



OUR BOORIS
our way



Informing the development of an
Aboriginal and Torres Strait Islander
Children's Commissioner for the ACT

Community Discussion Paper

October 2021

Prepared by:

The Jumbunna Institute for Indigenous Education and Research
University of Technology (UTS) Sydney

Background

In 2019, the *Our Booris Our Way* review of the Australian Capital Territory (ACT)'s child protection system was published. The report's findings were clear:

“The experience of Aboriginal and Torres Strait Islander children in contact with the child protection system in the ACT is one of: a lack of active efforts, poor consistency in experience and decision making, discrimination, and cultural dislocation.”

Our Booris, Our Way Steering Committee (2019)

The *Our Booris, Our Way Steering Committee* made 28 recommendations for urgent reform.

A key recommendation was to create a dedicated Aboriginal and Torres Strait Islander Children's Commissioner role to provide active oversight and promote improved outcomes for children and families. The *Our Booris Our Way Steering Committee* stated that they wanted:

“The Commissioner to provide monitoring, advice and advocacy on systemic and individual cases, on an ongoing basis. The Commissioner should be able to advise and influence government on a broad spectrum of issues that impact our children across both government and non-government services including for example, education, health, housing, child protection and provide independent advice on issues of culture and equity. They would also have the specific ability to engage as a party to case conferences and provide alternative pathways to resolution than court orders.

It is the desire of the community for the Commissioner to be more engaged and connected to the community through current Aboriginal Community Controlled Organisations (ACCO) and the future Aboriginal Child Care Association that would distinguish it from other jurisdictions' singular rights-based framework.”

The ACT Government has committed to establishing an Aboriginal and Torres Strait Islander Children's Commissioner for the ACT, to be enshrined in legislation. The community must play a key role in designing the Aboriginal and Torres Strait Islander Children's Commission role, its priorities and focus, positioning and characteristics, to have confidence that it is able to effectively meet the needs of children, families and communities. This process will be facilitated by UTS Jumbunna, working closely with the *Our Booris Our Way Implementation Oversight Committee*, and include a series of community dialogues to develop the:

- functions and powers,
- governance structures,
- most appropriate location,
- connections and collaborative relationship with other stakeholders, including the community and other oversight agencies, and
- process for recruitment.

This paper has been prepared to help the ACT Aboriginal and Torres Strait Islander community make decisions about an appropriate model for an Aboriginal and Torres Strait Islander Children's Commissioner in the ACT that is able to promote and protect the rights of their children.

Principles for Human Rights Oversight Bodies

The Paris Principles are internationally-recognised standards for institutions intended to **protect and promote human rights**, such as a Children’s Commissioner. These principles include:

- A clear **mandate** and **legal authority** to undertake their role **independent** of other parties (such as government and non-government organisations), including powers of **inquiry** and **investigation**
- **Engagement** with stakeholders, including **government, non-government organisations, experts** and the **broader community**, to protect and promote human rights.
- **Cooperation with other human rights bodies**
- The opportunity to **influence** systems, policies and practice, including the ability to **make recommendations** and relevant **follow up actions** regarding the response to recommendations
- **Clear, transparent** and **participatory** appointment processes, with a pre-determined criteria
- **Funding and infrastructure** necessary to carry out their job effectively.

Together, these principles outline the functions of human rights oversight bodies, such as:

- **Make recommendations** regarding human rights issues, including legislation and policy.
- **Inquire** into matters where there has been a **violation of human rights**, whether including individual and systemic circumstances.
- **Publish reports** (such as annual reports or inquiries) including tabling with the legislature
- **Cooperate with other human rights bodies**, including international human rights systems
- **Raise public awareness** about human rights issues.

Self-determination is not an element of the Paris Principles, as this is generally assumed, however requires specific attention when considering efforts to promote and protect the rights of Indigenous peoples. It is worth considering how self-determination is reflected in the design and implementation of this role, particularly given its prominence in delivering improved outcomes for Indigenous children, including child welfare and youth justice, with self-determination a key recommendation of the *Bringing Them Home* Report.

An Aboriginal and Torres Strait Islander Children’s Commissioner should **monitor and report on** human rights issues affecting Aboriginal and Torres Strait Islander children and young people, holding governments and systems to account, promoting transparency and public accountability for the Aboriginal and Torres Strait Islander community, and respecting Aboriginal and Torres Strait Islander governance.

