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The Senate Standing Committee on Legal and Constitutional Affairs
Inquiry into the Australian Human Rights Commission Amendment
(National Children's Commissioner) Bill 2012

Thursday, May 31, 2012

Dear Mr. Watling,

Thank you for inviting us to make a submission to the Legal and Constitutional Affairs Committee, with reference to the inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012.

We have attached our submission accordingly.

Yours sincerely,

Dr Rebecca Newton

Professor Chris Goddard

Another Act for Compliance?

A Submission in relation to the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012. A Bill for an Act to provide for a National Children's Commissioner, and for related purposes.

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Child Abuse Prevention Research Australia (CAPRA)

A joint initiative between the Australian Childhood Foundation and Monash University.

1. Introduction

In order to comply with Australia's obligations as a signatory to the United Nations Convention on the Rights of the Child, the UN Committee on the Rights of the Child recommended the establishment of an identifiable, national commissioner specifically for children's rights.

Consequently, the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 (hereafter referred to as 'the Bill'), seeks to establish compliance through amendments to the Australian Human Rights Commission Act 1986, which in turn, enables the establishment of the statutory office of a National Children's Commissioner within the existing Australian Human Rights Commission. This is significant as, in addition to the advocacy and leadership role of the Commission, it represents a departure from the preceding (and much debated) *Commonwealth Commissioner for Children and Young People Bill 2010*. This Bill promoted the establishment of an independent Children's Commissioner, distinct from the Human Rights Commission.

However, it is not only the contents of the new Bill which are of significance, but the timing of its release. As Gerber (2012) observes:

*The timing of the publication of the Bill is likely to have been prompted by an impending review of Australia's implementation of the Convention on the Rights of the Child, by the UN Committee on the Rights of the Child.*³

Notwithstanding the existence of divergence between the two Bills, the 2012 Bill expedites compliance with the United Nations Convention on the Rights of the Child, in what, on first reading, appears to be a comparatively straightforward manner. Nonetheless, a number of points are raised which are worthy of further discussion.

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³ 'Australia finally gets a National Children's Commission' Associate Professor Paula Gerber, Deputy Director of the Castan Centre for Human Rights Law in the Faculty of Law at Monash University.
<http://www.monash.edu.au/news/show/australia-finally-gets-a-national-childrens-commission>

This paper serves to outline the principal limitations of the Bill, as a practical piece of legislation. This will be achieved by a) citing noteworthy aspects of the legislation, b) highlighting the principal concern and, c) concluding with a summary of our main concerns and recommendations.

2. Noteworthy aspects of the Bill

In considering the Bill as a practical piece of legislation, seven noteworthy aspects are identified, each of which will be addressed in turn.

2.1 The Functions of the Commissioner

The functions of the Children's Commissioner are presented in section 46MB of the Bill and closely mirror the wording which is to be found within Part IIA of the *Australian Human Rights Commission Act 1986*, which enable the establishment and functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner. Section 46MB outlines the functions of the Children's Commissioner accordingly:

46MB Functions of Commission that are to be performed by National Children's Commissioner

(1) The following functions are conferred on the Commission:

- (a) to submit a report to the Minister that complies with subsection (3) as soon as practicable after 30 June in each year;
- (b) to promote discussion and awareness of matters relating to the human rights of children in Australia;
- (c) to undertake research, or educational or other programs, for the purpose of promoting respect for the human rights of children in Australia, and promoting the enjoyment and exercise of human rights by children in Australia;
- (d) to examine existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of children in Australia, and to report to the Minister the results of any such examination.

It is of interest to note that the principal functions of the Commissioner are concerned with research, advocacy and monitoring. Any reference to the 'protection' of children is omitted. This focus contrasts somewhat with the principles governing the work of the New South Wales Commission, outlined within s.10 of the Commission for Children and Young People Act 1998. Here, the first principle governing the work of the Commission is 'the safety, welfare and wellbeing of children are the paramount considerations' before specifying the importance of engagement and cooperation.

Similarly, the provisions contained within the Western Australian Commissioner for Children and Young People Act 2006 detail a number of 'guiding principles' including, under s.4(a), an entitlement that children should be 'protected from harm and exploitation'. In terms of international law, the Norwegian Act Relating to the Ombudsman for Children 1981 (amended 1998) also emphasizes protecting the interests of children (s.3a), in addition to provisions for educating both the public and private sectors regarding children's rights.

