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**Submission to the
Legal and Constitutional Affairs Committee**

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

15 December 2010



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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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1. Introduction

1. On 26 October 2010, the Senate referred the Commonwealth Commissioner for Children and Young People Bill 2010 (**Bill**) to the Senate Legal and Constitutional Committee. The Bill seeks to establish an independent statutory office of the Commonwealth Commissioner for Children and Young People (**Children's Commissioner**), which will act as an advocate at a federal level for the needs, rights and views of children and young people including, but not limited to, those below the age of 18 years.
2. The Bill establishes the Children's Commissioner as an independent statutory office. The Bill gives the Children's Commissioner various functions and powers, including the ability to advocate for the rights of children and young people, review existing laws and policies, propose new laws and policies, conduct research and inquire into areas of concern, promote and co-ordinate various initiatives, involve young people in the making of decisions that effect them, act as a guardian in certain circumstances and intervene in legal proceedings involving children. The Bill also explicitly provides that the Children's Commissioner's role includes ensuring Australia meets its obligations under the United Nations *Convention on the Rights of the Child* (**CRC**).
3. The Human Rights Law Resource Centre (**HRLRC**) welcomes this initiative and supports the passage of the Bill, subject to several proposed amendments. The HRLRC recommends that the Bill be amended in several key areas so as to enable it to operate more effectively and appropriately in safeguarding the rights of children and young people.

2. Executive Summary

4. The HRLRC welcomes the establishment of a Children's Commissioner, subject to the following two major conditions:
 - (a) the Children's Commissioner, established by the Bill, should sit within the Australian Human Rights Commission – and be recognised as constituting part of that Commission under section 8(1) of the Australian Human Rights Commission Act 1986 (Cth) – rather than being established as a wholly independent and “stand alone” statutory office; and
 - (b) the Children's Commissioner should not be responsible for preparation of Australia's reports on its compliance with the CRC, but should instead contribute to the Australian Human Rights Commission's reports under the CRC, together with other relevant UN human rights bodies and mechanisms.

5. The HRLRC considers that the role of the Children's Commissioner could be enhanced by:
 - (a) providing more explicit functions relating to monitoring Australia's compliance with its international obligations;
 - (b) expanding and clarifying the Children's Commissioner's powers to receive and determine complaints and to make inquiries and publish reports; and
 - (c) provide for the demarcation of the roles of the Children's Commissioner vis-à-vis the commissioner's in the states and territories and outline how they are to interact.

3. The Need for a Children's Commissioner

3.1 Compliance with International Legal Obligations

6. The CRC has been ratified by 193 states parties, making it one of the most widely endorsed international human rights treaties. In ratifying the Convention, Australia has made a commitment to protect and promote children's rights in Australia. However, at a federal level, Australia does not have a mechanism independent of the Federal Government that serves to promote, safeguard and monitor the rights of children and young people. Rather, decisions that affect children are made at various levels of government, often without explicit regard to the human rights of children and young people. Advocacy on behalf of children and young people is often undertaken by non-government organisations, community groups or charities.
7. While establishing a Children's Commissioner is an important step in ensuring that all Australian children can fully enjoy their human rights, it is a particularly important for children currently experiencing disadvantage. These children include Aboriginal and Torres Strait Islander children, children in out-of-home care, child migrants and children in immigration detention, children in the juvenile justice system, children who are victims of crime and abuse, children with disabilities, children involved in family breakdowns and disputes, children who are disadvantaged in their access to education, homeless children and children living in poverty. For these children and others who are vulnerable, an independent monitor and advocate for their needs and views at a federal level would greatly assist in the fulfilment of their human rights.
8. The need for a Children's Commissioner is also evidenced by the fact that children and young people often lack the ability to effectively advocate for themselves or to independently engage with the political or legal system. They cannot vote for their political representatives, are not usually well resourced and are often not consulted in the formulation of laws or policies, even those that directly affect them.

9. The establishment of a Children’s Commissioner would assist in ensuring that Australia complies with its legal obligations under the CRC that States parties take “all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the [CRC]”.¹ In 2005, the Committee on the Rights of the Child (**Committee**) in its Concluding Observations on Australia recommended that the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission (**AHRC**)) be equipped with the ability to monitor the implementation of children’s rights in accordance with the Committee’s *General Comment No. 2 (2002)* on the role of independent national human rights institutions.²

3.2 Conformity with Other Jurisdictions

10. The passage of the Bill would bring Australia into conformity with other jurisdictions that have created a Children’s Commissioner or equivalent body to monitor and advocate for the rights of children and young people. Within Australia, all states and territories have a children’s commissioner. The existence of the national Children’s Commissioner will ensure that areas subject to federal regulation (for example, immigration and social security) will also be overseen by an independent commissioner. This will also mean that a national approach can more effectively be taken to issues that affect children across Australia (for example, bullying and homelessness), thus assisting to eliminate any “gaps” in the framework protecting the rights of children and young people. It could also help ensure that Australian governments are meeting what has been recognised as best practice under the Council of Australian Government’s National Framework for Protecting Australia’s Children 2009-2020.³
11. Outside Australia, jurisdictions that have independent children’s commissioners include New Zealand, England, Scotland, Wales, Northern Ireland, Norway and Sweden. It is apparent from the practices of, and the outcomes in, these jurisdictions, and from the Concluding Observations of the Committee, that a Commissioner or an equivalent body is an essential mechanism to safeguard and protect the rights of children and young people.⁴

¹ Article 2(2) of the CRC.

² 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.

³ Available at http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf.

