



Australian
Human Rights
Commission

everyone, everywhere, everyday

Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010

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Australian Human Rights Commission Submission
to the Senate Legal and Constitutional Affairs
Committee

15 December 2010

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Senate Legal and Constitutional Affairs Committee in its inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010. This submission considers the broad issues raised by the Bill. It does not make a detailed analysis of each proposed provision.
2. The Commission has for a number of years supported the establishment of the Office of a national Children's Commissioner as an important way of better respecting and promoting the rights of all children in Australia.
3. Australia ratified the United Nations Convention on the Rights of the Child (CRC) in 1990. This means that under international law the Australian Government has specific human rights obligations to children.
4. The United Nations Committee on the Rights of the Child has expressed concern that there is no national commissioner with a specific mandate for monitoring children's rights in Australia. The Committee has also noted that despite the valuable work of the Australian Human Rights Commission in the area of children's rights there is no unit devoted specifically to children's rights at the Commission.ⁱ Establishing a Commonwealth Commissioner for Children and Young People would be an important step towards meeting Australia's international obligations to protect and promote the rights of children in Australia.

2 Summary

5. The Commission would welcome the establishment of the office of a Commonwealth Commissioner for Children and Young People.ⁱⁱ The Australian Human Rights Commission believes that a Commonwealth Commissioner for Children and Young People could play an important role in protecting the rights of children and young people, in particular by:
 - operating as a national advocate for children's rights, ensuring that government decision making processes and outcomes are consistent with the best interests of children
 - developing mechanisms to secure the participation of children in decisions that affect them
 - providing a coordinated national approach to children's rights.
6. The Australian Human Rights Commission believes that the key features of a national Children's Commissioner are:
 - independence from government
 - statutory authority and power, including security of tenure
 - adequate resourcing
 - accessibility to children, including establishment of a child-appropriate complaints process

- exclusive focus on children under 18 years of age
- ability to act proactively and reactively and to direct its own agenda.

3 Recommendations

7. The Commission recommends that:

- Recommendation 1: A statutory office of Commonwealth Commissioner for Children and Young People should be established.
- Recommendation 2: The functions and powers of a Commonwealth Commissioner for Children and Young People should extend to 'all children in Australia' regardless of their citizenship or residency status.
- Recommendation 3: The Australian Government should retain responsibility for preparing reports to the United Nations Committee on the Rights of the Child. The Commonwealth Commissioner for Children and Young People should be able to prepare an independent report to the Committee should he or she wish to do so.

4 Why does Australia need a national Children's Commissioner?

8. Many children in Australia are able to enjoy their rights. However, the rights of some children are vulnerable. These include children experiencing homelessness, children experiencing violence, bullying or harassment and children who live with a disability, including those living with mental illness.
9. There are also certain groups of at-risk children who are less likely to be able to enjoy their full range of rights. These groups include Aboriginal and Torres Strait Islander children; children in out of home care; children in detention, including those in immigration detention; and children living in rural and remote areas of Australia.
10. A Commonwealth Commissioner for Children and Young People would play an important role in promoting and protecting the rights of all children in Australia, particularly of those who are most at risk. This could improve their opportunities to develop to their full potential and to make a positive contribution to society. In particular, a Commonwealth Commissioner for Children and Young People could:
- operate as a national advocate for children's rights, ensuring that government decision-making processes and outcomes are consistent with the best interests of children
 - develop mechanisms to secure the participation of children in decisions that affect them
 - provide a coordinated national approach to children's rights.
11. **Recommendation 1:** A statutory office of Commonwealth Commissioner for Children and Young People should be established.

12. The Commission is concerned that the Bill refers to 'Australian children and young people' in proposed section 9(1)(a). Under the CRC, the Australian Government has obligations to all children in Australia, whether or not they are Australian citizens. This should be made clear in the Bill.
13. **Recommendation 2:** The functions and powers of a Commonwealth Commissioner for Children and Young People should extend to 'all children in Australia' regardless of their citizenship or residency status.

5 A national Children's Commissioner should take a rights-based approach

14. The Australian Human Rights Commission welcomes section 4 of the Bill which states that the principles of the CRC are to be applied in the exercise and performance of duties of a Commonwealth Commissioner for Children and Young People.
15. The Australian Human Rights Commission believes that the rights, needs and interests of children would be best protected by a Commonwealth Commissioner for Children and Young People who works through a human rights framework, rather than under a welfare model concerned predominantly with child protection.
16. Working from a rights based perspective has a number of benefits. These include that a rights based approach:
 - Focuses on the rights of *all* children, including but not limited to, the most disadvantaged.
 - Considers children to be rights-holders rather than service recipients. For each right there is a corresponding obligation on the part of government, service providers and individuals to respect, promote, protect and fulfil that right.
 - Relies heavily on active and meaningful participation; children are not viewed as passive recipients of welfare policies but are empowered as citizens with a legitimate role to play in shaping the policies that affect their lives.
 - Improves accountability of government, institutions and individuals. For example, a Commonwealth Commissioner for Children and Young People would do this through advocacy, by scrutinising laws and policies and by assisting institutions to change procedures and practices to be more sensitive to the rights of children. Using a child-rights framework helps to ensure rights are adequately considered in the decision making process and outcomes are more responsive to the rights of children.
 - Can draw on international standards and guidelines to assist in monitoring and evaluating laws, policies and programs.
 - Is able to address underlying power imbalances and systemic inequalities that perpetuate breaches of children's rights.