Further, the inclusion of a 'protective' element was a feature of s. 4 of the previous *Commonwealth Commissioner for Children and Young People Bill 2010*:

4 Principles underlying this Act

The following principles, drawn from the United Nations Convention on the Rights of the Child, are to be applied in exercising powers and performing duties under this Act:

- (a) every child is a valued member of society; and
- (b) the family has the primary responsibility for the upbringing and development of its children and should be supported in that role; and
- (c) every child is entitled to be protected from abuse, exploitation and discrimination; and every child is entitled to form and express views and have those views taken into account in a way that has regard to the child's age and maturity; and
- (e) in decisions involving a child, the child's best interests are of primary concern.

These principles mirror those contained within the preamble to the Convention on the Rights of the Child; in the light of the requirement to comply with the Convention, it is apposite that these are included in the legislation. Furthermore, there is scope for clarifying the terms 'abuse', 'exploitation' and 'discrimination'. This could readily be achieved by replicating the wording contained within Article 19(1) of the Convention on the Rights of the Child which states that:

Every child is entitled to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Recommendation 1

- That the principles underlying the Act be clearly stipulated to encompass a 'protective element', thus mirroring existing state and international legislation and facilitating greater alignment with Article 19(1) of the Convention on the Rights of the Child.

2.2 Vulnerable or At Risk Children

The second area of interest within the Bill, concerns children who are deemed to be 'at risk' or 'vulnerable'. Whilst the principal functions of the Commissioner concern research, advocacy and monitoring, section 46MB(4) states:

46MB(4)

In performing functions under this section, the National Children's Commissioner may give particular attention to children who are at risk or vulnerable.

The inclusion of the word 'may' is unfortunate, as it alludes to a lack of imperative to focus on this particular cohort of children. We suggest that it should be replaced with the word 'must'. Moreover, the use of such terms as 'at risk' and 'vulnerable' brings with it the danger of obfuscation, rather than elucidation. A means of overcoming this is through the insertion of the wording contained in Article 19(1) of the Convention of the Rights of the Child. Thus, an amended section 46MB(4) may read accordingly:

46MB(4)

In performing functions under this section, the National Children's Commissioner must give particular attention to children who are abused and/or neglected, at risk or vulnerable to all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Recommendation 2

- The wording of section 46MB(4) be amended to require the Commissioner to give particular attention to children who are abused or neglected, or who are at risk all forms of physical or mental violence, injury, abuse, neglect, maltreatment or exploitation.

2.3 Consultation

Similarly to the provisions contained within the aforementioned section, part 46MB(5) of the Bill includes the use of the word ‘may’, within the context of the Commissioner consulting children, Commonwealth and State departments and other organisations:

46MB

(5) In performing functions under this section, the National Children’s Commissioner may consult any of the following:

- (a) children;
- (b) Departments and authorities of the Commonwealth, and of the States and Territories
- (c) non-governmental organisations;
- (d) international organisations and agencies;
- (e) such other organisations, agencies or persons as the Commissioner considers appropriate.

This is unfortunate as, again, it alludes to a lack of imperative to focus on consultation, and we suggest that it should be replaced with the word ‘must’. As Gerber (2012)⁴ observes, it is imperative that children are actively involved in the work of the Commissioner and regularly consulted. Moreover, this reflects the right of participation set out in Article 12 of the Convention on the Rights of the Child. If the legislation is to genuinely facilitate accessibility and consultation, then the wording of part 46MB should be modified accordingly.

Recommendation 3

- The wording of section 46MB(5) be amended to replace the word ‘may’ with ‘must’, thus requiring the Commissioner to pro-actively consult with children (in accordance with Article 12 of the Convention on the Rights of the Child), in addition to government and non-government stakeholders.

2.4 Alignment with the UN Convention on the Rights of the Child

The requirement for the activities of the Commissioner to have regard to the Convention on the Rights of the Child and other key international instruments relating to human rights, is clearly stipulated in part 46 MB (6) of the Bill:

(6) In performing functions under this section, the National Children’s Commissioner must, as appropriate, have regard to:

- (a) the Universal Declaration of Human Rights (United Nations General Assembly Resolution A/RES/217(III) A (1948); and
- (b) the following, as amended and in force for Australia from time to time:

⁴ ‘Australia finally gets a National Children’s Commission’, Associate Professor Paula Gerber, Deputy Director of the Castan Centre for Human Rights Law in the Faculty of Law at Monash University. <http://www.monash.edu.au/news/show/australia-finally-gets-a-national-childrens-commission>.

- (i) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);
- (ii) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);
- (iii) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);
- (iv) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);
- (v) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);
- (vi) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12); and
- (c) such other instruments relating to human rights as the Commissioner considers relevant.

