



A NSW Children's Commission –
Green Paper

RESPONSE

March 1998

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UnitingCare Burnside (Burnside) is pleased to present this submission to the Office of Children and Young People in response to the Green Paper, *A NSW Children's Commission*.

Burnside stands in the Uniting Church tradition of compassion and concern for justice. Our role is to facilitate the development of children and families most in need through quality services, research and advocacy.

Burnside's service aims are:

- to protect and nurture children and young people who are unable to live with their families by providing quality care;
- to develop preventative services aimed at children and young people at risk of abuse and/or admission to care;
- to strengthen the capacity of vulnerable young people and families within the community;
- to assist in the development of networks and self-help initiatives which support families and strengthen communities; and
- to promote just and equitable social structures aimed at reducing the causes of social disadvantage

Burnside adamantly supports the establishment of a Children's Commission in NSW. However, several aspects of the models presented in the Green Paper are of concern to Burnside and several essential aspects of an effective Commission are missing from that document. Burnside's preferred model is set out in Chapter Two, below. Chapter Three responds directly to the questions set out in the Green Paper.

Burnside believes that a number of principles are so fundamental that the Commission could be neither effective nor worthwhile in their absence. These principles are set out:

1. The Commission must be a statutory body, independent of government and answerable to Parliament.
2. The Commission must have sufficient powers to carry out its functions and to effectively monitor systems for children and young people.
3. The Commission should have broad policy and educational functions in relation to all children and young people, with a focus on the most disadvantaged groups. This should be reflected in the establishing legislation.
4. The Commission should be mandated to promote the rights of children and young people and to monitor failures to uphold the United Nations Convention on the Rights of the Child.
5. The Commission should have a statutory responsibility to involve and consult with children and young people in its work.

6. The Commission should offer a “one stop shop” for advice and referral, enabling children and young people to access services provided by government or non-government agencies. This should also involve referral to complaints handling bodies.
7. The Government should have a statutory duty to consult with the Commission on all legislation or regulations which directly impact on children and young people.
8. The Commission should have a statutory responsibility for monitoring the effectiveness of an “all of government” approach to the protection of children and young people.
9. As well as working across government, the Commission should have a central role in building partnerships between government and non-government agencies.
10. The Commission should receive sufficient resources to enable it to carry out all of these functions.

These fundamental principles are explained in more detail in Chapter Two, “The Preferred Model”.

The Preferred Model

As a result of this recognition, Burnside produced the paper *A Proposal for A Commissioner for Children* in 1997. This argued for the establishment of a Federal Commissioner for Children. While Burnside remains committed to such a Federal body, a NSW Commission is also crucial. This is particularly so, given the current context which includes: the low level of commitment across Australia, including NSW, to the rights expounded in the United Nations Convention on the Rights of the Child; the view of children’s rights as being subsidiary to the rights of adults; an increasing emphasis on individual families and their responsibility for their own children; and a denial of the community’s responsibility for children and young people, as evidenced by the low priority given to programs and services for families, children and young people.

The roles and functions of a Children’s Commission as proposed by Justice Wood and in the Green paper largely focus on sexual (and other) abuse. Burnside believes that the role and functions of the Commission should be much wider.

Roles and functions

Burnside endorses the list of functions listed by the Forum of Non-Government Agencies (FONGA) in their submission.¹ These include:

- providing policy advice to Government on children's issues and legislation as it affects children and young people; this should include the monitoring of compliance with the United Nations Convention on the Rights of the Child;
- assisting the participation of children in decision making;
- promoting child friendly practices within agencies;
- research, education and training;
- assisting the establishment of a network of children's advocates; such a network would: be regionally based, provide advocacy for children who have no-one else to advocate on their behalf, assist in raising the profile of the Children's (and Young Persons) Commission in regional areas, train workers and other advocates for children and have input into policy development;
- operating a one stop shop information and referral service for children and young people seeking information about government and non-government services, including complaints bodies;
- monitoring how individual complaints systems work for children (and young people);
- overseeing the work of the child death review team;
- initiating inquiries into systemic issues.

¹ Response by the Forum Of Non-Government Agencies to the Green Paper, A NSW Children's Commission, December 1997, FONGA, March 1998, pp. 4-5.

