

19 September 2019

Dear valued partner,

RE: Seeking your support for the establishment of a national commissioner for Aboriginal and Torres Strait Islander children and young people

We are writing to you to seek your support in calling for the establishment of a national commissioner for Aboriginal and Torres Strait Islander children and young people. Attached is a position paper that outlines this important call. Please respond to let us know if you would like to join us by adding the endorsement of your organisation to this position paper.

Why we need a national commissioner

Aboriginal and Torres Strait Islander children and young people experience disproportionately high levels of disadvantage and discrimination. This is reflected in unacceptably high levels of developmental vulnerability, and high and escalating rates of contact with and over-representation in the child protection and youth justice systems across the country. These tragic outcomes demonstrate a significant and urgent need for oversight and change in the systems and services that support Aboriginal and Torres Strait Islander children and young people.

Aboriginal and Torres Strait Islander children and young people often fall through the cracks of our federal system. Children are impacted by 'buck passing' between the federal and state and territory governments, as well as between government departments and agencies. A national commissioner could play a vital role in providing a dedicated voice for Aboriginal and Torres Strait Islander children and young people and supporting strategies for more effective collaboration and coordination both between and within governments.

There is increasing recognition by state and territory governments of the importance and value of a commissioner dedicated to Aboriginal and Torres Strait Islander children and young people. Victoria and South Australia both have dedicated commissioners for Aboriginal children and young people. The establishment of a national commissioner will build on this momentum and contribute to more effective, consistent, efficient and accountable systems and services for Aboriginal and Torres Strait Islander children and young people.

Seeking your support

At the recent SNAICC National Conference held in Adelaide from 3-5 September 2019, over 1200 delegates supported a call for a national commissioner, including the United Nations Special Rapporteur on the rights of indigenous peoples.

We are asking your organisation to join this call by endorsing the attached position paper, which outlines the core components required for the establishment of such a commissioner.

If you are interested in supporting our call and endorsing our position paper, please email nadeshda.jayakody@snaicc.org.au by **Friday, 4 October 2019** with your organisation's logo for us to include in the list of endorsees. We will use this position paper as an advocacy tool to call for positive change and increased government accountability for our children and young people.

Please do not hesitate to contact John Burton, Acting SNAICC CEO (John.Burton@snaicc.org.au) should you have any questions.

Now more than ever, we need to stand in solidarity and work together to achieve better outcomes for Aboriginal and Torres Strait Islander children and young people.

We thank you for considering our request.

Yours sincerely,



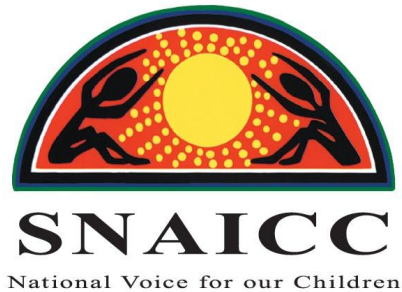
Muriel Bamblett,
Chairperson, SNAICC – National Voice for our Children



Natalie Lewis,
Co-Chair, Family Matters



Richard Weston
Co-Chair, Family Matters



Position Paper Establishment of a national commissioner for Aboriginal and Torres Strait Islander children and young people

This position paper outlines the core components required for the establishment of a national commissioner for Aboriginal and Torres Strait Islander children and young people (national commissioner) to advocate at a national level for the needs, rights and views of Aboriginal and Torres Strait Islander children and young people.

1. Executive Summary

Aboriginal and Torres Strait Islander children and young people around the country experience widespread and persistent discrimination and disadvantage, impacting on current and future generations. There is an urgent need and imperative to establish a dedicated national commissioner for Aboriginal and Torres Strait Islander children and young people to provide improved oversight and accountability for systems and services to improve the protection of the rights of Aboriginal and Torres Strait Islander children and young people.

A dedicated national commissioner should form part of the Australian Human Rights Commission (AHRC) on equal footing with the existing commissioner roles. The national commissioner should be established in conformity with the United Nations benchmark guidelines for national human rights institutions, known as the “Paris Principles”. To achieve this, the role of the national commissioner must:

- be established by legislation to ensure its independence and autonomy from government
- be filled by an identified Aboriginal and Torres Strait Islander person with appropriate qualifications, knowledge and experience and appointed through a transparent process
- be mandated with a clear scope and purpose for the role

- be granted appropriate functions and powers to promote systemic change and accountability, including powers of inquiry and investigation
- be adequately resourced to perform its role effectively.

