

Establishing A Children's Commissioner

Lessons from Australia on Creating an
Oversight Body for Children's Issues

Commissioned by



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Executive Summary

Although the United States has not—and perhaps never will—adopt the Convention on the Rights of Children, there is much the United States could learn from the subsequent implementation of the Convention in similarly-situated countries such as Australia that have done so.

A key recommendation by the United Nations Committee on the Convention was to establish an independent officer—a children’s commissioner—to investigate and report on policies and laws affecting children’s safety and well-being. The creation of a children’s commissioner is not necessarily something that requires joining the Convention, and there are ample examples of ombudsmen that could perform similar functions in the American context at either a federal or state level.

This paper will argue that the United States should still consider adopting a children’s commissioner and provide recommendations and considerations for such an office. A children’s commissioner could play several different roles in our federal system: a coordinating role to better align public policies, an oversight and monitoring body to provide input into legislation and regulations, or a liaison for educating the public on children’s issues while serving as an entry point for children and youth to access the federal government.

I. INTRODUCTION

...the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life; the sick, the needy and the handicapped.

Hubert H. Humphrey

In our public policy debates, there are many, many interest groups representing key constituencies before our elected leaders and government bureaucracies. While many of these constituencies have the power to mobilize, organize, advocate, fundraise, and vote in order to achieve their political goals, one segment of our society cannot do many of these things: children.

Many policymakers have argued that an essential function of government itself is resolving issues affecting the health and well-being of America's children. Government—from local levels up to the federal government—spends billions of dollars on children's needs. Government runs education, health, nutrition, and other critical social services. Government includes specialized courts and officers who are supposed to intervene in children's best interests.

Despite what might seem like a prioritization of children in our public policy agenda, our country ranks poorly on too many indicators of children's well-being. For instance, the United States ranks 26th out of 29 advanced economies on indicators of children's well-being as surveyed by UNICEF with particularly low marks for health and safety and for education.¹ Similarly, the Organisation for Economic Co-operation and Development ranked the United States as 23rd out of 30 member countries, again with low marks for educational achievement and health and safety.² The World Economic Forum noted that the United States has high rates of child poverty with as many as one in five children experiencing food insecurity.³

To live up to Senator Humphrey's statement, our country must do better. Unfortunately, we are not seeing that level of leadership in our federal government. Children's vulnerability is often referenced in political debates but not adequately addressed because of their lack of political standing: "To expect that...debates will take place around the needs and rights of children is to make the very plausible assertion that the first and last duty of governments and their agencies, of schools, courts, community groups, and parents is to further the interests of the most vulnerable group in the society. Children's vulnerability resides in their generally total lack of economic and social resources, and their inability to generate these resources through their own actions"⁴

Even if none of the glaring atrocities being committed against children were happening at this particular moment in our country's political history,⁵ our government—and our children and their advo-

1 UNICEF, "Child Well-Being in rich countries: A comparative overview," 2 (2013), https://www.unicef-irc.org/publications/pdf/rc11_eng.pdf.

2 "Comparative Child Well-being across the OECD," in *Doing Better for Children* (2009), <https://www.oecd.org/social/family/43570328.pdf>.

3 Charlotte Edmond, "These rich countries have high levels of child poverty," *World Economic Forum* (June 28, 2017), <https://www.weforum.org/agenda/2017/06/these-rich-countries-have-high-levels-of-child-poverty/>.

4 Bettina Cass, "Toward a National Agenda for Children," in *The UN Convention and Australia* 22 (1991).

5 "A firsthand report of 'inhumane conditions' at a migrant children's detention facility," *PBS News Hour* (June 21, 2019), <https://www.pbs.org/news-hour/show/a-firsthand-report-of-inhumane-conditions-at-a-migrant-childrens-detention-facility>.

cates—still lacks a focal point for children’s policies. Such a focal point would ensure that the country’s health, education, nutrition, housing, justice, and other services were working together so that children and adolescents⁶ could grow up in a healthy environment no matter where they live in the United States.