The inclusion of this section is welcomed, as it serves to act as a reminder of the importance of aligning the practical activities of the Commissioner with the requirements specified within the various instruments. This is essential if we are to ensure that the role of the Commissioner is of genuine, practical utility in protecting Australia's children, rather than merely a symbolic token of compliance.

Recommendation 4

- We welcome the inclusion of part 46MB(6). In view of the need for i) genuine compliance and practical utility, and ii) in the light of the foregoing recommendations made thus far, we must ensure that the functions of the Commissioner that are stipulated within the Bill clearly reflect the various international instruments, and in particular the UN Convention on the Rights of the Child.

2.5 Provisions for Information Sharing

The provisions for information sharing are specified within Division 4 - Miscellaneous, part 46ML of the Bill:

46ML National Children's Commissioner may obtain information from Commonwealth government agencies

(1) If the National Children's Commissioner has reason to believe that a Commonwealth government agency has information or a document relevant to the performance by the Commissioner of functions under this Part, the Commissioner may give a written notice to the agency requiring the agency:

- (a) to give the information to the Commissioner in writing signed by or on behalf of the agency; or
- (b) to produce the document to the Commissioner.

(2) The notice must state:

- (a) the place at which the information or document is to be given or produced; and
- (b) the time at which, or period within which, the information or document is to be given or produced.

(3) The time or period stated under paragraph (2)(b) must be reasonable.

(4) A Commonwealth government agency must not, in response to a requirement under this section:

- (a) give information in a manner that would reveal the identity of a particular individual; or
- (b) produce a document that reveals the identity of a particular individual;

unless the individual has consented to the giving of the information or the production of the document.

(5) If:

- (a) subsection (4) would prevent a Commonwealth government agency from complying with a requirement under this section to produce a document; and
 - (b) the agency is able to provide a copy of the document that has had deleted from it the information that would reveal the identity of the individual concerned;
- the agency must comply with the requirement by producing a copy with that information deleted.

(6) In this section:

Commonwealth government agency means:

- (a) a Department or authority of the Commonwealth; or

(b) a person who performs the functions of, or performs functions within, a Department or authority of the Commonwealth.

Similarly to the wording contained within previous sections of the Bill, the inclusion of the word ‘may’ within section 46ML(1) is unfavourable, as again it alludes to a lack of imperative to request relevant information. We suggest that it should be replaced with the word ‘must’.

Furthermore, the provisions contained within this section are restricted to Commonwealth government agencies, rather than encompassing State agencies, which would encompass State and Territory Children’s Commissioners. It is difficult to envisage how a National Commissioner could act with genuine independence and effectively preside over the strategic coordination of efforts, under these current arrangements.

Further potential limitations surround the powers contained within part 46ML(4) of the Bill. This prohibits a Commonwealth government agency from producing a document or disclosing information to the Commissioner which reveals the identity of an individual, unless that individual has consented to that information being released. However, if the agency is able to provide the Commissioner with documentation which has been de-identified, then they are required to do so. Notwithstanding the importance of recognising the need to maintain privacy, these provisions fail to guard against the Commissioner being in receipt of heavily edited, potentially incoherent documents and information.

In its current form, the Bill does not contain sufficiently robust measures to empower the Commissioner to obtain information or documents for either the purposes of effective strategic oversight or the protection of the rights, interests and well-being of children and young people.

Recommendation 5

- It is recommended that part 46ML of the Bill be subject to amendments in order that it empowers the Commissioner to request and obtain information from both Commonwealth and State agencies. Such legislative provisions should be supplemented with a set of national guidelines and policy requirements in order to ensure that the information sharing provisions are subsumed into policy and practice. Additionally, with regard to the need to respect privacy, it is recommended that a clause be added to the legislation in order to ensure that any such information is not subject to unlawful disclosure by the Commissioner, or a representative acting on their behalf.

2.6 Collaboration with State and Territory Children’s Commissioners

Having considered the provisions for information sharing that exist within Part 46ML of the Bill, it is worthwhile noting that the Bill remains silent in regards to how, in practice, the Commissioner will engage in collaboration with their state and territory counterparts to facilitate the ‘strategic coordination of efforts and avoid counterproductive duplication’ (Gerber 2012)⁵.

⁵ *ibid.*

Recommendation 6

- In view of the limitations that exist around information sharing, it is recommended that a new section be inserted to provide clarity with regards to the interoperability of existing State-level Commissioner legislation and the Bill. An explanatory note accompanying the Bill may serve to further clarify this matter.

