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SUBMISSION TO THE SENATE LEGAL AND  
CONSTITUTIONAL AFFAIRS COMMITTEE

# INQUIRY INTO THE AUSTRALIAN HUMAN RIGHTS COMMISSION AMENDMENT (NATIONAL CHILDREN'S COMMISSIONER) BILL 2012



## 1 | Introduction

UnitingJustice Australia is the justice unit of the Assembly of the Uniting Church in Australia (the national Council of the Uniting Church), pursuing matters of social and economic justice, human rights, peace and the environment. It works in collaboration with other Assembly agencies, Uniting Church synod justice staff around the country, and with other community and faith-based organisations and groups. It engages in advocacy and education and works collaboratively to communicate the Church's vision for a reconciled world.

The Uniting Church in Australia is committed to involvement in the making of just public policy that prioritises the needs of the most vulnerable and disadvantaged in our society. In 1977, the Inaugural Assembly of the Uniting Church issued a *Statement to the Nation*.<sup>1</sup> In this statement, the Church declared that "our response to the Christian gospel will continue to involve us in social and national affairs". In part, this statement reads:

We pledge ourselves to seek the correction of injustices wherever they occur. We will work for the eradication of poverty and racism within our society and beyond. We affirm the rights of all people to equal educational opportunities, adequate health care, freedom of speech, employment or dignity in unemployment if work is not available. We will oppose all forms of discrimination which infringe basic rights and freedoms.

The Uniting Church's support for human rights is based on our belief that human beings are created in the image of God. As bearers of God's image, human beings are inherently deserving of dignity and respect. The image of God that is reflected in human life, the form of life that corresponds to God, is the human community. Humans, made in God's image, are inherently relational, finding life and sustenance in relationship and community. Being called into community with the whole of humankind as we are, when one person is diminished, we are all diminished.

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<sup>1</sup> This statement is available at: <http://www.unitingjustice.org.au/uniting-church-statements/key-assembly-statements/item/511-statement-to-the-nation>

The Uniting Church's support for human rights and the upholding of the dignity of all people was fully articulated in its statement on human rights, *Dignity in Humanity: Recognising Christ in Every Person*, adopted by the National Assembly of the Church in 2006.<sup>2</sup> As well as laying out the theological basis of our commitment to human rights, this statement expresses the Church's support for "the human rights standards recognised by the United Nations," which express the birthright of all people to "all that is necessary for a decent life and to the hope for a peaceful future".

In *Dignity in Humanity*, the Uniting Church also urged the Australian Government to fulfil its responsibilities under the human rights treaties that Australia has ratified or signed and pledged to assess current and future national public policy and practice against international human rights instruments, keeping in mind Christ's call and example to work for justice for the oppressed and vulnerable. It is these promises that continue to drive the Church's involvement in the development of just and responsible government policy and practice in Australia. It is in accordance with these beliefs that UnitingJustice Australia makes the following submission to the Inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012.

While we welcome this opportunity to comment on the Inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012, we question the very limited period of time that has been allowed for the preparation of a submission concerning this important piece of legislation. The absence of a Children's Commissioner has been a notable omission from the array of protections offered in Australia, and there have been strong calls for this to be remedied for over a decade. While the announcement in late April for the establishment of the role of a National Children's Commissioner was cautiously welcomed by UnitingJustice,<sup>3</sup> we do

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<sup>2</sup> <http://www.unitingjustice.org.au/human-rights/uca-statements/item/484-dignity-in-humanity-a-uniting-church-statement-on-human-rights>

<sup>3</sup> See: <http://www.unitingjustice.org.au/human-rights/news/item/843-national-childrens-watchdog-needs-more-bite>

not believe it is reasonable to allow organisations, community groups and other interested parties less than a week to comment on the proposed legislative amendments.