Other similarly-situated countries do have some form of such an official through a designated children’s commissioner. Some countries created such an office as part of their commitment to the United Nations Convention on the Rights of the Child,⁷ which the United States has not ratified (and is unlikely to ratify in the near future). We, however, should not dismiss the lessons we can learn from other countries’ experience though as simply fulfilling a treaty commitment. Nor should we dismiss the idea of a Commissioner as something that must be tied to the Convention—just because some countries adopted a Children’s Commissioner as part of fulfilling their commitments to the Convention does not mean that they would not or could not have done so without having signed or ratified the Convention.

This white paper explores creating a central office—a point person—that could be the voice for children within the federal government. Such an official or agency could shine a spotlight on glaring problems facing children, provide coordination between different youth and adolescent public policies, or advocate for resources for children’s programs in the budget process.

As we will explore in the case study of Australia in this white paper, Australian lawmakers faced political backlash when they considered joining the Convention and establishing their national commissioner, and the arguments they heard are very similar to those arguments that the United States debated when it considered joining the Convention. Thus, we should not dismiss the lessons we can learn from these examples simply because they come from other countries—the political considerations are not so foreign, and the resolve to protect our children should be universal.

II. Origins of Children’s Commissioners

This section will explore the role of the UN Convention on the Rights of the Child and its relationship to children’s commissioners. Several countries established their national children’s commissioners as a means of fulfilling their obligations under the Convention; however, the Convention itself does not require the establishment of such an office. Given that almost all countries have signed and ratified the Convention, it’s impossible to know whether they would have established such an office but for the Convention, but it is entirely possible many of them would have created such an office regardless of whether the Convention had existed.

⁶ For purposes of this paper, the term “children” collectively refers to both children and adolescents as the Convention applies to any individual under the age of 18. The World Health Organization recognizes the term “adolescent” to refer to individuals between ages 10 and 18. World Health Organization, “Recognizing adolescence” (2014), <http://apps.who.int/adolescent/second-decade/section2/page1/recognizing-adolescence.html>.

⁷ The Convention does not require such an office, but the UN committee responsible for monitoring the Convention’s implementation has urged countries to establish an office “with responsibility for promoting and protecting children’s rights... independently and effectively to monitor, promote and protect children’s rights.” Howard Davidson, “A U.S. National Ombudsman for Children,” in First Focus, *Big Ideas: Game-Changers for Children 74-75* (2010) (quoting United Nations Committee on the Rights of the Child, “The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child,” CRC/GC/2002/2 (General Comments), Nov. 15, 2002, www.refworld.org/docid/4538834e4.html).

What is the Convention on the Rights of the Child?

The UN Convention on the Rights of the Child (“the Convention”) began as a suggestion to commemorate the International Year of the Child, which itself was to commemorate the twentieth anniversary of the 1959 Declaration on the Rights of the Child, in 1979. Subsequently, UN members debated drafts of the Convention for the next decade, concluding with its adoption in 1989 and it entering into force in 1990.

One scholar described the Convention as two sections, with the first section, including the preamble and the first forty articles, being substantive and defining the rights of the child and the steps that governments must take to protect those rights.⁸ This section is “the single, most comprehensive statement of children’s rights ever drawn up at the international level.”⁹ Such rights not only include “a wide range of issues which have only recently emerged on the international agenda”¹⁰ but also “the right of each child to be involved - to participate - in decision-making on matters that affect his or her interests and for the child’s evolving capacities to be taken into account in that regard.”¹¹ Additionally, Article 5 respects parents’ roles, rights, and duties as well as children’s rights to know who their parents are and be cared for by them.¹²

The remaining articles form more of a procedural section for evaluating states’ actions.¹³ For instance, Article 43 establishes a Committee on the Rights of the Child, which is made up of 18 independent experts from member states.¹⁴ This Committee is the primary “enforcement” means for the Convention through ongoing monitoring: the Committee receives reports from countries—within two years of ratifying the Convention and then every five years—and issues recommendations in response or requests additional information.¹⁵

In addition, Article 45 allows the Committee to accept additional information from “specialized agencies” “in order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention.”¹⁶ The UN Children’s Fund (UNICEF) declared that such a recognition of non-governmental organizations’ roles was “a first among human rights treaties.”¹⁷

Although the United States is an outlier on ratifying the Convention,¹⁸ our country was an active participant in the Convention’s development.¹⁹ Notably, the United States urged discussion of “individual personality” rights such as freedom of expression and a right to privacy, which some have noted helped move the Convention away from being limited to just providing care and protection for children and instead laying the groundwork for thinking how children could participate in the po-

8 Cynthia Price Cohen, “The Role of the United States in Drafting the Convention on the Rights of the Child,” 4 *Loyola Poverty J.* 9, 23 (1998).