Powers

In order to fulfil the functions outlined above, the Commission will need a number of powers, which would need to be enunciated in the establishing legislation.

The following powers would be necessary, at a bare minimum:

- the power to act independently in order to protect and promote the rights and interests of children and young people;
- the power to seek independent advice;
- the power to initiate and conduct inquiries, including the power to compel witnesses and the production of material;
- the power to access information from and share information with government and non-government agencies;
- the power to refer to other bodies;
- the power to have input on any legislative or regulatory change affecting children. This could be expressed as a duty on the part of the Government, the Premier or Ministers.
- the power and responsibility to report to Parliament.

Green Paper Questions – Burnside’s Response

Role and jurisdiction

Should the Children’s Commission:

- **be a statutory body independent of Government?**
- **address all issues affecting children, or just child protection?**
- **focus on vulnerable and disadvantaged children?**
- **have a broad jurisdiction which extends to Government organisations, non-government community based agencies and commercial organisations?**

As stated Burnside believes that the Commission must be a statutory body and independent of Government. This is essential to guarantee the freedom and confidence to speak out on behalf of children and young people, even where this is at times embarrassing or inconvenient to the Government of the day. At the same time, the Commission should seek wherever possible to have a cooperative relationship with Government, rather than being antagonistic.

Burnside also strongly supports the Commission having a wide brief to address all issues affecting children and young people, rather than focusing exclusively on child protection issues. This should also encompass issues affecting all children and young people in NSW, but there should be a focus on disadvantaged and vulnerable groups.

The jurisdiction of the Commission should extend to all individuals and organisations which impact on children and young people in NSW: that is, the broadest jurisdiction possible. The jurisdiction over Commonwealth agencies operating in NSW would, of course, be limited for Constitutional reasons.

What accountability and reporting arrangements should be put in place for the Children’s Commission?

The Commission should have the power and responsibility to report to Parliament. In order to be independent from Government, the Commission should be answerable only to Parliament. This could take the form of being “overseen” by a joint parliamentary committee.

How and from whom should the Children’s Commission receive advice?

There should be a formal advisory committee, consisting of a broad, multi-disciplinary group of experts in the area of children’s rights and welfare from both the government and non-government sectors. There should also be some mechanism by which the Commission seeks the views and advice of children and young people. More broadly, however, the Commissioner should also have the power to seek independent advice and consult with the community.

Structure and functions

Should the Children's Commission focus on systemic advocacy for children?

It is important that the Commission focus on "the big picture", including systemic advocacy for children and young people. Individual advocacy should be the responsibility of existing agencies and the network of advocates, as recommended by the Legislative Council Standing Committee on Social Issues Inquiry into Children's Advocacy. This network should be administered by the Commission but located regionally. This would allow the Commission to reach out into NSW, providing direct community access and raising the Commission's profile. It would also of course, provide individual advocacy in areas where none presently exists and would enable training and support of other advocates, including parents, workers and young people themselves.

Any systemic advocacy to be undertaken by the Commission would be entirely reliant on the existence of such a network. It is only in this way that the policy work of the Commission can be informed by the real issues confronting individual children and young people.

Should the Children's Commission develop and promote the use of models to help children participate in decisions which affect their lives?

The Commission should develop and promote models of best practice, in consultation with children and young people and agencies providing services to them. Paramount among these should be models to maximise the participation of children and young people in decisions which affect their lives.

Research, public education and training

Should the functions of the Children's Commission include the following:

- **research?**
- **coordinating, developing and conducting professional training and education?**
- **coordinating, developing and conducting public education and awareness?**
- **convening an annual child protection conference?**
- **coordinating children's advocacy groups and, if so, how should it carry out this role?**
- **coordinating a voluntary accreditation scheme for people who work with child sex offenders?**
- **monitoring children's overall wellbeing in NSW?**

The Royal Commission recommended that the functions of the existing Child Protection Council should be transferred to the Children and Young Persons' Commission to form the Centre for Child Protection. Burnside supports this proposal. Thus, by virtue of this transfer, the Commission's functions would include:

- policy advice, monitoring and coordination;
- research and interagency training functions;
- public awareness raising;
- coordination of advocacy groups and Area Child Protection Committees;
- holding an annual conference on child protection; and
- monitoring the recommendations of the Royal Commission.