## 2 | Summary of Recommendations

**Recommendation One:** *Section 46MB(6)(b) of the Bill be amended to explicitly reference all pertinent Conventions and Optional Protocols that have been ratified by Australia.*

**Recommendation Two:** *Insertion of subsection 46MB(4)(a) to provide that the Commissioner must give priority to, and have special regards to, the interests and needs of Aboriginal children and young people, and Torres Strait Islander children and young people.*

**Recommendation Three:** *Insertion of subsection 46MB(4)(b)(i) to provide that the Commissioner protect the rights of children and young people in immigration detention or children whose parents or guardians are in immigration detention. Insertion of subsection 46MB(4)(b)(ii) to provide that, where appropriate, the Commissioner be assigned the role of legal guardian for unaccompanied minors. Insertion of subsection 46MB(4)(b)(iii) to provide that the powers of the Commissioner should apply to all children and young people who are Australian citizens, Australian residents and those in Australia irrespective of their citizenship or residency status.*

**Recommendation Four:** *Insertion of Section 46MO to provide that the Minister must ensure that the Commissioner is provided with the staff and additional resources reasonably needed for carrying out its functions under this Act.*

**Recommendation Five:** *Insertion of Subsection 46MB(1)(e) to provide that the Office of the Commissioner should directly receive complaints of breaches of children's rights under the Convention on the Rights of the Child, and should be a direct avenue for children and young people to access should they have a complaint regarding a breach of their rights.*

**Recommendation Six:** *A commitment by the Federal Government to implement the Convention on the Rights of the Child into our domestic legislation, preferably through the creation of a Human Rights Act to provide a comprehensive framework for protecting human rights in Australia.*

## 3 | Background

Ratification of the UN Convention on the Rights of the Child (CROC) by Australia in 1991 signalled a commitment to implement and uphold the rights of children in a wide range of areas within public life. While the establishment of guardian and commissioner roles within various State and Territory bodies was a welcome reinforcement of the government's commitment,<sup>4</sup> there were consistent and clear calls for the establishment of a national role to ensure consistency in the application of protections and to fulfil our obligations under international law. Without a national position, important Commonwealth policy areas impacting some of the most vulnerable groups of children are not adequately safeguarded, such as Indigenous affairs, immigration, family law, taxation, social security and national health. Additionally, the roles of the State and Territory guardians and commissioners vary; some take a broad approach to the overall well-being of children in our community, while others are focussed on child protection and safety. Under the current arrangements, there are very limited opportunities for children and young people to access complaint mechanisms and the courts.

The United Nations Committee on the Rights of the Child has, on several occasions, expressed their deep concern "that there is no commissioner...devoted specifically to child rights".<sup>5</sup> The Australian Human Rights Commission (AHRC) echoed this concern in a recent Discussion Paper devoted to the issue of the role of a National Children's Commissioner. The AHRC argued that "a National Children's Commissioner could 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 grow and develop and to make a positive contribution to society".<sup>6</sup> UnitingJustice has similarly advocated for the introduction of a National Children's Commissioner, particularly to ensure that the rights of vulnerable asylum seeker children are protected.<sup>7</sup>

4 See: <http://www.aifs.gov.au/nch/pubs/sheets/rs15/rs15.pdf>

5 See, for instance: UN Committee on the Rights of the Child (2005), *Concluding Observations on Australia*, UN Doc CRC/C/15/Add.268, para 15 – 16.

6 Australian Human Rights Commission (AHRC) (2010), *An Australian Children's Commissioner: Discussion Paper*, p. 4.

7 See: <http://unitingjustice.org.au/human-rights/submissions/item/696-comments-to-the-universal-periodic-review-2011> and <http://www.unitingjustice.org.au/human-rights/submissions/item/835-comments-on-the-national-human-rights-action-plan-exposure-draft>

There are several key human rights concerns that impact children in particular, including but not limited to:

- Indigenous well-being – Indigenous children are six times more likely to be in child protection than their non-Indigenous counterparts. Infant mortality rates are three times higher for Indigenous children, while youth suicide rates are significantly higher in Indigenous communities. Young Indigenous people have comparatively limited access to education (particularly high school and tertiary institutions), and are grossly over-represented in their experience of limited access to medical and dental services. Indigenous youth are also 26 times as likely to be in juvenile justice supervision;<sup>8</sup>
- Immigration detention – despite recent reforms and oft-repeated commitments from the Federal Government that children will not be detained in immigration detention centres,<sup>9</sup> the most recent Immigration Detention Statistics Summary shows that over 1,000 children are currently in immigration detention (463 of whom are in secure locked facilities, and 158 of whom are detained on Christmas Island);<sup>10</sup>
- Youth homelessness – 46 per cent of those who are homeless are under the age of 18;<sup>11</sup>
- Child abuse and neglect – as of 2011, there are 37,730 children on care and protection orders, which is an increase of 25 per cent since 2005;
- Bullying – a recent survey revealed approximately 68 per cent of students are bullied at school, with a large proportion of these students experiencing cyberbullying;<sup>12</sup>
- Juvenile detention – as of 2011 there were 1,055 young people in detention. Almost half of those were unsentenced. Indigenous youth aged 10 – 17 are 20 times as likely to be in unsentenced detention and 26 times as likely to be in sentenced detention as a non-Indigenous young person.<sup>13</sup> The majority of Indigenous youth are imprisoned for petty, non-serious crimes.<sup>14</sup> Under articles 37 and 40 of the UN Convention on the Rights of the Child, Australia has made itself bound to only arrest, detain or imprison a child as a “measure of last resort” and to promote the availability of alternatives to institutional care. This is especially important for Indigenous youth;
- Mental health – less than 9 per cent of overall mental health funding is spent on childhood mental illness, despite the fact that 50 per cent of mental illnesses start before the age of 14.<sup>15</sup> The complex needs of children diagnosed with a mental illness are not currently being met, with long waiting lists and a severe lack of early intervention programs. In 2011, the Productivity Commission reported that “the current disability support system is underfunded, unfair, fragmented, and inefficient, and gives people with a disability little choice and no certainty of access to appropriate supports”;<sup>16</sup> and
- Disability – one in every 24 children suffer from either a profound or serious disability, with the burden of care exacting a high physical, emotional and financial toll on families and carers. 89 per cent of students with disabilities aged 5 – 14 attend mainstream schools, however there is a significant gap in attainment and participation between those with a disability and those without.<sup>17</sup>

8 See: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4725.0Chapter100Apr%202011>, <http://www.abc.net.au/am/content/2012/s3426306.htm> and <http://www.aihw.gov.au/publication-detail/?id=10737419261>

9 See, for instance: <http://www.immi.gov.au/media/fact-sheets/82detention.htm#c>.

10 [http://www.immi.gov.au/managing-australias-borders/detention/\\_pdf/immigration-detention-statistics-20120430.pdf](http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20120430.pdf)

11 See: <http://greens.org.au/files/CommissionerChildren.pdf>

12 See: Cross, D., Shaw, T., Hearn, I., Epstein, M., Monks, H., Lester, L. & Thomas, L. (2009), *Australian Covert Bullying Prevalence Study*, Child Health Promotion Research Centre, Edith Cowan University, and Guides Australia (2010), *Girl Guides Survey Reveals Alarming Concern*, available at <http://www.girlguides.org.au/news-events/news-coverage/smh-article-guides-speak-out-on-bullying.html>

13 <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737421149>

14 <http://rightnow.org.au/topics/children-and-youth/indigenous-juvenile-detention-australia%E2%80%99s-neglected-crisis/>

15 Centre for Community Child Health (2011), *Place-based Approaches to Child and Family Services: A literature review*, prepared by Centre for Community Child Health, Murdoch Childrens Research Institute, The Royal Children’s Hospital, Melbourne. See also: Keen, Liz (2011). Kids’ mental health services, ABC Local Online, 27 September 2011, available: [www.abc.net.au/local/stories/2011/09/27/3326470.htm?site=northcoast&zbrandid=2039&zidType=CH&zid=2155390&zsubscriberId=503220059&zbdom=http://aracy.informz.net](http://www.abc.net.au/local/stories/2011/09/27/3326470.htm?site=northcoast&zbrandid=2039&zidType=CH&zid=2155390&zsubscriberId=503220059&zbdom=http://aracy.informz.net).