17. The Australian Human Rights Commission believes that human rights provide a clear framework for promoting, and for ensuring accountability in respect of, child wellbeing. Human rights outline the minimum standards necessary to ensure the wellbeing of children – including the right to an adequate standard of living, the right to health care, the right to education, the right to family life, the right to protection from violence, and the right to participate in one's culture.
18. The Commission believes that, through a human rights framework, a Commonwealth Commissioner for Children and Young People could have a positive impact on the wellbeing, healthy development and quality of life of all children in Australia.

6 What would a national Children's Commissioner do?

19. In order to monitor the implementation of a State's obligations under the CRC, the Committee on the Rights of the Child (the Committee) has encouraged all States Parties to establish the office of a Children's Commissioner. Australia has submitted two reports to the Committee. In its concluding observations to both those reports, the Committee expressed concern that there is no commissioner with a specific mandate for monitoring children's rights and no unit devoted to issues of children's rights:

While acknowledging the valuable work of HREOC in the area of children's rights, the Committee is concerned that there is no commissioner within HREOC devoted specifically to child rights.ⁱⁱⁱ

20. The Committee has recommended the following as roles and functions appropriate to an independent Children's Commissioner:^{iv}
 - monitoring, investigating and reporting on children's rights under the CRC, its Optional Protocols and other human rights instruments
 - promoting respect for the views of children and ensuring children's opinions are expressed and heard
 - supporting children who take cases to court and intervening in relevant matters before the court
 - promoting public understanding of children's rights among government, public agencies and the general public as well as in schools and universities
 - investigating, and providing effective remedies for, violations of children's rights by all public and private entities, either through individual complaints received or of its own motion.
21. The Commission is broadly supportive of the functions and powers set out in the Bill.
22. This section of the submission discusses each of these functions with reference to the provisions of the Bill.

6.1 Monitoring

23. A primary function of the Commonwealth Commissioner for Children and Young People should be to monitor, investigate and report on the implementation of children's rights under the CRC. The monitoring role is referred to in proposed section 9 (1)(a) of the Bill. This section could be improved by reference to monitoring Australia's compliance with the CRC, rather than monitoring the 'wellbeing' of Australian children.

24. A monitoring role might include:

- reviewing proposed and existing laws, policies and resource allocations, and practices relating to children and young people
- making recommendations to relevant Ministers about laws which should be made or amended to ensure that the rights of children and young people are considered and protected
- conducting inquiries and reporting to Parliament about children's rights issues, including through an own motion power
- establishing ongoing dialogue with providers of public services to families, children and youth to ensure that services are delivered in a way that protects the rights of children
- advocating for effective data collection on children's health, wellbeing, development and participation in order to measure the impact of laws, policies and programs upon children and accurately monitor progress towards implementation of children's rights.

25. The monitoring role should include responsibility for monitoring the implementation of Australia's obligations under the two existing Optional Protocols to the CRC.

26. The current Bill proposes that the Commonwealth Commissioner for Children and Young People prepare the Australian report to the United Nations Committee on the Rights of the Child. The Australian Human Rights Commission is concerned that this may undermine the independence of the Office of the Commonwealth Commissioner for Children and Young People.

27. **Recommendation 3:** The Australian Government should retain responsibility for preparing reports to the United Nations Committee on the Rights of the Child. The Commonwealth Commissioner for Children and Young People should be able to prepare an independent report to the Committee should he or she wish to do so.

6.2 Participation

28. International and Australian communities recognise that children have a right to participate in decisions that affect them.^v The creation of a statutory office of Commonwealth Commissioner for Children and Young People should enhance the capacity of children to exercise their right to participate.

29. The Commissioner's Office should have responsibility for promoting meaningful dialogue between children and government by developing mechanisms for direct consultation. The Commission could also have a responsibility to speak on behalf of children if there were insufficient mechanisms for children to represent their own interests at the national level.
30. The Commission welcomes that participation is an object (s 3(2)(d)) and an underlying principle (s 4(d)) of the Commonwealth Commissioner for Children and Young People Bill 2010. The Commission notes that proposed section 9(1)(g) confers on the Commonwealth Commissioner for Children and Young People the function of involving children in decisions that affect them. The Commission further welcomes the duty of the Commonwealth Commissioner for Children and Young People to consult with children and young people in performing his or her functions (s 10).