These principles have been enacted in different ways in various jurisdictions. In many circumstances, the legislated mandate of Children’s Commissioners has been on systemic issues, with limited mandate for individual advocacy or intervention, with direct reporting to parliament, sometimes following a feedback process with the Minister or relevant department. Some are narrowly focused on specific systems, or part of the systems (such as out-of-home care), while others have a broader remit.

You can read more about similar roles in SNAICC’s *Options Paper – Models for a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People*, available [here](#).

Key considerations for the ACT Aboriginal Children’s Commissioner

As noted above, the Paris Principles provide important guidance for establishing the role of Aboriginal and Torres Strait Islander Children’s Commissioner in the ACT, and how the role and mandate might best be enshrined in law. This is the focus of these consultations, and will have significant implications for the way the Aboriginal and Torres Strait Islander Children’s Commissioner goes about their work.

This section will outline the broad areas for discussion towards developing a model for the ACT. It includes exploring issues such as:

- Whether the role will **focus on systemic issues** (such as regulation, monitoring and oversight of the child protection system) **or individual cases** (such as inquiries into child deaths in child protection or individual advocacy), **or both**, and if so, how these functions will be managed, and what powers might be required
- Whether the Aboriginal and Torres Strait Islander Children’s Commissioner will have a **complaints handling function**, and, if so, how this will be positioned alongside other key roles such as individual or systemic advocacy, which reflect different assumptions and standpoints.
- Whether the Aboriginal and Torres Strait Islander Children’s Commissioner will have a **broader focus on multiple systems** (whether their role will go beyond child protection and youth justice, to also focus on education, health, etc.).
- If the Aboriginal and Torres Strait Islander Children’s Commissioner is **attached to the existing ACT Human Rights Commission, or has its own standalone office**.
- The **relationships** between the Commissioner and other key stakeholders, including the ACT Human Rights Commission, the judiciary, and the Aboriginal and Torres Strait Islander community
- The **requirements and process for selection** of the Commissioner, including the key characteristics, skills and values of an effective Commissioner, and how the Aboriginal Torres Strait Islander community, including Aboriginal and Torres Strait Islander children and young people, might be involved in the selection process.
- **The duration of the term the Aboriginal and Torres Strait Islander Children’s Commissioner will serve** (the specific period of appointment, and whether Commissioners can serve multiple terms).

Function and Powers

There are a broad range of potential functions to be considered for defining how the Aboriginal and Torres Strait Islander Children’s Commissioner will protect and promote the rights of Aboriginal and Torres Strait Islander children, consistent with community expectations. This will include clearly describing the role’s mandate, and how the functions and powers might best be positioned to deliver on this mandate.

Through *Our Booris Our Way*, the Aboriginal and Torres Strait Islander community expressed an interest for the proposed Aboriginal and Torres Strait Islander Children’s Commissioner to provide monitoring, advice and advocacy on both systemic issues and individual matters, and across key areas including education, health, housing, child protection, and culture and equity. Different jurisdictions have approached this in different ways, including providing an explicit rights-based mandate, or outlining broad values such as safety, welfare or best interests, focused on a single system (such as child protection), or across multiple systems.

The Commissioner role might include a regulatory function regarding the implementation of the Aboriginal and Torres Strait Islander Placement Principle in child protection, and include consideration of issues affecting the broader family, taking a holistic approach. This broad mandate may introduce challenges in effectively delivering for the community, creating potential conflicts in delivering on various functions, resource strain, or create structural difficulties when engaging with stakeholders to influence change.

One key area for consideration is whether the Commissioner should include a specific complaints handling role, which may require significant resourcing, and duplicate existing structures. However, providing a complaints handling role may improve access and choice for Aboriginal and Torres Strait Islander children and families. Alternatively, the Commissioner may play an oversight function regarding existing complaints processes (such as with the Human Rights Commission), with an interest in supporting improved complaints handling for Aboriginal and Torres Strait Islander people across the Human Rights Commission, as well as the discretion to intervene where needed.

In thinking about the roles and functions of the Commissioner, it is important to consider how certain roles functions might interact or even create challenges or potential conflicts (for example, the relationship between individual advocacy and impartially handling complaints), and the unique role that the Aboriginal and Torres Strait Islander Children’s Commissioner might play within the ACT community. This includes relationships with existing human rights bodies, government agencies and the judiciary, all of which play a role in the lives of Aboriginal and Torres Strait Islander children and young people (discussed below).