Burnside strongly supports the focus of the Commission being broader than child protection, thus these functions should merely form part of the Commission's overall functions.

The Commission would be well placed to undertake and coordinate broader research into issues affecting children and young people, given sufficient resources. This would necessarily involve significantly greater resources than those currently provided to the Child Protection Council, as it presently struggles to cover a much narrower brief. The focus of all the functions should of course be the most disadvantaged and vulnerable of children and young people, which should be spelt out in the establishing legislation.

Other child protection functions

Should the Child Death Review Team be transferred to the Children's Commission?

Burnside supports the transfer of the Child Death Review Team to form part of the Centre for Child Protection.

Special guardianship

Should there be a role of Special Guardian in relation to children in care?

If so, who should perform the role of Special Guardian?

Burnside strongly supports the establishment of a Special Guardian for children in care. It is imperative that this office be separated from the Department of Community Services and other agencies providing services to children and young people.

While Burnside also supports a new approach to guardianship being developed, as canvassed in the recently released *Review of the Children (Care and Protection) Act 1987*, which allows a wider range of persons to exercise aspects of guardianship, ultimately some decisions will remain the preserve of a Special Guardian.

Since there are some concerns about the Commission being subsumed by issues pertaining to substitute care, Burnside does not support the Commissioner being vested with this role. Rather, an Office of Children's Guardian should be set up either within the Commission as a discrete unit or as part of the Guardianship Board, given that body's extensive experience in this area.

The proposed changes to guardianship under the Act need careful consideration and it may be that the entire issues of guardianship needs to be revisited in that context.

Employment screening functions

Should all employees whose work involves the care of children be screened, whether they are employed in public, non-government or commercial sector organisations?

Burnside strongly supports the screening of all employees whose work involves the care of children, regardless of where or by whom they are employed. However, Burnside just as strongly believes that the Commission should not be given this task. There are a number of reasons for this, including the fact that any probity system which is developed will ultimately involve groups of employees and volunteers who do not work with children, but with adults with disabilities and the elderly, who are just as vulnerable. It would be entirely inappropriate for these processes to be administered by a Commission whose focus is the rights and welfare of children and young people. Moreover, the substantive policy and advocacy work of the Commission risks being swamped by the essentially mechanical task of screening which, while important, contributes little if anything to the Commission's other essential tasks.

Burnside prefers the establishment of a "stand alone" probity unit, with a jurisdiction to screen across the full range of government and non-government organisations.

Should volunteers be screened and if so, which?

All volunteers whose work involves access to children must be screened. Burnside recognises that this represents a mammoth undertaking, when one considers the full range of sporting, social and other activities involved, but the safety and welfare of children must be the overriding consideration.

Should screening be undertaken on employees whose work involves regular unsupervised contact with children, on employees who work in a facility which children use, or should all employees of organisations which provide services to children be screened?

Any employee (or volunteer) whose work involves contact with or access to children must be screened. Again, this represents a fairly massive undertaking, depending on what is screened for, but if that is necessary to protect our children, it must be done. One proposal that could be considered is developing an hierarchy of categories of staff, ranging from those required to have full clearance (those in closest and most regular proximity to children) through to those not required to have a clearance (eg. a worker in the pay-roll department). Employers could have the discretion to request clearance where there were reasonable concerns or as part of an employment policy, even if it was not formally required by the law. Individuals would also be able to seek a clearance, at their own cost, even where this was not legally required.

Should existing employees be screened as a matter of course, on application or transfer to a new position, or only if allegations of abuse are made against them or the employer has reasonable grounds to suspect them of abuse?

If existing employees should be screened, how often should they be subject to a new screening check?

These matters would need to be looked at carefully as the screening processes were introduced, so as to maintain the goodwill and confidence of the community, employees and employers. A number of factors would need to be considered, including cost, efficiency and fairness to employees. However, the overriding concern should be the safety and welfare of children.

Is it reasonable to limit criminal convictions which are included in the screening to those convictions which relate to sexual and physical assault? Should any other category of conviction be included and if so, which?

Burnside believes that criteria as to what represents an “unacceptable risk” need to be developed. Clearly, evidence of crimes of violence, especially against children and young people, should be included. However, recording other kinds of misbehaviour or criminality could lead to victimisation and destroy the credibility of the entire process.