Details relating to each of these aspects are outlined below, including examples of similar powers vested in national and state/territory commissioner roles that already exist around the country.

2. Need and Imperative

There are at least three key reasons why there is an urgent need and imperative to establish a national commissioner dedicated to Aboriginal and Torres Strait Islander children and young people.

Firstly, **Aboriginal and Torres Strait Islander children and young people experience disproportionately high levels of disadvantage and discrimination.** The multiple and complex forms of disadvantage and discrimination experienced by Aboriginal and Torres Strait Islander children and young people is widespread, systemic and intergenerational. Unacceptably high levels of developmental vulnerability, and escalating rates of contact and significant over-representation in the child protection and youth justice systems around the country demonstrate that the need for change in the systems and services that support Aboriginal and Torres Strait Islander children and young people is significant and urgent. The historical and ongoing impacts of colonisation, dispossession and destruction of culture require responses and solutions that are uniquely tailored to the experiences of Aboriginal and Torres Strait Islander children and young people. A dedicated focus on advancing the rights of the current generation of Aboriginal and Torres Strait Islander children and young people is essential to end the intergenerational cycle of disadvantage and progress equality for future generations.

Secondly, **Aboriginal and Torres Strait Islander children and young people often fall through the cracks of our federal system.** Aboriginal and Torres Strait Islander children and young people are impacted by 'buck passing' between the federal and state and territory governments, as well as between government departments and agencies. A national commissioner could play a vital role in providing a dedicated voice for Aboriginal and Torres Strait Islander children and young people and supporting strategies for more effective collaboration and coordination both between and within governments.

Finally, **there is increasing recognition by state and territory governments** of the importance and value of a commissioner dedicated to Aboriginal and Torres Strait Islander children and young people. Victoria established the commissioner for Aboriginal children and young people in 2013. Since that time, South Australia established the commissioner for Aboriginal children and young people in 2018 and there are advanced discussions taking place in Queensland about a similar role. The establishment of a national commissioner will build on this momentum and contribute to more effective, consistent, efficient and accountable systems and services for Aboriginal and Torres Strait Islander children and young people.

3. Key Principles

The United Nations Principles Relating to the Status of National Human Rights Institutions (known as the “Paris Principles”) set out the minimum standards required by national human rights institutions to be considered credible and to operate effectively.¹ The Paris Principles has been central to the establishment and ongoing operation of the Australian Human Rights Commission and its current commissioner roles,² and so too should provide the foundation for the establishment of a national commissioner.

The Paris Principles set out six main criteria that should be met:

1. A clearly defined and broad-based mandate based on universal human rights standards.
2. Autonomy from government.
3. Independence guaranteed by legislation or constitution.
4. Pluralism, including membership that broadly reflects the society.
5. Adequate resources.
6. Adequate powers of investigation.

The Paris Principles also outline a range of different functions required to:

- **protect** human rights, including by receiving, investigating and resolving complaints, mediating conflicts and monitoring activities
- **promote** human rights, including through education, outreach, the media, publications, training and capacity building, as well as advising and assisting government.

The application of the Paris Principles to the role of a national commissioner is outlined throughout this paper.

4. Independence and Autonomy

Independence and autonomy from government is the first and most essential requirement for the national commissioner. Independence and accountability are essential to be able to advocate effectively for marginalised and disadvantaged groups and to hold governments to account.

To ensure independence and autonomy, the role of the national commissioner needs to be established by Commonwealth legislation. Rather than being established as a new stand-

¹ Adopted by the United Nations General Assembly in 1993, available at <https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>.

² The Australian Human Rights Commission has been granted “A status” accreditation by the International Coordinating Committee of NHRIs.

alone statutory office, the national commissioner should sit within the Australian Human Rights Commission. This would have a number of advantages, including:

- the national commissioner would benefit from the expertise and experience of the other commissioners, particularly where there are common functions and powers
- the national commissioner would be able to work more readily in conjunction with the Aboriginal and Torres Strait Islander social justice commissioner and the national children’s commissioner, as well as other AHRC commissioners where appropriate
- reducing the likelihood of any overlap and duplication that may otherwise occur.

This would require legislation being passed by the Federal Parliament that amends the *Australian Human Rights Commission Act 1986* (Cth), including a consequential amendment to section 8(1) of the Act to recognise the office of the national commissioner as constituting part of the Australian Human Rights Commission.