6.3 Legal Proceedings

31. The Commonwealth Commissioner for Children should have responsibility for:
- assisting courts as amicus curiae by providing expert advice on human rights issues in important cases impacting on the rights of children and young people
 - intervening in legal cases brought by individuals alleging a breach of rights set out in the CRC as well as in legal cases with implications for the enjoyment of the rights of children and young people at the systemic level.
32. The Commission welcomes the inclusion of proposed section 9(h) which confers on the Commonwealth Commissioner for Children and Young People the power to intervene in legal cases involving the rights of children and young people.

6.4 Education

33. Building community understanding about children's rights should be an important function of a Commonwealth Commissioner for Children and Young People.^{vi}
34. The Commissioner's role should include responsibility for:
- conducting research around children's rights issues and developing appropriate public education programs
 - promoting understanding of children's rights among children, young people and the broader community, and in government and public agencies
 - collaborating and coordinating with the community and business sectors and existing state and territory children's commissioners and children's guardians to develop and strengthen community understanding of children's rights.

35. The Commission welcomes proposed sections 9(1)(a), 9(1)(b) and 9(1)(f) which confer on the Commonwealth Commissioner for Children and Young People broad functions relating to the promotion and advancement of respect for children's rights in Australia.

6.5 Complaints

36. According to the United Nations Committee on the Rights of the Child, it is important for an independent Children's Commissioner to have the power to receive and investigate complaints from children who feel that their rights have been breached.^{vii}
37. The Commission notes that the Commonwealth Commissioner for Children and Young People Bill 2010 is silent with regard to a complaints mechanism.
38. In Australia, children and young people can already make a complaint about some human rights breaches. For example, children can make a complaint to the Australian Human Rights Commission if they feel they have been discriminated against on the grounds of age, race, sex or disability. The Australian Human Rights Commission has a more limited mandate to investigate complaints where an action by the Commonwealth is alleged to have breached or infringed a right contained in the CRC.^{viii} The Commission recommends that complaints regarding children's rights continue to be handled by the Australian Human Rights Commission under the statutory provisions contained in the *Australian Human Rights Commission Act 1986* (Cth).

7 Guardian of unaccompanied minors who arrive in Australia without a visa

39. The Bill proposes that the Commonwealth Commissioner for Children and Young People would have the function of 'in appropriate cases, acting as the legal guardian of unaccompanied children and young people who arrive in Australia without the requisite visa or other authority for entry into Australia' (proposed s 9(1)(i)).
40. In Australia, the Minister for Immigration is the legal guardian of unaccompanied children seeking asylum.^{ix} The Minister can delegate those powers to any officer or authority of the Commonwealth or of any State or Territory.^x The guardianship of unaccompanied children in immigration detention is routinely delegated to Department of Immigration and Citizenship (DIAC) officers. The Commission has for many years raised concerns about these arrangements.^{xi} In the Commission's view, they create a fundamental conflict of interest. It is not possible for the Minister or a DIAC officer to ensure that the best interests of an unaccompanied minor are their primary consideration when they are simultaneously the child's legal guardian, the detaining authority and the visa decision-maker.
41. The Commission has repeatedly recommended that an independent legal guardian be appointed for unaccompanied minors in immigration detention.^{xii}

42. If the Commonwealth Commissioner for Children and Young People is to become the legal guardian of unaccompanied children in immigration detention, it is important that the office is provided with sufficient resources and is able to engage people with appropriate expertise to ensure that the role is adequately performed. In addition, guardianship responsibilities should be delegated to appropriately qualified individuals who reside in close proximity to places of detention.

ⁱ The Committee on the Rights of the Child, 40th Session, *Concluding Observations: Australia*, 20 October 2005; The Committee on the Rights of the Child, 16th Session, *Concluding Observations: Australia*, 21 October 1997.

ⁱⁱ The Australian Human Rights Commission has called for the establishment of a 'national Children's Commissioner'. As the Bill uses the term Commonwealth Commissioner for Children and Young People, this term will be used throughout this submission.

ⁱⁱⁱ The Committee on the Rights of the Child, 40th Session, *Concluding Observations: Australia*, 20 October 2005; The Committee on the Rights of the Child, 16th Session, *Concluding Observations: Australia*, 21 October 1997.

^{iv} The Committee on the Rights of the Child, General Comment No. 2.

^v See for example the Australian Law Reform Commission Report 84, *Seen and Heard: priority for children in the legal process*, 1997, chapter 3, para 5.25.

^{vi} The Committee on the Rights of the Child, *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para.6): General Comment No 5, CRC/GC/2003/5*, 27 November 2003.

^{vii} The 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: General Comment No. 2, CRC/GC/2002/2*, 15 November 2002.

^{viii} Under the *Australian Human Rights Commission Act 1986*.

^{ix} See *Immigration (Guardianship of Children) Act 1946 (Cth)*, s 6.

^x See *Immigration (Guardianship of Children) Act 1946 (Cth)*, s 5.

^{xi} See Australian Human Rights Commission, *A last resort?*, National Inquiry into Children in Immigration Detention (2004) (A last resort), chapter 14.

^{xii} See A last resort, chapters 14, 17.