

**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE IN RELATION
TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION AMENDMENT (NATIONAL
CHILDREN'S COMMISSIONER) BILL 2012**

Introduction

1. The Employment Law Centre of WA (**ELC**) is a community legal centre (**CLC**) that has provided free, confidential employment law advice, education, representation and referrals to many thousands of vulnerable, non-unionised employees in Western Australia since 2001. ELC focuses on issues such as unfair dismissal, unlawful termination, underpayment of entitlements, breach of contract, equal opportunity and occupational safety and health.
2. Between 1 July 2010 and 30 June 2011, ELC assisted 280 callers aged up to 21 years. Eleven of those were under the age of 15 years, 46 were aged between 16 and 17 years and 223 were aged between 18 to 21 years. Generally, they worked in trades and labour, hospitality, hairdressing/beauty and customer service. Most required advice and assistance in relation to termination of their employment and underpayment of entitlements.

Summary of submissions

3. ELC supports the *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* (Cth) (**Bill**) which seeks to provide a National Children's Commissioner to promote discussion and awareness of issues affecting children, conduct research and education programs, and consult directly with children and representative organisations. The Commissioner will also examine Commonwealth legislation, policies and programs that relate to children's human rights, wellbeing and development.

Why Australia needs a National Children's Commissioner

4. This year marks the 22nd anniversary of Australia's ratification of the United Nations Convention on the Rights of the Child (**CRC**), however there are still many children in Australia who do not enjoy their human rights and who are in need of a national advocate to promote and protect their interests.
5. Accordingly, ELC supports the many child-rights focused groups, including the Australian Human Rights Commission, UNICEF, Save the Children and the National Children's and Youth Law Centre, in their call for an independent body charged with the power and mandate to listen to, understand and advocate for children and their rights within Australia.
6. ELC considers that as a signatory to the CRC, Australia should uphold its obligations in relation to the protection of children. The appointment of a National Children's Commissioner will assist Australia in this regard. Specifically, ELC considers that Australia needs a National Children's Commissioner to:
 - promote national coordination of Australia's approach to children's rights;
 - ensure the protection of children as vulnerable members of our society;

- promote and ensure participation by children in decisions that affect them; and
- advocate for and educate children and the community in relation to children's rights.

Need for national coordination

7. Whilst Australian States and Territories all have a Commissioner for Children and Young People, the responsibilities of those Commissioners are varied. There are also significant gaps in coverage of issues affecting children, including children in immigration detention. Accordingly, Australia needs a clear framework of minimum human rights standards to ensure the wellbeing of children.
8. Further, whilst children's rights are affected by a range of services which fall within the power of the States and Territories, there are many policy areas, directly impacting upon the lives of children, which fall within the ambit of the Commonwealth such as immigration, social security and family law. There are also many issues faced by Australian children which affect children around the country, and which should be addressed from a national perspective. These include issues such as homelessness and access to justice.

Protection of the vulnerable

9. As a CLC, ELC assists vulnerable clients, including children, on a daily basis. It is ELC's view that Australia needs a National Children's Commissioner who will promote and protect the rights of children in Australia, especially of those who are most vulnerable.
10. Moira Rayner describes the powerlessness experienced by children: *'...a large uninfluential section of the community, they do not have access to the means of exerting power, or protecting their own vulnerability. They are restricted in the extent to which they can make decisions about their own lives. They do not play any part in the processes which determine the policies which affect them. They, unlike other subjects of discrimination, are peculiarly unable to organise themselves politically.'*¹
11. The experience of ELC's younger clients confirms the need for reform. KD was a 15 year old student working part-time as a stable hand and assistant trainer. After being dismissed from her employment, for a reason which KD considered to be unfair, KD brought an unfair dismissal claim against her employer under the *Fair Work Act 2009* (Cth).
12. KD had a telephone conference with her employer and a conciliator from Fair Work Australia. KD said she felt very "nervous" prior to the conference and found the conference itself "scary." Ultimately, KD felt that the conference "didn't go very well." From KD's perspective the conciliator "was on [the employer's] side and didn't even give me a chance." KD said that the conciliator "treated me like that because I'm a kid." KD also felt "very let down, disappointed and upset" after the conference, and felt that she was "not listened to" or "respected."
13. After attending the conference KD said "I think there should be a better way for children and young people to be heard in situations like mine and we should not be ignored by the laws just because we are kids... something like this [referring to the conference] shouldn't be scary or hard and as a kid this option should be available to us too but in a more user friendly way. We deserve to be treated fairly just like everyone else."
14. Of the 11 callers under the age of 15 who have called ELC for assistance between 1 July 2010 and 30 June 2011, more than half related to unfair dismissal claims like KD's.

¹ Rayner, M. Taking Seriously the Child's Right to be Heard, in Alston P. and Brennan G (ed.s) *The UN Children's Convention and Australia*. Sydney: Human Rights and Equal Opportunity Commission, 1991.

15. Based on client experiences including KD's, ELC recognises the positive effect a National Children's Commissioner could have in terms of providing all children with the necessary rights and protections to ensure that they are able to reach their potential.

Need for enhanced participation

16. Children are vulnerable to human rights violations, but do not have a defined role in politics or policy making. Children lack the political power and influence to promote and protect their rights, and have limited access to complaint mechanisms and the legal system. Accordingly, it is easy for decision-makers to overlook children's views and opinions.
17. In the words of Australian Human Rights Commission President and Human Rights Commissioner Catherine Branson QC, "*they are unable to vote, are rarely consulted in a meaningful way about decisions that will affect their lives, and have less recourse than adults to challenge decisions that adversely affect their interests.*"²
18. Despite the lack of participation by children in decision-making processes that affect their lives, 85% of Australians believe that children and young people should be consulted in relation to major decisions that affect their lives.³
19. Australia needs a National Children's Commissioner to ensure that children are heard, with their opinions respected, by those involved in the decision-making processes. Further, the role is necessary to monitor and advocate for the protection of children's rights.