5. Qualifications and Experience

It is essential that the role of the national commissioner is filled by a person with the necessary qualifications, knowledge and experience to carry out the role effectively. A key element of this is that the position must be filled by an Aboriginal and/or Torres Strait Islander person. Only an Aboriginal and/or Torres Strait Islander person could have the requisite cultural understanding and relationships to understand and promote the best interests of Aboriginal and Torres Strait Islander children and young people through the commissioner’s role.

The establishing legislation should contain a section regarding the qualifications and experience for the appointment of the commissioner. This section should mirror equivalent provisions in the *Australian Human Rights Commission Act 1986* (Cth) regarding the qualifications and experience required for commissioner roles,³ with an additional requirement mandating that the national commissioner be an identified position for an Aboriginal and/or Torres Strait Islander person.⁴

6. Scope

The scope of the national commissioner’s role should be clearly defined in the establishing legislation. Specifically, the commissioner should be granted a clear mandate to advocate on a national level for the rights, views and needs of Aboriginal and Torres Strait Islander children and young people below the age of 18 years.

Consistent with the right of self-determination, the national commissioner role should sit on equal footing with other AHRC commissioners.

³ See for example sections 8B(2) and 46MC(2) of the *Australian Human Rights Commission Act 1986* (Cth).

⁴ Section 46B(2) of the *Australian Human Rights Commission Act 1986* (Cth) – that the person should have “significant experience in community life of Aboriginal persons or Torres Strait Islanders” – is not considered to be strong enough.

The legislation should also provide clarification on how the national commissioner's role is to interact with other AHRC commissioners, as well as state and territory commissioners – see further below regarding cooperation and coordination.⁵ This is particularly important to avoid any duplication or uncertainty associated with the scope of the national commissioner's role.

It may be considered desirable, although not essential, to amend the legislation provisions regarding the scope of the Aboriginal and Torres Strait Islander Social Justice Commissioner and the national children's commissioner roles to clarify that the national commissioner has a mandate that covers Aboriginal and Torres Strait Islander people under the age of 18 years.

7. Purpose

In addition to mandating a clear scope for the role, the establishing legislation should also identify the key purposes and objects of the national commissioner role. This should include:

- monitoring the development and application of laws, policies and programs affecting Aboriginal and Torres Strait Islander children and young people
- contributing to the development and coordination of policies, programs and funding across Australia that impact on Aboriginal and Torres Strait Islander children and young people
- promoting best practice approaches to ensuring that Aboriginal and Torres Strait Islander children's unique needs and rights, including their right to stay connected to culture, are respected, protected and promoted
- proactively involving Aboriginal and Torres Strait Islander children and young people in decisions that affect them
- monitoring Australia's compliance with its international human rights obligations with respect to Aboriginal and Torres Strait Islander children and young people, particularly in relation to the UN Convention on the Rights of the Child (CRC) and the UN Declaration on the Rights of Indigenous Peoples (DRIP).

8. Functions and Powers

Given the significant and widespread issues experienced by many Aboriginal and Torres Strait Islander children and young people, it is important that the national commissioner be granted appropriate functions and powers to promote systemic oversight and accountability. To achieve this, the establishing legislation should grant the national commissioner the following range of general and specific functions and powers:

⁵ See section 32 of the *Commission for Children and Young People Act 2012* (Vic) as an example of a legislative provision providing for the need to avoid unnecessary duplication of the work of different authorities and bodies.

- **Reporting:** submit reports to the minister on the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander children and young people, which must also be tabled by the minister in the Federal Parliament.⁶
- **Promotion of human rights:** promote discussion and awareness of matters relating to the human rights of Aboriginal and Torres Strait Islander children in Australia, including undertaking research, publishing reports and delivering education programs.⁷
- **Review of Commonwealth laws:** examine existing and proposed Commonwealth laws, policies and programs and report to the minister on whether they recognise and protect the human rights of Aboriginal and Torres Strait Islander children.⁸
- **Complaints handling:** powers to receive, investigate and determine complaints from Aboriginal and Torres Strait Islander children and young people (or their representatives) who consider that their rights under the CRC [and/or DRIP] have been breached, as well as to publish determinations on the complaints.⁹
- **Inquiry and reporting:** the power to investigate and report publicly on particular issues that affect and are relevant to the wellbeing and safety of Aboriginal and Torres Strait Islander children and young, akin to the functions conferred on the Victorian commissioner for children and young people.¹⁰ This should include the power to initiate own-motion inquiries and reports as well as the ability to access information and documents relevant to inquiries.