2.7 Independence from Government

Division 2 of the Bill outlines the provisions for the appointment of the Commissioner. Unlike the *Commonwealth Commissioner for Children and Young People Bill 2010*, the 2012 Bill remains silent with regards to the Commissioner acting independently of government. Notwithstanding the fact that the Commissioner is appointed by the Governor-General (46MC[1]), their appointment is reliant on the Minister being satisfied that they have the appropriate qualifications, knowledge or experience. It is of interest to note that a further departure from the 2010 Bill exists, insofar as despite a requirement for appropriate experience, there is no stipulation for the candidate to have demonstrated both a commitment and a capacity to advance the rights of children and young people. Such an omission remains a serious concern. Additionally, it remains to be seen whether and to what extent the Commissioner can act with genuine independence, given their appointment has been sanctioned by the Minister.

Recommendation 7

- It is recommended that Division 2 be amended in order to ensure that appointment processes remain distinct from Government influence.

Recommendation 8

- It is recommended that part 46MC(2) is amended to include a stipulation that the candidate has demonstrated both a commitment and a capacity to advance the rights of children and young people.

Similarly to the discussion undertaken in the foregoing section, part 46(ME) of the Bill facilitates the Ministerial appointment of an Acting Children's Commissioner. Once more, this prevents the Commissioner from acting with genuine independence and differs from the provisions contained within other statutes, such as s.12 of the Commissioner for Children and Young People (Scotland) Act 2003, which specifies that an 'acting Commissioner' be appointed by the Parliamentary corporation (rather than the Minister), irrespective of whether they are an existing member of the Commissioner's staff, thus ensuring that appointment processes are distinct from direct Government influences.

Recommendation 9

- It is recommended that part 46(ME) be amended in order to ensure that appointment processes remain distinct from Government influence.

Part 46MB(1)(a) of the Bill outlines the requirement for the Commissioner to submit a report to the Minister ‘as soon as practicable after 30 June in each year’. Furthermore, part 46MB(3) specifies that the report:

- (a) must deal with such matters, relating to the enjoyment and exercise of human rights by children in Australia, as the National Children’s Commissioner considers appropriate; and
- (b) may include recommendations that the Commissioner considers appropriate as to the action that should be taken to ensure the enjoyment and exercise of human rights by children in Australia.

Under part 46MN, the Minister must present the report to each House of the Parliament, within fifteen sitting days of receipt. These provisions are of interest as, once more, the extent to which the Commissioner is *genuinely* independent from Ministerial control is highly questionable.

The reporting requirements contained within this section are similar to the provisions found within the legislation in England, specifically s.8 of the *Children Act 2004*. Within this jurisdiction, the Commissioner is required to report annually on their activities, findings and matters for consideration during the forthcoming year. A copy of this report is sent to the Secretary of State, who transmits it to each House of Parliament, prior to publication. It is interesting to note that these measures differ from those which are to be found within other statutes. In Sweden, s. 4 of the *Ombudsman for Children’s Act* merely specifies that the Ombudsman must report annually ‘to the Government’. These provisions are mirrored directly in both the legislation in Finland, *Act of Government on the Ombudsman for Children and the Norwegian Act Relating to the Ombudsman for Children*. In contrast, *Commissioner for Children and Young People (Scotland) Act 2003* allows for greater transparency in reporting processes, than its counterpart in England. Under s. 10 of the Scottish Act, the Commissioner is required to report to Parliament annually on the exercise of their functions, rather than the Minister doing so on their behalf. Although it may be argued that independence of action is separate from the matter of appointment and reporting, the proximity between the two components of the Commissioner process renders it very difficult for the Bill as presently drafted to guarantee genuine transparency and independence from Ministerial influence.

Recommendation 10

- It is recommended that in the interests of transparency, the Commissioner be required to directly report to Parliament annually, under the terms of part 46MN, immediately following completion of the report.

3. Conclusion

This paper has provided a review of the proposed federal legislation concerning the appointment of a national Commissioner for Children, within the Human Rights Commission. A number of limitations have been identified, which we summarise below.

Summary of Limitations and Recommendations

Limitation 1: Absence of reference to a ‘protective’ element to the legislation.

Recommendation: That the principles underlying the Act be clearly stipulated to encompass a ‘protective element’, thus mirroring existing state and international legislation and facilitating greater alignment with Article 19(1) of the Convention on the Rights of the Child.

Limitation 2: The use of the word ‘may’ in section 46MB(4) suggests a lack of imperative to focus on children who have been abused and/or neglected or are at risk from physical, mental violence, abuse, neglect, maltreatment or exploitation.