Advancement of child rights and education

20. Existing laws, proposed new laws or policies, inquires and reports to Parliament should all seek to advance the rights and status of children and young people in accordance with the CRC. A National Children's Commissioner would assist in consulting with relevant Commonwealth agencies, State and Territory bodies and other organisations in this regard.
21. Further, all persons living in Australia, including children, must be educated in relation to children's rights. Leadership in terms of the development and implementation of educational initiatives which relate to children's rights is essential. A National Children's Commissioner should be charged with this leadership role.

What should a National Children's Commissioner do?

22. Any role developed which provides for a National Children's Commissioner must be broad enough in scope so as to extend to the protection and promotion of the rights of *all* children within Australia, regardless of their citizenship or residency status.
23. The role must also require the Commissioner to act independently. The Commissioner should not be under the control or direction of any Minister.
24. The Bill should be amended to require the Commissioner to perform the role in a way which ensures the promotion and protection of children's rights and wellbeing.

Coordinate

25. The National Children's Commissioner should provide national leadership; facilitating the development of a clear human rights framework, focussing on key issues affecting children which have previously been overlooked, and coordinating state and territory programs,

² Australian Human Rights Commissions 'Still more to do to protect children's rights', 19 November 2010, Media Release

³ Save the Children Australia 'National Children's Commissioner – Our Position', 2010, www.savethechildren.org.au/resources/position-papers/national-childrens-commissioner

funding and services to ensure consistency. The Commissioner should also ensure that at both at a national and state and territory level, policy makers consider the guiding principles of the CRC and the best interests of children.

Monitor and investigate

26. ELC supports section 46MB of the Bill. ELC recommends that a National Children's Commissioner should monitor governments' consideration and promotion of children's rights, and their observation of the provisions of the CRC. The Commissioner should also investigate and report upon the implementation of children's rights under the CRC, creating and promoting accountability for children's rights.
27. The Commissioner's responsibilities should not only include reviewing proposed and existing legislation, policies and practices which relate to children, but also making recommendations to relevant Ministers as to their findings.
28. The Bill should be amended to ensure that the Commissioner leads research, inquiries and reporting in relation to children's rights issues, and advocates for effective data collection which would assist in measuring the actual implementation of children's rights in accordance with the CRC. This would again promote accountability and assist in ascertaining the true position of children's rights within Australia.
29. ELC submits that the Government should be required to consider and act on the advice of the National Children's Commissioner.

Ensure participation

30. In ELC's view, the Bill should include a requirement that the National Children's Commissioner consult children. The Commissioner should provide a voice for children, ensuring that they are heard and that their opinions are effectively expressed to policy makers and those making decisions which will affect children's rights. The Commissioner should proactively involve children and young people in decisions which affect them, and where necessary, should speak on behalf of children to ensure meaningful consideration of their views.
31. The Commissioner should promote a meaningful dialogue between children and decision-makers by developing and facilitating communication and consultation mechanisms.
32. ELC endorses the recommendation made by Youthlaw in relation to the National Children's Commissioner encouraging the development of accessible, effective and children-friendly mechanisms and remedies in existing bodies. Similarly, ELC agrees that the Commissioner's report to Parliament must be made accessible to children and young people.

Receive complaints

33. Currently the Australian Human Rights Commission has a limited ability to investigate complaints where the Commonwealth is alleged to have breached or infringed a right contained in the CRC.
34. The implementation of a National Children's Commissioner could lead to a more comprehensive complaint system. For instance, a National Children's Commissioner should encourage more direct engagement with children, rather than relying on parents or advocates to act on their behalf.
35. ELC considers that the Bill should be amended to enable the National Children's Commissioner to directly receive complaints of breaches of children's rights under the CRC.

The Commissioner should be a direct avenue for children to access should they have a complaint regarding a breach of their rights.

Represent and educate

36. The Commissioner should support children who may want to pursue their legal interests by taking matters to court or tribunals. This should include acting as amicus curiae and intervening in relevant matters before the courts.
37. Where appropriate the Commissioner should also act as the legal guardian of unaccompanied minors who arrive in Australia without the requisite visa or authority for entry into Australia.
38. ELC supports the National Children's Commissioner providing leadership in relation to research, education and awareness of children's rights in accordance with the CRC. The Commissioner should assist in promoting public understanding of children's rights amongst government, public agencies and the general public, as well as amongst children themselves.
39. Specifically, unaccompanied minors seeking asylum are currently at high risk in Australia in terms of the protection of their human rights.⁴ Accordingly, the Commissioner should educate in relation to, and promote, the rights of children and young people in immigration detention, or whose parents are in immigration detention.

Conclusion

40. For the reasons discussed above, ELC supports the Bill and the appointment of a National Children's Commissioner. ELC regards the Bill as an important step towards the meeting of Australia's international obligations to protect and promote the rights of children.
41. Ultimately, ELC considers the establishment of a National Children's Commissioner vital to provide a voice for young people, a means of communication with Government, an avenue for complaint and, importantly, access to justice.

⁴ Curr, P 'Why Australia needs a national commissioner for children', 22 November 2010, ABC, www.abc.net.au/unleashed/41352.html