9 Philip Alston, “Foreword,” in *The UN Convention on the Rights of the Child and Australia*, iii (1998) (emphasis added to emphasize the Convention is a statement).

10 *Id.* (including “inter-country adoptions, child abuse and sexual exploitation, drug-related problems, rehabilitation for children who have been exposed to cruel or exploitative treatment, etc.”).

11 *Id.*

12 Convention; CRS at 3.

13 Cohen, *supra* note 9, at 23.

14 <https://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx>

15 Article 44; <https://www.unicef.org/child-rights-convention/implementing-monitoring>

16 Article 45.

17 <https://www.unicef.org/child-rights-convention/implementing-monitoring> (noting “individual non-governmental organizations or coalitions can and do prepare alternative reports for the Committee’s consideration”).

18 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en

19 Howard Davidson, “Does the U.N. Convention on the Rights of the Child Make a Difference?” 22 *Mich. State Internat’l L.Rev.* 497, 498 (2014).

litical and policymaking process.²⁰

But even though both the Reagan and George H.W. Bush administrations had a role in the Convention's drafting, both administrations expressed concerns about its potential for conflict with state and federal law.²¹ The Clinton Administration did sign the treaty but did not submit it to the Senate for ratification due to hostility by then-Senate Foreign Relations Committee Chairman Jesse Helms, ensuring that the Convention lacked the votes for ratification. Subsequently, the George W. Bush Administration echoed hostility toward the Convention but supported two optional protocols, and while the Obama Administration expressed support for the Convention's ideals, it never submitted it for ratification in the Senate.

Recommendations to Create an Independent Observer

Despite opponents' argument that the Convention is a political attack on state sovereignty, the Convention exists mainly as an aspirational symbol for children's well-being and a means of monitoring the status of children in countries that have ratified the Convention.²² Such monitoring occurs either through reports that countries draft themselves or are submitted by non-governmental organizations.

In 2003, the UN Committee on the Rights of the Child issued a recommendation that countries establish "[i]ndependent national human rights institutions (NHRIs)" as part of their commitment under Article 4 of the Convention.²³ Similarly, UNICEF reiterated the Committee's recommendation to "set up independent national offices—ombudspersons, commissions, focal points within national human rights institutions, or other institutions—to promote and protect children's rights."²⁴ The Committee offered additional guidance to ensure an NHRI would have legitimacy and capacity to do its work, recognizing that child-focused NRHIs must have "special attention" from other human rights offices because of children's lack of a voice in the political process.²⁵ In addition to such independent offices, UNICEF encouraged the involvement of non-governmental organizations because they can "play a major role in raising public awareness" and should be invited to prepare reports—either with the country's NHRI or independently—on children's well-being to UNICEF.²⁶

With these guidelines in mind, we turn to look at how Australia considered the Committee's recommendations and how the United States could implement its own Children's Commissioner.

III. Australia

Australia today has a children's commissioner, Megan Mitchell,²⁷ but establishing this office took

20 Cohen, *supra* note 14 at 38-39.

21 CRS at 5-6.

22 www.unicef.org/crc/index_30208.html (noting that "[t]here are no specific right or wrong implementation measures, however the Convention should be the main benchmark and inspiration for all government action").

23 United Nations Committee on the Rights of the Child, "Convention on the Rights of the Child, General Comment No. 2," 1 (2003) (noting that Article 4 requires ""undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention").