16 Australian Productivity Commission (2011), *Draft Report into Disability Care and Support*, available at: <http://www.pc.gov.au/projects/inquiry/disability-support/report>

17 Australian Institute of Health and Welfare (2006), *Disability updates: children with disabilities*, p1.

The creation of a National Children’s Commissioner would aid in protecting the rights of all children, especially those vulnerable to human rights abuses.

#### 4 | Recommendations & General Comments

**Recommendation One:** *Section 46MB(6)(b) of the Bill be amended to explicitly reference all pertinent Conventions and Optional Protocols that have been ratified by Australia.*

There are several key Conventions and Optional Protocols that have been excluded from the proposed legislation. These include:

- The *Convention Relating to the Status of Refugees*;
- The *Protocol Relating to the Status of Refugees*;
- The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;
- The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*;
- The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*; and
- The *Declaration on the Rights of Indigenous Peoples*.

These additional Conventions and Protocols outline important obligations that Australia has under international law. While the proposed legislative amendments make reference to “such other instruments relating to human rights as the Commissioner considers relevant”,<sup>18</sup> we do not believe that this clause pays sufficient regard to the responsibilities conferred by our ratification of these treaties. Additionally, it is not appropriate for the Commissioner to be granted discretionary powers with regards to these statutes; as a signatory, Australia has a binding obligation to take into account the provisions contained within *all* treaties that deal with rights of children and young people in Australia.

In December 2011, the UN General Assembly adopted the Third Optional Protocol to the CRoC. This Optional Protocol establishes a communication procedure for violation of human rights, enabling children to bring a complaint directly to the UN Committee on the Rights of the Child. Disappointingly, Australia was not among the twenty states that signed the Optional Protocol when it opened for signature in February 2012. UnitingJustice encourages the Australian Government to ratify this important treaty without delay, and ensure that it is also explicitly acknowledged in the list of Conventions and Protocols to which the National Children’s Commissioner should pay regard to when advocating for the rights of children and young people.

<sup>18</sup> Section 46MB (6) (c)

**Recommendation Two:** *Insertion of subsection 46MB(4)(a) to provide that the Commissioner must give priority to, and have special regards to, the interests and needs of Aboriginal children and young people, and Torres Strait Islander children and young people.*

While the proposed legislation should make reference to the rights of all children and young people, UnitingJustice believes that explicit mention should be made of the rights of Indigenous youth. A suitable model for this is the enabling legislation for the Western Australian Commissioner for Children and Young People, which provides that the Commissioner “must give priority to, and have special regards to, the interests and needs of Aboriginal children and young people, and Torres Strait Islander children and young people”.<sup>19</sup> A similar priority in Commonwealth legislation is vital, particularly given that the United Nations Committee on the Rights of the Child has noted that insufficient attention is given to the rights of Indigenous young people.<sup>20</sup>

By virtue of their place as Australia’s First Peoples, and in light of the significant disadvantage that Indigenous youth face across a wide range of areas, UnitingJustice believes that the National Children’s Commissioner should be provided with a specific mandate to implement targeted strategies to engage Indigenous youth and to protect their unique rights. This targeted focus should include the preparation and distribution of culturally appropriate materials, and should also provide for genuine engagement with Indigenous children and their parents and carers. This is in accordance with the report of the Expert Mechanism on the Rights of Indigenous Peoples that noted “the right to full and effective participation in external decision-making is of fundamental importance to Indigenous peoples’ enjoyment of other human rights”.<sup>21</sup>

UnitingJustice has been opposed to the discriminatory aspects of the Northern Territory Emergency Response Act (the Intervention) since its implementation in 2007. The Stronger

<sup>19</sup> Section 20 (1) (a) *Commissioner for Children and Young People Act 2006 (WA)*

<sup>20</sup> UN Committee on the Rights of the Child (2009), *General Comment No. 11, Indigenous Children and their Rights under the Convention*, CRC/C/GC/11.

