



**Early Childhood  
Australia**  
A voice for young children

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**Patron** Her Excellency Ms Quentin Bryce AC  
Governor-General of the Commonwealth of Australia

ABN 44 950 767 752

# **Commonwealth Commissioner for Children and Young People Bill 2010**

## **Response to the draft legislation**

**14 December 2010**

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Early Childhood Australia (ECA) supports the establishment of an Office of the Commonwealth Commissioner for Children and Young People and is generally supportive of the draft legislation but would like to comment on particular aspects of it.

### **Principles underlying this Act**

#### *Consulting with children*

ECA strongly supports the principles embodied in the draft legislation in particular Principle 4 (d) which focuses on children's entitlement to form and express their views and have these taken into account. ECA agrees that children are not simply subjects of interest and concern. They have concerns and views and are competent witnesses to their own experience. Article 12 of the UN Convention on the Rights of the Child, which is at the heart of the proposed legislation's commitment to hear what children have to say and to take this into account, demands that children's views be respected as evidence of their unique experience of the world in which they live.

#### *Aboriginal and Torres Strait Islander Children*

ECA also believes that the Act should establish, as a principle, the requirement that the Office of the Commissioner for Children give particular focus in all of its work to the implications of this work for Aboriginal and Torres Strait Islander Children. This is not to deny the responsibility of the Office of the Commissioner for Children for all children or to undermine a commitment to their rights but rather it seeks to make clear the special obligation we have as a nation to Aboriginal and Torres Strait Islander children. That obligation arises from the impacts of colonisation and of the stolen generations. These impacts will be obviated only when the life chances and experience of these children are no longer so sharply different from the majority of young children. ECA understands the argument which says we need to attend to rights of other children who have particular needs but believes that this nation has an obligation to the children of Australia's first peoples which is different and in addition to its obligations to other children and young people. The nation has committed through its Parliament to a reconciled Australia. A key strategy in achieving this must be that every policy decision and every piece of legislation, such as this draft legislation, appropriately and practically embeds within it the commitment to reconciliation. For this reason ECA would like to see the obligation to Aboriginal and Torres Strait Islander children acknowledged as a principle in the proposed legislation.

### **Definitions - Best interests of the child**

The legislation acknowledges the role of the Commissioner in meeting its obligations under international law and refers, among other things to the obligation to act in the best interests of the child. ECA believes that it would be helpful to include a definition of "the best interests of the child" in the Definitions section of the proposed legislation.

ECA understands that this may be difficult to achieve but believes that some direction on how this might be done should be included in the legislation as the concept is open to much interpretation. This has been done in other places such

as in the Family Law Courts. These courts are required to have regard to the best interests of the child as the most important consideration when deciding parenting disputes. The Family Law Courts have outlined a process for how the “best interests of a child” might be determined in parenting cases. This work provides a useful starting point for how a child’s best interests could be defined in the draft legislation. The process referred to is outlined at <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Family+Law+Principles/Parenting+cases+%E2%80%93+the+best+interests+of+the+child/> (down-loaded 11 December 2010)

### **Functions and powers of Commissioner**

ECA generally supports the functions and powers of Commissioner as outlined in the legislation but wishes to comment on 9 (1)d which refers to promoting and protecting the rights of children and young people in immigration detention, or children whose parents or guardians are in immigration detention;

The Government has recently indicated that children and young people will no longer be held in immigration detention centres. ECA recognises keeping children and young people in these centres as a breach of children’s rights. As a consequence we believe that the legislation should go beyond promoting and protecting the rights of children and young people in detention to upholding their rights not be incarcerated in these institutions.

In addition ECA also believes that to 9(1) (d) must include a reference to the right of children and young people not to be separated from their families.

Although ECA strongly supports the sentiment in 9 (1) (f) which gives the Commissioner the power to *ensure* strong investment in early childhood development the Commissioner, who is not a member of the Government, cannot therefore have the power to guarantee this. The Commissioner can advance the need for such investment but he/she cannot ensure that this will happen as this is the responsibility of the Government.

### **The Commissioner must act independently**

ECA supports the framework to secure the independence of the Commissioner that is set out in 11 of the draft legislation but believes that this is undermined by the requirement in Part 4 (25) of the legislation which deals with the Report to the United Nations on the UN Convention on the Rights of the Child. This section gives the Commissioner responsibility for the preparation of the report, on behalf of Australia, to the United Nations Committee on Rights of the Child under the terms of the UN Convention on the Rights of the Child.

The draft legislation further specifies that this report is not delivered directly to United Nations Committee on Rights of the Child by the Commissioner. Rather it is to be transmitted to that Committee by the appropriate Minister within the Australian Government. It is therefore fundamentally a Report of the Government and not an independent report from the Commissioner for Children and Young People.

ECA believes that a core function of the Commissioner should be the preparation of an independent report to the United Nations Committee on the United Nations Convention on Rights of the Child. Making this provision in the proposed legislation entrenches the independence of the Commissioner. Further ECA believes that the Australian Government should provide its own report to the UN Committee.

In regard to Annual Reports as set out in 26 of the Bill ECA believes that this report should be made to the Parliament rather than to the responsible Minister. A provision of this kind would further entrench the independence of the Commissioner and the confidence of the community in its work.

Similarly ECA believes it is crucial that the legislation establishing the Officer of the Commissioner for Children and Young people makes it clear that whilst the Government may refer particular Inquiries to the Commissioner it is vital to the public standing of this Office that the Commissioner is able to initiate inquiries independently of any reference by the Government.

### **Consulting with Non-government Organisations**

ECA is concerned that number 10 in the Bill titled *How the Commissioner is to perform functions* makes no mention of the need to consult with non government organisations. This is a major omission given the daily role carried out by such organisation in advocating for children and protecting their interests. Educators make an important contribution to this work but they are not the only group that does so. Organisations such as ECA, Infant Mental Health Association, the Secretariat for Aboriginal and Torres Strait Islander Child Care, Families Australia and many others have played a leadership role for children in Australia for many years. They have knowledge and expertise which will be important to the Commissioner of Children as do educators and other groups referenced in the Bill.

### **Conclusion**

ECA reiterates its support for the establishment of an Office for the Commissioner of Children and Young people. It will provide a focus on the best interests of Children and Young people and a platform comment and action which in their best interests.