24 www.unicef.org/crc/index_30208.html

25 General Comment, *supra* note 24 at 2.

26 <https://www.unicef.org/child-rights-convention/implementing-monitoring>

27 Mitchell has served in this role as the first and so far only National Children's Commissioner even over the transition from a Labor to Liberal national government. Australian Human Rights Commission, *Ms Megan Mitchell – National Children's Commissioner (Apr. 26, 2013)*, www.humanrights.gov.au/about/commissioners/ms-megan-mitchell-national-childrens-commissioner.

over two decades from ratification of the Convention in 1990 to the passage of legislation in 2012.²⁸ Although the UN recommendations for NHRIs did not come out until 2003, calls for a commissioner date back to Australia's ratification.²⁹

In answering the question whether Australia needed to take the Convention seriously following ratification, Australian scholar Philip Alston noted that Australians should regard it more than "only a symbolic gesture aimed at showing international solidarity with those countries where the Convention is really needed."³⁰ Rather than assuming because of Australia's economic status that all of its children were safe and secure, Australians should recognize the plight of too many children who were in marginalized communities: "The plight of Aboriginal children is a theme to which frequent reference is made. Other issues specifically addressed are the problems of homeless children, wards of the state and the mentally-ill, the inadequacy of social security arrangements for children and the need for a range of measures to offset the impact of the current recession."³¹

Adopting and Implementing the Convention

In 1990, Australia ratified the Convention, which went into effect in January 1991.³² Despite several concerning incidents related to the care and protection of children,³³ there was general criticism whether Australia was seeking enough public input when ratifying treaties such as the Convention.³⁴ Consequently, the Australian Parliament began an inquiry into the "Status of the Convention on the Rights of the Child"³⁵ in order to analyze the ramifications, assess compliance, and determine jurisdictional issues and the need for possible national standards related to children's programs, services, and welfare.³⁶

In its inquiry, the parliamentary committee received over 700 comments from organizations and individuals about the Convention with the majority being in opposition.³⁷ One possible reason for the inquiry was not only to assuage these concerns and explain the actual role and impact of the Convention in Australian law but also to respond to "a number of government and non-government reports that proposed the creation of a Children's Commissioner."³⁸ In its report, the committee recommended an "Office for Children" as part of the Prime Minister's office with the dual role of "[promoting] the vitality and importance of the family as the basic unit in society [with] recognising the need for government support for families and those children whose well being may be under pressure due to problems confronting the family."³⁹ In a separate but related recommendation, the committee urged the government to "develop a coordinated mechanism for ongoing monitoring of

28 Australian Human Rights Commission, *About the National Children's Commissioner*, www.humanrights.gov.au/our-work/about-national-childrens-commissioner.

29 *Id.*

30 Philip Alston, "Forward," *The UN Convention and Australia*, iii.

31 *Id.*

32 Melinda Jones, Myths and facts concerning the Convention on the Rights of the Child in Australia, 5 *Aus. J. Human Rts.* 126, 127 (1999).

33 *Id.* at 130 (noting "insufficient resources for Aboriginal health and education, the Stolen Generation report [on the removal of Indigenous Australian children], and the inquiry into paedophilia").

34 Parliament of Australia, Executive Summary, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties (Nov. 1995)* ("Many of the misconceptions that abound in relation to the Convention on the Rights of the Child and some of the environmental treaties may be dispelled if there were sufficient explanatory material available to the community."), www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/pre1996/treaty/report/b02.

35 Joint Standing Committee on Treaties, House of Representatives, *United Nations Convention on the Rights of the Child (Aug. 1998)*, www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jscct/reports/report17/rept17contents.htm.

36 Jones, *supra* note 33, at 129-30.

37 *Id.* at 128. Jones notes that many of the opposing submissions reflect "a basic misunderstanding of the role of international law in Australia [or] misconceptions about the terms of the" Convention.

38 *Id.* at 130.

39 Joint Standing Committee on Treaties, Chapter 4, *supra* note 36 at 195.

the implementation of the Convention."⁴⁰ As part of this recommendation, the committee suggested either the proposed Office for Children or the existing Human Rights Commission could serve as a central office to handle this reporting.⁴¹

Leading to a National Children's Commissioner

Beginning with Queensland in 1996, all of Australia's states and territories had established an office for children to coordinate policies affecting youth and to provide some level of ombudsman functions.⁴² However, advocates noted that in conflict with Australia's duties under the Convention, these state and territorial offices had inconsistent standards and were not necessarily independent bodies.⁴³ Instead, they pushed for "an independent National Commissioner for Children... that will advocate for the welfare of children and young people in all states and territories."⁴⁴ These complaints were also reflected in a 2005 report by the UN Committee on the Rights of the Child.⁴⁵