<sup>21</sup> UN Human Rights Council (2011), *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, available: <http://www.indigenouspeoplesissues.com/attachments/article/12029/Expert%20Mechanism%20-%20Study%20on%20IPs%20and%20Rt%20to%20participate%20-%20FINAL%20REPORT%20to%20HRC%20-%20Aug%2017%2011.pdf>

Futures legislative package will see many of these discriminatory clauses extended by up to a decade if the Bills are approved by the Senate when debate resumes in mid-June. UnitingJustice has voiced its concern over the negative impact on Indigenous children of one aspect of the Stronger Futures legislative package in particular: the expansion of the Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM).

UnitingJustice acknowledges that poor school attendance is one of the most important features in accounting for the disparity between Indigenous and non-Indigenous literacy and numeracy outcomes. However we do not believe that punishing parents or carers will address the problems of school attendance and retention rates in Indigenous communities. Since SEAM commenced in 2009, up until August 2011, 380 parents have had their welfare payments suspended, however there is a paucity of evidence-led reporting to support the continuation of this program, let alone its expansion. SEAM spends disproportionate amounts of money on monitoring students, rather than directing funds to areas of poverty and disadvantage that may actually alleviate the underlying barriers to Indigenous students attending school.<sup>22</sup> UnitingJustice is also concerned that the SEAM program is in violation of the rights of Indigenous young people under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides for the right to social security.

**Recommendation Three:** *Insertion of subsection 46MB(4)(b)(i) to provide that the Commissioner protect the rights of children and young people in immigration detention or children whose parents or guardians are in immigration detention. Insertion of subsection 46MB(4)(b)(ii) to provide that, where appropriate, the Commissioner be assigned the role of legal guardian for unaccompanied minors. Insertion of subsection 46MB(4)(b)(iii) to provide that the powers of the Commissioner should apply to all children and young people who are Australian citizens, Australian residents and those in Australia irrespective of their citizenship or residency status.*

UnitingJustice has long been concerned with the role of the Minister for Immigration as legal guardian of unaccompanied minors. The power of the Minister to detain children and young people and to determine their refugee status stands in complete contradiction to the guardianship obligations under the *Immigration (Guardianship of Children) Act 1946*. Particularly concerning is the fact that the Minister may – and indeed, routinely does –

22 Campbell, D. & Wright, J. (2005), *Re-thinking Welfare School-Attendance Policies*, Social Service Review, March, Volume 79, no. 1.

delegate guardianship powers to the Department of Immigration and Citizenship (DIAC). As the Australian Human Rights Commission has noted, “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”.<sup>23</sup>

The cornerstone of Australia’s immigration policies is arbitrary, indefinite mandatory detention for asylum seekers arriving in Australian waters by boat. UnitingJustice has long-voiced its opposition to this policy, and has actively sought legislation that fulfills our obligations under relevant international human rights treaties such as the *Universal Declaration of Human Rights*, the *Convention and Protocol Relating to the Status of Refugees*, the *Convention on the Rights of the Child* and the *Covenant on Civil and Political Rights*. While all asylum seekers are vulnerable, children and young people are most deeply affected by the policies of detention currently imposed upon them. While UnitingJustice acknowledges the recent attempts to reform the immigration detention system by transferring a significant proportion of young asylum seekers into community-based detention arrangements,<sup>24</sup> over 460 children still remain locked up in secure detention facilities around Australia.<sup>25</sup>

The serious physical and mental health effects of detention on young asylum seekers are well-documented. A recent study assessed children immediately upon arrival in Australia, and then again after a period in immigration detention. This allowed for a comparative analysis to be made, and disturbingly revealed a tenfold increase in incidences of mental illness once children had spent time in detention. The same study also documented that of the children surveyed:

- 100 per cent were diagnosed with at least one psychiatric disorder;
- 80 per cent were diagnosed with multiple psychiatric disorders;
- 95 per cent were diagnosed with major depression;
- 55 per cent demonstrated suicidal ideation;
- 50 per cent were assessed to be suffering from separation anxiety disorder;

23 Australian Human Rights Commission (2010), *Submission for the Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010*, p. 9.