Recommendation: The wording of section 46MB(4) be amended to ‘must’, thus requiring the Commissioner to give particular attention to children who are at risk from all forms of physical or mental violence, injury, abuse, neglect, maltreatment or exploitation.

Limitation 3: The use of the word ‘may’ in section 46MB(5), suggests a lack of imperative to pro-actively consult with children.

Recommendation: The wording of section 46MB(5) be amended to replace the word ‘may’ with ‘must’, thus requiring the Commissioner to pro-actively consult with children (in accordance with Article 12 of the Convention on the Rights of the Child), in addition to government and non-government stakeholders.

Limitation 4: The powers conferred upon the Commissioner must be of practical utility in achieving compliance with international instruments.

Recommendation: We welcome the inclusion of part 46MB(6). In view of the need for i) genuine compliance and practical utility, and ii) in the light of the foregoing recommendations made thus far, we must ensure that the functions of the Commissioner that are stipulated within the Bill clearly reflect the various international instruments, and in particular the UN Convention on the Rights of the Child.

Limitation 5: Inadequate information sharing provisions.

Recommendation: It is recommended that part 46ML of the Bill be subject to amendments in order to empower the Commissioner to request and obtain information from both Commonwealth and State agencies. Such legislative provisions should be supplemented with a set of national guidelines and policy requirements in order to ensure that the information sharing provisions are subsumed into policy and practice. Additionally, with regard to the need to respect privacy, it is recommended that a clause be added to the legislation in order to ensure that any such information is not subject to unlawful disclosure by the Commissioner, or a representative acting on their behalf.

Limitation 6: Absence of clarity with regards to interoperability with existing legislation.

Recommendation: In view of the limitations that exist around information sharing, it is recommended that a new section be inserted to provide clarity with regards to the interoperability of the existing State-level Commissioner legislation and the Bill. An explanatory note accompanying the Bill may serve to further clarify this matter.

Limitation 7: The appointment process is not independent of government influence.

Recommendation: It is recommended that Division 2 be amended in order to ensure that appointment processes remain distinct from Government influence.

Limitation 8: The absence of a stipulation that the candidate has demonstrated both a commitment and a capacity to advance the rights of children and young people.

Recommendation: It is recommended that part 46MC(2) is amended to include a stipulation that the candidate has demonstrated both a commitment and a capacity to advance the rights of children and young people.

Limitation 9: The appointment process remains under government influence.

Recommendation: It is recommended that part 46(ME) be amended in order to ensure that appointment processes remain distinct from Government influence.

Limitation 10: The reporting process lacks independence from government influence.

Recommendation: It is recommended that in the interests of transparency, the Commissioner be required to directly report to Parliament annually, under the terms of part 46MN, immediately following completion of the report.

The authors welcome the intended provision of a National Commissioner. However, it remains regrettable that, given the not inconsiderable time available, the Australian government, unlike its counterparts in New Zealand, have been unable to promote the establishment of an independent Children's Commissioner, with the requisite powers to assume the role.

It is also extremely regrettable that we have been given only five working days to respond to such an important Bill which represents such a significant departure from the earlier draft.⁶ The establishment of a fully independent Commonwealth Children's Commissioner could be a first step towards a national legislative framework that ensured discrepancies in existing legislation in different States no longer constrain Australia's capacity to protect children effectively.

Whilst it is recognised that there is a need to align the proposed legislation with existing elements of the Australian Human Rights Commission Act, we also need to ensure that the legislation aligns with international human rights instruments and specifically the Convention on the Rights of the Child. In this regard, as discussed, there are elements of the Commonwealth Commissioner for Children and Young People Bill 2010, which remain of considerable practical utility.⁶ In essence, the Children's Commissioner needs to be able to carry out the mandate effectively, with the requisite powers enshrined in the legislation and sufficient financial resources to undertake the role.

Our principal concern with the Bill as presently written is that it remains partial and symbolic rather than practical and meaningful. The primary purpose appears to be compliance with UN Charters, as opposed to the provision of genuinely effective powers for abused, neglected and vulnerable children.

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⁶ Goddard, C. and Newton, R. An Act for Compliance, or an Act for Children? A submission in relation to the Commonwealth Commissioner for Children and Young People Bill 2010; A Bill for an Act to Establish an Independent Office of the Commonwealth Commissioner for Children and Young People, and for related purposes. <http://www.capra.monash.org/assets/files/act-compliance-act-children.pdf>