Under the Liberal Party, the Howard administration did not support a national children's commissioner, arguing that it would be duplicative of other government functions. However, the Labor Party, the major party in opposition, was supportive or at least interested in the idea of such an office: in 2002, Labor leaders indicated support for a commissioner that "that will play a proactive and positive role in improving and protecting the general welfare and well-being of our nation's children, including indigenous children,"⁴⁶ and a provision was included in 2004 campaign literature.⁴⁷

Movement toward creating a commissioner progressed after Labor took a majority following the November 2007 election with Australia taking both steps on the domestic and international fronts. In May 2008, the Australian Department of Families, Housing, Community Services and Indigenous Affairs (now the Department of Social Services) under the Rudd administration solicited input on establishing a children's commissioner as part of a larger inquiry into child protection policies, which later led to the first National Framework for Protecting Australia's Children in 2011. Around the same time, Australia initially broached the subject of an independent national commissioner in its 2011 report to the United Nations by stating it was "exploring a possible role" for such an entity.⁴⁸

Later that year, a coalition of non-governmental organizations and advocates released a consensus paper with thirteen key principles on what they believed should be the necessary roles, functions, and powers for an effective children's commissioner.⁴⁹ These principles included:

- » political independence;

40 Id. at Chapter 6, 214.

41 Id. at 215.

42 Natalie Kenney and Allison Tait, "Commissions for children and young people: Comparing state and territory statutory bodies for protecting the rights and interests of children," *National Child Protection Clearinghouse* (June 2005) 28, 28.

43 Id.

44 Id. at 33.

45 United Nations Committee on the Rights of the Child, *Concluding Observations: Australia* (Oct. 20, 2005) 4 (noting "the Committee is concerned that there is no commissioner within [the national human rights commission] devoted specifically to child rights").

46 Simon Crean and Nicola Roxon, *National Commissioner for children and young people* (May 2002), https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/DF4A6/upload_binary/DF4A6.pdf;fileType=application%2Fpdf#search=%22library/partypol/DF4A6%22.

47 Australian Labor Party, *Labor's plan to protect and strengthen human rights in Australia*, https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/L68L6/upload_binary/l68l62.pdf;fileType=application%2Fpdf#search=%22library/partypol/L68L6%22.

48 Australia's formal response to the UPR Recommendations (June 8, 2011), <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx>. For political context, Australia's submission for review was made in October 2010, shortly after Julia Gillard succeeded Kevin Rudd as prime minister.

49 "A National Commissioner for Australia's Children," *NGO Sector Position Paper* (Dec. 2011), https://ayac.org.au/uploads/A%20National%20Commissioner%20for%20Australia_s%20Children%20-%20paper.pdf.

- » the ability of children and young people to provide input into the office;
- » a mission based on the Convention and other human rights agreements;
- » the coordination between the office on its oversight functions with other state and national bodies to prevent duplication;
- » the prioritization of the needs of vulnerable populations in its work;
- » the recognition of the unique status of the children of Australia’s indigenous people;
- » the assurance that all children would be able to access the commissioner in a non-discriminatory basis;
- » an agenda that would be proactive, systematic, and evidence-based;
- » adequate resources for the commissioner to work at a national scale;
- » the appointment of a commissioner that would include child representatives in the decision-making process; and
- » the issuance of communications from the commissioner in a way that is accessible to young people.

In terms of the office’s functions, the document suggested that the commissioner monitor and review laws, policies, and programs for their impact on children; develop a means of gathering complaints from children on systemic issues; and provide public awareness and education on children’s rights. The only function that the advocates explicitly stated that the commissioner should not have is to serve as a guardian in asylum cases as the advocates believed that the government, not the commissioner, should fulfill that responsibility as the signatory to the Convention. In terms of the office’s power, the advocates believed the commissioner should be able to intervene in legal proceedings in cases involving a breach of children’s rights; to create a proactive agenda, including the ability to require the government to participate in an inquiry; require the government to at least respond to the commissioner’s recommendations; and to report to the Parliament.