24 See: <http://www.minister.immi.gov.au/media/cb/2012/cb186759.htm>

25 See: <http://www.onlineopinion.com.au/view.asp?article=13669>

- 45 per cent displayed oppositional defiant disorder;
- 25 per cent engaged in self-harm behaviours (such as wrist-cutting or banging their heads).<sup>26</sup>

UnitingJustice is also deeply concerned about the treatment of minors charged with so-called people-smuggling offences under the *Migration Act 1958*. The Indonesian Consulate is currently investigating the incarceration of 16 minors in Western Australian prisons, 2 in Victoria, 14 in New South Wales, 1 in Darwin, and 7 in Queensland.<sup>27</sup> This is in direct contravention of not only Australia's domestic legislation, which recommends all minors charged with people smuggling offences be immediately repatriated to their country of origin, but is a gross violation of our international obligations under Article 37(b) of the *Convention on the Right of the Child*, Article 5.1 of the *UN Standard Minimum Rules for the Administration of Juvenile Justice*, and Articles 1, 17 and 18 of the *UN Rules for the Protection of Juveniles Deprived of their Liberty*.

While there have been calls for the establishment of a guardianship role independent to the proposed National Children's Commissioner, UnitingJustice does not believe this is in the best interest of young asylum seekers. No distinction should be made between the rights of children and young people who are Australian citizens and those who are in Australia seeking asylum. Our obligations to all children are established under international law and must be universally applied.

**Recommendation Four:** *Insertion of Section 46MO to provide that the Minister must ensure that the Commissioner is provided with the staff and additional resources reasonably needed for carrying out its functions under this Act.*

While the legislation makes specific reference to the remuneration of the Commissioner,<sup>28</sup> the details of the resources that will be provided to the office remain unclear. The Explanatory Memorandum notes that the "establishment of the Children's Commissioner will cost \$3.5 million over four years",<sup>29</sup> which means less than one million dollars a year will be provided to resource this essential role.

26 Steel, Z., Momartin, S., Bateman, C., Hafshejani, A. & Silove, D. (2004), *Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia*, Australia and New Zealand Journal of Public Health, 28: 527–536.

27 See: <http://www.abc.net.au/radionational/programs/backgroundbriefing/casualties-in-the-war-on-people-smuggling/3601454>

28 Section 46MF.

29 Page 2.

UnitingJustice is deeply concerned that this low figure will render the new office essentially impotent. Most State Governments provide significantly greater financial support for their equivalent monitoring bodies of children, with Western Australia allocating \$2.6 million per year, Victoria allocating \$3.8 million per year, New South Wales allocating \$13.6 million per year, and Queensland allocating \$45 million per year.<sup>30</sup> The United Nations Committee on the Rights of the Child has stated that without adequate infrastructure, funding and staff, "the mandate and powers of [the Commissioner] may be meaningless, or the exercise of their powers limited".<sup>31</sup>

**Recommendation Five:** *Insertion of Subsection 46MB(1)(e) to provide that the Office of the Commissioner should directly receive complaints of breaches of children's rights under the Convention on the Rights of the Child, and should be a direct avenue for children and young people to access should they have a complaint regarding a breach of their rights.*

UnitingJustice is concerned that the existing complaints mechanisms are not appropriate for the special needs of children and young people. It is of great concern then, that the proposed legislation makes no reference to the powers of the Commissioner including a complaints role.<sup>32</sup> The United Nations Committee on the Rights of the Child has noted the importance of a Children's Commissioner being empowered to receive complaints from children and young people. Additionally, according to the Committee, a Children's Commissioner "should undertake mediation and conciliation of complaints from children and investigate breaches of human rights".<sup>33</sup>

Currently, the Australian Human Rights Commission holds only limited powers with regards to investigating complaints where the Commonwealth is alleged to have breached or infringed a right contained in the CROC.<sup>34</sup> Specifically, any

30 See: <http://www.ayac.org.au/uploads/Budget%20Provision%20for%20Commissioner.pdf>

31 UN Committee on the Rights of the Child (2002), *General Comment No. 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child*, CRC/GC/2002/2, para. 11.