Should screening include information relating to charges for child abuse which are pending or which were dropped, dismissed or proved but resulted in no conviction recorded?

This would also have to be carefully considered when “unacceptable risk” is being defined. It is important that the rights of children and young people are safeguarded, but it is also important that the rights of employees and volunteers are not trampled upon. A single allegation from an adolescent, for example, may be treated differently to a string of alleged abusive incidents against young children. Guidelines would need to be carefully designed. In addition, there would need to be appellate rights against unfavourable decisions and a right of access to files to verify the accuracy of information contained therein.

Should records of unproved allegations of child abuse be exchanged between public, non-government and commercial employers? If so, how could the confidentiality of this information be protected?

The Probity Unit should be the only body mandated to collate and maintain records of such allegations. Employers would still have the responsibility to check references and work histories but it is important that one central, credible source be the repository of information, in order for the process to have credibility. Strong legislative protection of confidentiality will of course be imperative and there should be harsh penalties, including imprisonment, for breaches.

Should the Government introduce time limits on the retention of unproved allegations of child abuse made against employees similar to the “spent conviction” provisions of the Criminal Records Act? If so, what time limits should apply to allegations which are determined as unfounded and allegations which are not proved?

This would need to be looked at the time that the concept of “unacceptable risk” was being defined. However, Burnside would be in favour of quite long time limits (eg 20 years), if any, being adopted. The paramount consideration should always be the safety of children.

How workable is the “unacceptable risk” certificate? Are there better alternatives?

Clearly, a certificate of clearance is more workable than one which states the opposite. Such a clearance would be refused where a person was deemed to be an “unacceptable risk”. Such a decision should be appealable. In order to be employed or engaged as a volunteer in specific circumstances, a clearance would be necessary. Without such a clearance, it would be an offence to employ or offer a position to any employee or volunteer. Thus, the details of a person’s history are not necessarily revealed to the potential employer and thus cannot be misused, but the safety of children is also ensured.

Is the Royal Commission's recommendation that the Administrative Decisions Tribunal review the issues of "unacceptable risk certificates" appropriate?

Burnside has no specific comment on which tribunal should be involved, but clearly there needs to be some avenue for appeal and review. While a dismissal on the grounds of a negative finding would be able to be challenged under industrial laws, the actual finding would need to be appealable, in order to comply with the principles of procedural fairness.

Bearing in mind the costs, should all screening include a national criminal record check?

The system of certificates mentioned above would involve all prospective volunteers or employees for certain positions requiring a current NSW clearance. This would optimally involve a national criminal record check.

What cost recovery scheme should be established?

The British system of "user pays" is put forward in the Green Paper as a possible solution to costs. Burnside supports this, but clearly the cost should be kept reasonable, even if this means the full cost of each screening is not recovered. A cost of around \$40.00 per individual would be reasonable, though special arrangements might have to be made for volunteers and very low income earners.

Investigation and review functions

Are complaints more effectively handled on the basis of service systems or population groups?

Should the Children's Commission handle complaints in addition to its advocacy and screening functions?

Which option for complaints handling best meets the needs of children?

Burnside does not support the concept of the Commission handling individual complaints. Rather, the Commission should act as a central point for information and referral for children, young people and their advocates. Burnside believes that a complaints system is more effectively structured around a portfolio or service area such as Community Services, Health or Education. Burnside is absolutely committed to the retention of the Community Services Commission.

The preferred model would use existing bodies, such as the Community Services Commission, the Health Care Complaints Commission, the Ombudsman and a new Education complaints body with the Children and Young Persons' Commission having the legislative power to follow up and monitor such bodies and advocate for children and young people in these systems. Where complaints cross jurisdictions, there should be protocols to determine who will pursue the investigation, including the potential for joint investigations.

One problem with such a proposal is that two areas with huge impact on children and young people presently have no effective complaints mechanisms. They are juvenile justice and education. Burnside would propose that juvenile justice complaints should be handled by the Community Services Commission (requiring amendment to the relevant legislation).

In the area of education, Burnside strongly supports the establishment of an independent Education Complaints Commission, with jurisdiction covering the Department of School Education, private and independent schools and TAFE. It is anomalous that education, the area that most universally and profoundly affects children and young people has no effective, independent complaints mechanism. This new body should also be assisted and monitored by the Children and Young Persons' Commission.