In 2012, Australia passed legislation, introduced by then-Attorney General Nicola Roxon, to amend the Australian Human Rights Commission’s enabling legislation to include a national Children’s Commissioner. In remarks, Roxon was careful to note that the commissioner would “not have a guardianship role nor... a role in dealing with individual children, including individual children’s cases in the context of child protection or family law.”⁵⁰ But Roxon also noted that the commissioner would not “have a complaint handling role” and would only have “a limited role” to intervene in judicial cases. The explanatory memo accompanying the legislation noted that the children’s commissioner would have the same ability to file an amicus brief as other commissioners on the Australian Human Rights Commission only in cases that narrowly fell in their area of concern.⁵¹

In 2013, Megan Mitchell, the children’s commissioner of New South Wales, was appointed to be the first Children’s Commissioner.⁵² She has remained in place as the Children’s Commissioner despite the change in leadership.⁵³ In a 2019 speech reflecting on the anniversary of the Convention, Mitchell noted that Australia had many accomplishments that advanced children’s health, well-being, and rights but still needed to improve in many areas.⁵⁴ Her primary concern was the lack of “a [national]

50 Nicola Roxon, Second Reading Speech for the Australian Human Rights Commission Amendment (National Children’s Commissioner) Bill (2012).

51 Australian House of Representatives, Explanatory Memorandum, Australian Human Rights Commission Amendment (National Children’s Commissioner) Bill (2012) 9.

52 Australian Human Rights Commission, “Ms Megan Mitchell – National Children’s Commissioner” (Apr. 26, 2013), <https://www.humanrights.gov.au/about/commissioners/ms-megan-mitchell-national-childrens-commissioner>.

53 In addition to a change in party leadership from Labor to Liberal in 2013, the role of Prime Minister has changed multiple times due to intraparty fights.

54 Megan Mitchell, “Children’s Rights in Australia: looking back and moving forward” (June 21, 2019), <https://www.humanrights.gov.au/about/news/speeches/childrens-rights-australia-looking-back-and-moving-forward>.

Bill or Charter of Rights, and all the scaffolding that would necessarily flow from that to protect human rights, including those of children.” Additionally, Mitchell highlighted specific issues:

- » The growing anxiety in Australian children and the need for greater attention and resources directed at their mental health
- » The significant numbers of children exposed to family violence and abuse
- » The high rates of children removed into care
- » [Australia’s] under-investment in early childhood, early intervention and prevention
- » The over-representation of Indigenous children in the care and justice systems
- » [Australia’s] low age of criminal responsibility at 10
- » The policy and impact of keeping children in immigration detention for any period
- » The rise in child homelessness
- » Recent changes to laws that diminish the rights of children and their families, for example Counter-terrorism laws extending control orders to children as young as 14.⁵⁵

IV. Lessons for the United States

Even though the United States has not ratified the Convention, policy advocates and researchers have proposed establishing a children’s commissioner within the federal government.⁵⁶ This proposal parallels the UN’s recommendation for a NHRI. Of course, ratifying the convention does not mean that a country will establish an independent children’s commissioner. Indeed, Canada is a good example of a country that has ratified the Convention but not adopted a NHRI for children. Conversely, the fact that the United States has not adopted the Convention should not be an impediment for creating an office similar to a NHRI for children.⁵⁷ Indeed, proponents of creating such an office will likely face the same opposing arguments as proponents of the Convention heard against its ratification.

The central mission for a Commissioner

A children’s commissioner could play several different roles in our federal system: a coordinating role to better align public policies, an oversight and monitoring body to provide input into legislation and regulations, or a liaison for educating the public on children’s issues while serving as an entry point for children and youth to access the federal government. The following discusses how these roles might look and examples in current law to draw from.

Coordinating body

As the Congressional Research Service has noted,

The federal government has not adopted a single overarching federal policy or legislative vehicle that addresses the challenges at risk youth experience in adolescence or while making the transition to adulthood. Rather, federal youth policy today has evolved from multiple programs established in the early 20th century and expanded

⁵⁵ Id.

⁵⁶ Howard Davidson, “A U.S. National Ombudsman for Children,” *Big Ideas: Game-Changers for Children* 74.

⁵⁷ Given that the United States is such an outlier, there are fewer examples to show the converse.