Case Study: Taskforce 1000

In 2016, the Victorian Commission for Children and Young People released a landmark report on the over-representation of Aboriginal children and young people in Victoria's child protection system.¹¹ The report was based on a major investigation undertaken by the Commission into the experiences of nearly 1,000 Aboriginal children and young people in out-of-home care in Victoria, known as "Taskforce 1000".

The inquiry and investigation powers exercised by the Commission uncovered a range of systemic issues with the child protection system that disproportionately impact Aboriginal children and young people and led to major reforms being introduced by the Victorian Government.

Based on the success of Taskforce 1000, the Victorian Government recently established "Taskforce 250", which tasks the Victorian Commission for Children and Young People to

⁶ See, for example, sections 46C(2A) and (2B) and section 46M of the *Australian Human Rights Commission Act 1986* (Cth).

⁷ See, for example, powers granted to the Social Justice Commissioner under section 46C of the *Australian Human Rights Commission Act 1986* (Cth).

⁸ See, for example, powers granted to the Social Justice Commissioner under section 46C(1)(d) of the *Australian Human Rights Commission Act 1986* (Cth).

⁹ See, for example, powers granted to the President of the AHRC under Part IIB of the *Australian Human Rights Commission Act 1986* (Cth).

¹⁰ See Part 5 of the *Commission for Children and Young People Act 2012* (Vic).

¹¹ Available at https://www.parliament.vic.gov.au/file_uploads/CCYP_-_Always_was_always_will_be_Koori_children_Systemic_Inquiry_report_October_2016_QZZbp4gC.pdf.

use its powers to examine the situation of 250 Aboriginal young people in Victoria's youth justice system.

In undertaking the functions and powers identified above, the establishing legislation should also specify a number of requirements relating to how the national commissioner is to perform his or her functions. These requirements should include:

- **Regard to UN human rights instruments:** The national commissioner must have regard to the full range of UN human rights instruments to which Australia is a party when performing his or her functions or exercising his or her powers.¹² This should include explicit reference to both the CRC and DRIP.
- **Consultation with Aboriginal and Torres Strait Islander children and young people:** The right for children and young people to be directly involved in decisions about matters that affect them is a central principle of both the CRC and DRIP. The establishing legislation should include a strong emphasis on involving and empowering Aboriginal and Torres Strait Islander children and young people in the work of the commissioner.¹³
- **Broader consultation cooperation and coordination:** In addition to consultation with Aboriginal and Torres Strait Islander children and young people, the national commissioner should also be required to consult, cooperate and coordinate with Commonwealth, state and territory government departments and agencies, Aboriginal and Torres Strait Islander community-controlled organisations, Aboriginal and Torres Strait Islander communities and families, and other entities concerned with issues affecting Aboriginal and Torres Strait Islander children and young people, as well as other AHRC commissioners.¹⁴
- **Documents and information:** The national commissioner should be able to access relevant documents and information on request from government departments and agencies.¹⁵

A specific provision should be included in the establishing legislation that contains the above requirements as part of a non-exhaustive list of matters to which the national commissioner must have regard when undertaking his or her functions.

¹² See, for example, section 46MB(6) of the *Australian Human Rights Commission Act 1986* (Cth).

¹³ See, for example, section 19B of the *Human Rights Commission Act 2005* (ACT) regarding the involvement of children and young people in decision-making.

¹⁴ See, for example, section 46MB(5) of the *Australian Human Rights Commission Act 1986* (Cth), section 23 of the *Family and Child Commission Act 2014* (Qld) and section 14(1) of the *Commission for Children and Young People Act 1998* (NSW).

¹⁵ See, for example, powers granted to the Social Justice Commissioner under section 46K of the *Australian Human Rights Commission Act 1986* (Cth).

9. Adequate Resourcing

It is crucial that the commissioner is adequately resourced to perform his or her functions. Establishing the commissioner as part of the AHRC will help facilitate this objective by reducing the costs required to run the office of the commissioner effectively. Ideally, the establishing legislation should make explicit provision for the need for adequate resourcing.

10. Other Key Provisions

Finally, the establishing legislation should also include other key provisions relating to the general operation and administration of the national commissioner role, including:

- appointment, duration and termination/resignation
- remuneration and allowances
- other terms and conditions.

These provisions should be based on equivalent provisions currently contained in the *Australian Human Rights Commission Act 1986* (Cth).