32 Section 46MB.

33 UN Committee on the Rights of the Child (2002), *General Comment No. 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child*, CRC/GC/2002/2.

34 Australian Human Rights Commission (2010), *Submission for the Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010*, p. 9.

recommendations made by the AHRC are not legally enforceable.

UnitingJustice is concerned that unless this situation is remedied through a more comprehensive investment in the powers assigned to the National Children's Commissioner, then the role will be rendered tokenistic.

**Recommendation Six:** *A commitment by the Federal Government to implement the Convention on the Rights of the Child into our domestic legislation, preferably through the creation of a Human Rights Act to provide a comprehensive framework for protecting human rights in Australia.*

The current system of human rights protection provides few options for children and young people who feel that their rights have been violated. Australia's commitments at the United Nations, while conferring a certain degree of political and social pressure on the Government, are not legally binding in Australia unless they are incorporated into domestic law.<sup>35</sup> The nature of our political and legal system in Australia means that the current approach to the protection of the rights of children and young people is fragmented and inconsistent. The lack of comprehensive legal protection in Australia for the human rights standards Australia has committed to uphold at the international level has been noted on numerous occasions by UN committees.<sup>36</sup> Many important rights outlined in the Convention on the Rights of Children are not covered by Commonwealth legislation, but rather fall within the purview of the states and territories. In the absence of incorporation into domestic law, a Human Rights Act would "create greater consistency between federal, state and territory governments in legislation that affects children, and ensure that effective remedies are available in the case of a breach of the rights of a child" or young person.<sup>37</sup>

Despite tremendous public support, Australia still has no Human Rights Act. In 2008, the Uniting Church called on the Australian Government to introduce a national human rights charter that would fulfil our international obligations as outlined

35 Nulyarimma & Others v Thompson & Ors (1999) 96 FCR 193

36 Recommendations for the comprehensive protection of Australia's human rights obligations in domestic law have been made by the CERD (2010), CEDAW (2010), HRC (2009), CESCE (2009) and CAT (2008), among others (<http://www.hrlrc.org.au/files/UPR-Summary-of-Key-Issues-and-Recommendations.pdf>).

37 Child Rights Task Force (2011), *Listen to the Children: Child Rights NGO Report Australia*, p. 1.

in the treaties to which we are a signatory.<sup>38</sup>

A Human Rights Act would provide the most comprehensive framework for protecting human rights in Australia, including the rights of children and young people. More broadly, such an Act would serve as a checklist for governments in formulating their policies and for the courts when examining laws, and would assist in doing the following:

- Recognise and protect the human rights of all people in Australia;
- Ensure that human rights are respected by our government;
- Improve government policy and decision making – the government would need to consider human rights when drafting laws, developing policy and delivering services;
- Protect economically and socially vulnerable people who are more likely than others in Australia to have their human rights breached;
- Be an important practical tool for advocates of those facing discrimination, disadvantage or exclusion;
- Assist Australia in meeting its obligations under the United Nation treaties we have promised to uphold; and
- Help all Australians to become more aware of their rights and the rights of others, and contribute to building a culture of respect for human rights in Australia.

## 5 | Conclusion

UnitingJustice Australia welcomes the proposed creation of the role of a National Children's Commissioner. We believe it is a positive step in the effective incorporation of our human rights obligations into policy and legislative frameworks. However, we do not believe that the proposed legislative amendments go far enough. We are concerned that the legislation will be implemented without due consideration, to coincide with Australia's appearance before the UN Committee on the Rights of the Child in June for periodic review. While UnitingJustice Australia remains strongly committed to the establishment of the role of National Children's Commissioner, such a reform is far too important to be undermined by rushed implementation.

38 See: <http://www.unitingjustice.org.au/human-rights/uca-statements/item/482-a-uniting-church-response-to-human-rights-legislation>