*through Great Society initiatives.... Despite the range of federal services and activities for vulnerable youth, many of the programs have not been developed into a coordinated system of support.*⁵⁸

Congress has on multiple occasions passed authorizations to create a body responsible for greater coordination of federal programs but has generally failed to fund such efforts. For instance, Congress passed the Young Americans Act of 1990 and the Tom Osborne Federal Youth Coordination Act in 2006: the Young Americans Act created a “Federal Council on Children, Youth, and Families” to streamline federal youth programs and provide advice on youth issues to the President, and the Federal Youth Coordination Act authorized an interagency “Federal Youth Development Council” to be led by the Health and Human Services Secretary. While neither council received appropriations, President George W. Bush did issue a 2008 executive order to establish the “Interagency Working Group on Youth Programs” that mirrored many of the same interagency coordinating activities for youth programs that the Osborne bill would have. While there has been no evaluation of the effectiveness of the Interagency Working Group at coordinating youth services, this group has brought together 21 different agencies and still exists under the current administration. Its website, youth.gov, includes 29 different youth topics, and a 2016 plan on ways to remove federal barriers that prevent better coordination and collaboration with non-federal partners to provide youth services.⁵⁹

Liaison for children and the advocacy and policy community

Another key role is serving as a liaison for children and youth—as well as the advocates who serve them—to be able to interact with the federal government. This role also can help generate policy ideas for administrative action or to present to Congress.

In addition to having the commissioner serve as a liaison, this mission also could be used as a means of including youth representatives on an advisory body. For instance, the Australian Children’s Commissioner plays such a role in her duties to monitor and report on the welfare of children. In Canada, Prime Minister Justin Trudeau created a Youth Policy Council within his office to help develop a national youth policy agenda and reports.⁶⁰

An example of such an advisory body in the American government was the UNESCO Youth Working Group set up by then-Secretary of State Hillary Clinton.⁶¹ This working group provided content for forums at UNESCO events hosted by the United States. Note that the website for the UNESCO Youth Working Group is currently under construction so it is not totally clear what its status is under the current administration, but there were interviews with staff members as late as fall 2018.⁶²

Another way that a commissioner could conduct outreach to children and youth is through convenings, something that occurs in federal aging policy and that has been successful in launching policy ideas. For instance, the Older Americans Act (OAA), which was the vehicle for the FYCA when it was

58 Adrienne Fernandes-Alcantara, “Vulnerable Youth: Background and Policies,” *Congressional Research Service* (Jan. 30, 2018) 1.

59 Interagency Working Group on Youth Programs, “Pathways to Federal Collaboration” (Dec. 2016), https://youth.gov/sites/default/files/IWGY-Pathways_for_Youth.pdf. While it is not readily clear from youth.gov how successful the government has been in making it easier to participate in federally-funded youth programs, the website does serve as a useful clearinghouse for different agencies’ programs, reports, and announcements on youth issues.

60 Prime Minister’s Youth Council, <https://www.canada.ca/en/campaign/prime-ministers-youth-council.html>.

61 Alex Wirth, “The State Department and USAID Get It,” *Huffington Post* (Nov. 28, 2011), https://www.huffpost.com/entry/the-state-department-and-_b_983694.

62 See, e.g., an interview with the vice chair Neha Dalal, <http://www.harvardaed.org/new-blog/2018/8/12/neha-dalal>.

reauthorized in 2006, is tied to the White House Conference on Aging, a once-a-decade convening of advocates to provide guidance and support for aging policy.⁶³ Today, the OAA is the authorization for several social service programs and ombudsman initiatives for seniors. Note that Congress has considered a youth parallel to the OAA in the past, and the White House has hosted similar Conferences on Children and Youth⁶⁴ from 1909 until the final one in 1971.⁶⁵

Oversight and investigatory body

Lastly, a commissioner could play a critical oversight role in monitoring federal policy and making recommendations on ways to make federal programs more accessible and efficient for youth. The Australian Children's Commissioner does so through an annual report to Parliament as well as a periodic report to the United Nations as required by the Convention.

The United States does have oversight bodies such as the Governmental Accountability Office (GAO), which is a congressional support agency, and Inspector Generals (IGs), which are housed within federal agencies. Both the GAO's comptroller general and IG serve for set terms. GAO has existed since 1921 to assist Congress with financial management, and its mission was expanded in 1974 to have a broader role in program evaluation and budget management. The Congressional Research Service notes that GAO is a type of IG.⁶⁶

IGs have a dual reporting structure, letting both agency leadership and Congress know about waste, fraud, and abuse within an agency. Since being initially established in 1978, the number of IGs has grown from twelve to over seventy to accompany "virtually every important federal entity."⁶⁷ Some IGs are subject to Senate confirmation whereas others are appointed by the agency head. IGs have great investigatory powers, including the ability to subpoena records and documents, to access information and documents in the agency the IG is responsible for monitoring, to take statements under oath, to respond to agency staff's complaints, and to exercise law enforcement powers in some circumstances. Under federal law, an IG cannot force an agency to take corrective action following its investigation and recommendations, but the agency must respond to the IG's recommendations.

