia;**
- **encourage and facilitate public debate and community awareness on matters relating to children;**
- **monitor performance of Australia's international obligations to children;**
- **establish a mechanism for public reporting on breaches and compliance with the *Convention on the Rights of the Child*;**
- **prepare Australia's reports to the United Nations Committee on the Rights of the Child; and**

- **investigate appropriate processes to enhance the opportunities for contribution by non-government organisations and young people to Australia's reports to the United Nations Committee on the Rights of the Child.**

5.201 The Committee believes that at the Federal level the most important need is to improve the coordination of the various portfolios in order to implement the Convention nationally and effectively monitor our progress in compliance. The Committee sees the main purpose of the Office for Children as coordination and advocacy.

5.202 While the Committee does not see the establishment of a children's commissioner as essential, we believe that a review should be conducted to ensure that the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman provide adequate opportunity for children's complaints which fall within Commonwealth jurisdiction, to be heard.

5.203 The Committee believes that the Government should assess the current situation with the HREOC and the Ombudsman's Office to determine the most effective and accessible avenue for children's complaints to be heard and to undertake any necessary changes to ensure there are adequate avenues through which children's complaints can be pursued.

Recommendation 26

The Joint Standing Committee on Treaties recommends that the Government review the role and functions of the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman to ensure that there are adequate opportunities and resources available to address potential complaints concerning children under the *Convention on the Rights of the Child*.

5.204 The Committee does not support the establishment of an Office for Family as these functions should be performed within the portfolio of the Minister for Families. We believe that it is essential that the Minister's Office liaise closely with the Office for Children to ensure coordination of policies and provide access to an appropriate complaints mechanism.