1. What are the specific roles and functions that are desirable for an effective Aboriginal and Torres Strait Islander Children’s Commissioner for the ACT?
2. Which of these roles or function are **most important** in meeting the expectations of Aboriginal and Torres Strait Islander Children’s Commissioners?
3. In providing monitoring, advice and advocacy on individual matters, what should be the scope of the Commissioner’s responsibility, and its relationship with other complaints handling and advocacy processes?

Governance, connections and collaborative relationships

Independence is an essential principle for an effective Aboriginal and Torres Strait Islander Children’s Commissioner. However, effectively monitoring and influencing systems and practice to protect and promote the rights of Aboriginal and Torres Strait Islander children also requires good relationships with Aboriginal and Torres Strait Islander communities, as well as strong connections and collaborative relationships with a range of stakeholders, including community, government, and other oversight bodies, such as the ACT Human Rights Commission.

These relationships might be included in legislation, reflected through organisational structures, as well as the physical location and environment of the Commissioner (discussed below).

Governance should prioritise the principle of independence, and consider how to effectively promote representation of the community, influence government and key stakeholders, and provide accountability to the community. Community and cultural accountability is a key part of promoting confidence in the role. This might include a clear mandate for broad community engagement, including access to specific

cohorts and populations (such as children and young people in out-of-home care or in youth justice). It may also include a requirement or option to established an Aboriginal and Torres Strait Islander Advisory Council, or youth council, to assist the Commissioner in exercising their responsibilities. There may be options to link governance of the ACT Aboriginal and Torres Strait Islander Children’s Commissioner in with existing Aboriginal advisory or governance mechanisms as well but, if that is the case, the independence of the role should be preserved.

Other considerations include organisational decision making and the opportunity to direct adequate resources to fulfil their mandate, and whether the Commissioner is part of the ACT Human Rights Commission, or structurally independent. If so, what should the relationship be between the Aboriginal and Torres Strait Islander Children’s Commissioner and other related roles in the ACT Human Rights Commission that would promote greater reach and impact through coordinating effort and influencing the exercise of these functions (such as advocacy and complaints handling roles). Effective collaboration across these structures is likely to increase reach and impact, and promote improved outcomes for Aboriginal and Torres Strait Islander children and young people in the ACT. Similarly, other key relationships, such as with child protection and juvenile justice systems, are also worth considering, including if it is desirable for the Commissioner to be able to participate in child protection matters before the Courts, and if so, at what times and in what capacity.

Finally, reporting processes should also be considered, including annual, special and thematic reports, and how these processes promote transparency and accountability, particularly to the Aboriginal and Torres Strait Islander community. This might include a mandate to table reports simultaneously with Parliament and relevant Aboriginal and Torres Strait Islander community bodies, such as the ACT Aboriginal and Torres Strait Islander Elected Body.

4. What governance structures are necessary to effectively fulfil the mandate of the ACT Aboriginal and Torres Strait Islander Children’s Commissioner?
5. What relationships are expected with respect to the Aboriginal and Torres Strait Islander community, and the ACT Human Rights Commission?
6. What should the Commissioner’s mandate be with respect to reporting?
7. What mechanisms need to be put in place to ensure the ACT Aboriginal and Torres Strait Islander Commissioner is accountable to community?

Location

In addition to expectations and mandates to engage collaboratively with community and other stakeholders, the physical location and space occupied by the Commissioner can send a clear message about the Commissioner’s role, independence and relationships. It is also a clear opportunity to communicate to Aboriginal and Torres Strait Islander children and young people, and the community more generally, about the priorities and values of the Commission.

The physical location of the Commissioner will also have impact on the nature of relationships. Co-locating the Commissioner with the Human Rights Commission, even if established through distinct legislation, is likely to foster closer relationships with other oversight bodies and support collaboration across the broader remit. Co-locating the Commissioner’s role with an Aboriginal Community Controlled Organisation might signal an intent to work in a community-based way but may introduce potential conflicts and diminish the perception of independence.

8. Where should the Commissioner be located? Are there other considerations regarding the location and setting of the Commissioner to effectively deliver on its mandate?