But because youth services fall across many different federal agencies, it might be difficult to provide oversight across such a wide range of offices. One approach would be to require GAO to have a specific team for youth services. Another could be to establish a central Inspector General for Youth with staff imbedded within agency IG offices that have significant amounts of youth-related programs. Congress has designated some IGs to review multiple agencies as well as designating multiple IGs for the Departments of Defense and Treasury.⁶⁸

Ensuring an Independent Commissioner

Whichever model is adopted, there are a number of issues in common to all of them that would

63 OAA came from a White House Conference on Aging, <https://academic.oup.com/ppar/article/29/2/45/5486598?rss=1>

64 A 1967 backgrounder, <https://files.eric.ed.gov/fulltext/ED078896.pdf>, discusses the White House Conference on Children and Youth through 1960.

65 Note that CRS indicates the final one was in 1971, Fernandes-Alcantara, *supra* note 59, at 14; see also Jennifer Michael and Madeline Goldstein, "Reviving the White House Conference on Children," <https://www.cwla.org/reviving-the-white-house-conference-on-children/>. But some sources refer to the Clinton administration's 1997 conference on early childhood development and learning, <https://clintonwhitehouse3.archives.gov/WH/New/ECDC/About.html>, as a White House Conference on Children.

66 Kathryn Francis, "Statutory Inspectors General in the Federal Government: A Primer," Congressional Research Service (Jan. 3, 2019) 4.

67 The Constitution Project, "The Offices of Inspectors General," 103.

68 Francis, *supra* note 67, at 5-6.

need to be resolved. Although the Australian Parliament did not adopt all of the Australian advocates' recommendations, these recommendations could be useful in building out the basic outline for an American children's commissioner.

- » Length of the appointment: If the commissioner is to be an apolitical office, should the commissioner serve for longer than a presidential term? Should there be a limit on the number of terms a commissioner could serve? Having terms that do not coincide with a presidential term is often used to insulate an official from political influence. Even if an appointment extends beyond a presidential term, there usually is some mechanism for the President to remove an appointee for cause.
- » Confirmation: Should the commissioner be a Senate-confirmed position? While such an action would normally help reinforce the nonpartisan nature of the role, Senators have used the confirmation process as a way of bargaining for unrelated needs or to score political points with an interest group.
- » Appropriations: How will the commissioner be funded, and will there be sufficient funding appropriated for the office to fulfill its mission? Staffing an office in a meaningful way could incur significant costs for staff needed to do the review of policies, budgets, and regulations.

The appropriations process could also be problematic. Congress often fails to pass appropriations bills annually, and they often can be a means of injecting politics into nonpartisan initiatives. There is also the reality that Congress does not fund every authorization and often does not like funding commissions over direct services. For example, the Federal Youth Coordination Act did not receive funding, and Congress did not appropriate even meager funding for the 2015 White House Conference on Aging, requiring the administration to piece together funding and foundation support.

- » Scope of review: What powers and authorities should the commissioner have? It depends on whether the commissioner's mission is to serve youth through coordinating services or to provide oversight of existing programs (or some combination of both).
- » It may be appropriate to consider what should be the targeted age range for the commissioner to serve. Congress has on several instances changed federal law to recognize that the needs of adolescents—particularly vulnerable youth such as those in foster care—may extend beyond age eighteen when many programs consider individuals to be fully transitioned into adulthood. For instance, the Affordable Care Act recognized that children may need to remain on their parents' insurance to age 26, and the Fostering Connections Act gives states the option to extend foster care programs for youth up to age 21 under Title IV under certain circumstances. The Achieving a Better Life Experience (ABLE) Act allows parents to establish an ABLE tax-preferred account for individuals with significant disabilities younger than age 26 (although legislation has been introduced to raise the age criteria).