Role requirements and selection

Appointed Commissioners should have the confidence of the community they serve. This can be promoted by involving the community in shaping the role, as well as the skills, knowledge and experience to undertake the role effectively, and the process for recruitment. It is important that these are clearly defined prior to appointment, promoting transparency in the selection process.

Relevant skills, knowledge and experience might include community engagement, navigating government systems and processes, strategic engagement, sector experience or formal qualifications, as well as cultural authority, integrity and community standing. Some of these features may be of more value to the community than others, while overly narrow or strict requirements may exclude some candidates from consideration.

Selection should involve a clear, transparent and participatory process. This could involve multiple stages and could include the active participation of representatives of the Aboriginal and Torres Strait Islander community (including children and young people specifically) in various ways such as publicising the role within the community or forming part of the selection panel. For example, it might be mandated that community members and children and young people participate on the selection panel, or include tasks intended to explore the candidate's competency in working with children and young people.

9. What personal and professional characteristics are essential for the ACT Aboriginal and Torres Strait Islander Commissioner to possess?
10. How should recruitment and selection be undertaken?

Next Steps

Aboriginal and Torres Strait Islander community members and other stakeholders including government and statutory officers are invited to share their views on the function and powers, governance structures, locations, connections and relationships, and process for recruitment of a Commissioner for Aboriginal and Torres Strait Islander Children in the ACT.

A series of community dialogues will be organised to provide an opportunity for community members to have their say. These will be facilitated by the Jumbunna Institute for Indigenous Education and Research team, led by Associate Professor Paul Gray, Distinguished Professor Larissa Behrendt, and Professor Lindon Coombes, working in partnership with the *Our Booris Our Way Implementation Oversight Committee*, and the ACT Justice and Community Safety Directorate.

Sessions will be advertised throughout the community and in partnership with local community organisations. We will also hear from government representatives and service providers. A final model will be developed through a final workshop with Aboriginal and Torres Strait Islander and government stakeholders. A report of the process will be developed and published for the community.

Relationships of the Aboriginal and Torres Strait Islander Children’s Commissioner



Summary Table

	Principles	Comments
Functions and powers	Human rights mandate Inquiry and investigation	<p>Some similar roles have an explicit mandate to promote and advocate for the rights of children. Others refer to broad concepts such as safety, wellbeing, or best interests.</p> <p>Some roles are given a broad mandate, while others might be specifically oriented towards particular systems – child protection, youth justice etc.</p> <p>Many statutory officers tend to have a focus on systemic issues affecting children. Some include scope for individual advocacy or complaints resolution, while others are limited in their mandate for individual matters.</p> <p>Some include specific powers of inquiry, including under their own motion, or at the request of the Minister. This can include powers to compel documents, access to sites, or other requirement to complete investigations. In some circumstances, this includes offence provisions for non-compliance.</p>
Governance and connections	Independence Plurality Cooperation with other human rights bodies Relationship with community	<p>Commissioner roles in Australia tend to be independent statutory officers, invested with their own authority.</p> <p>Some report to the Minister, while others may report directly to parliament, or to a parliamentary committee.</p> <p>Commissioners may be able to establish relevant advisory councils, including involving young people, or be mandated to establish advisory councils.</p> <p>Commissioners may be positioned as part of a broader institution (such as the ACT Human Rights Commission, or the Australian Human Rights Commission), or established in a standalone fashion.</p> <p>Some existing Aboriginal officers (see for example Queensland, Victoria and NSW) are within child-focused statutory bodies, which may include delegated authority, or other statutory connections to a principle commissioner/statutory officer.</p>

		<p>Many develop working relationships with other statutory officers, such as Ombudsman or Guardians, whether or not this relationship is established in legislation.</p> <p>Few have explicit formal relationships to Aboriginal community structures established in legislation, however tend to foster strong working relationships through regular, respectful engagement with the community.</p>
<p>Role Characteristics and Selection</p>	<p>Selection</p>	<p>Commissioners most often tend to be appointed by the Minister for a fixed term, and may follow a publicly advertised recruitment process.</p> <p>In some circumstances, key stakeholders have been involved in recruitment processes, for example including young people or community representatives on the selection panel, contributing to recommendations to the Minister. Some include specific tasks to demonstrate capacity to engage effectively with children and young people.</p>