⁴ The establishment of a Commissioner for Children and Young People in Australia is also supported by the AHRC (see http://www.humanrights.gov.au/human_rights/children/2010_commissioner_children.pdf), Defence for Children International (see <http://www.dci-au.org/html/section6.html>) and UNICEF.

4. Objects and Principles of the Bill

12. Clause 3 states that the object of the Bill is to establish an independent statutory office of the Children's Commissioner that will:
- (a) advocate on a national level for the needs, views and rights of people below the age of 18;
 - (b) monitor the development and application of laws affecting children and young people;
 - (c) co-ordinate related policies, programs and funding across Australia, which impact on children and young people; and
 - (d) proactively involve children and young people in decisions that affect them.
13. Clause 3(3) of the Bill also states that the Children's Commissioner is a measure to assist Australia in meeting its international obligations under the CRC, particularly those obligations under articles 2, 3, 6(1) and 12.⁵
14. The principles underlying the Bill are contained in clause 4. This clause draws from the preamble and various articles of the CRC.
15. The HRLRC generally welcomes the objects and principles of the Bill. However, we are concerned that clauses 3 and 4 invoke selective aspects of the CRC. The articles of the CRC cited in clause 3(3) are commonly regarded as being the general principles of the Convention. Accordingly, we consider that it would be preferable that:
- (a) the principles current contained in clause 3(3)(a)-(d) be removed and instead be inserted to replace the current clause 4; and
 - (b) an additional sub-clause be inserted into clause 3 which states monitoring Australia's compliance with its legal obligations under the CRC as an object of the Bill.
16. The HRLRC's proposed new clause 4 would read as follows:

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) non-discrimination in the applicability of children's rights (Article 2);
- (b) the primacy of the consideration of the child's best interests (Article 3);
- (c) the child's right to survival and development (Article 6(1));
- (d) the child's right to participation in decision-making (Article 12).

⁵ We note that clause 3(b) incorrectly refers to article 4 of the CRC. The "best interests" principle is enshrined in article 3 of the CRC.

17. Further reasons for these recommendations are explored below in relation to the independence of the Children's Commissioner and its roles and functions.

5. Establishment of the Office of the Children's Commissioner

5.1 Relationship with the Australian Human Rights Commission

18. Clause 8 of the Bill establishes the Office of the Commonwealth Commissioner for Children and Young People. The HRLRC's strong view is that the Children's Commissioner is a role that should be conferred on the AHRC, rather than being established as an independent statutory office. In our view, this would have the following advantages:
- (a) the Children's Commissioner would benefit from the expertise of the other Commissioners, particularly where there are common functions and powers;
 - (b) the Children's Commissioner would be able to work more readily in conjunction with the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, the Race Discrimination Commissioner and the Sex Discrimination Commissioner and Commissioner responsible for Age Discrimination where appropriate;
 - (c) the likelihood of any overlap and duplication that may otherwise occur would be reduced.
19. Accordingly, the Bill should also make a consequential amendment to section 8 of the *Australian Human Rights Commission Act 1986* (Cth), recognising that the constitution of that Commission includes the Children's Commissioner.
20. The importance of the Children's Commissioner forming part of Australia's national human rights institution is given greater weight in the context of its proposed role regarding reporting under the CRC, as discussed further in Section 8 below.

5.2 Independence of the Children's Commissioner

21. Clause 3(1) of the Bill provides that the Children's Commissioner is to operate independently and clause 11 echoes this provision. The HRLRC welcomes the Bill's emphasis on the independence of the Children's Commissioner. The role's independence is of the utmost importance if the Bill is to achieve its aims and objectives.
22. However, the HRLRC is concerned that the Children's Commissioner's independence could be undermined by the Bill's emphasis (in clause 3(3)) on the Commissioner's role in "assisting" Australia to meet its obligations under the CRC. Rather than merely *assisting* in this role, the Children's Commissioner should also play an important role in *monitoring* Australia's

compliance with the CRC. This role is in line with the role of a national human rights institution, as discussed in Section 5.1 above.

23. The HRLRC observes that the independence of children's commissioners is a principle that is also reflected in other jurisdictions. The Office of the Children's Rights Commissioner in the United Kingdom, for example, is required to remain independent and report freely and publicly without alignment to the policy goals of the government of the day.⁶ In Norway and New Zealand, the offices are considered particularly effective because they remain independent from government and are specifically child focused.⁷

5.3 The Children's Commissioner must be Adequately Resourced

24. The HRLRC considers that it is crucial that the Children's Commissioner be adequately resourced to perform his or her functions, and that ideally the Bill should make explicit provision for this. The HRLRC considers that establishing the Children's Commissioner as part of the AHRC will help facilitate this objective by reducing the costs required to effectively run the office of the Children's Commissioner.

6. Functions and Powers of the Children's Commissioner

25. The functions and powers of the Children's Commissioner are outlined in clause 9 of the Bill. These functions and powers are both general and specific and, as they are currently drafted, could significantly enhance the protection and promotion of the rights of children and young people.
26. However, there are several key areas in which the HRLRC considers that clause 9 could be strengthened. In summary, the HRLRC recommends that clause 9 should be amended to:
- (a) give the Children's Commissioner the specific function to monitor Australia's compliance with its international obligations;
 - (b) expand and clarify the Children's Commissioner's powers to:
 - (i) receive and determine complaints for violations of the CRC;
 - (ii) make inquiries and publish reports; and

⁶ Children's Alliance for England, *Time for England's child and young people to get a strong children's rights champion - Office of Children's Rights Commissioner for England Revised Minimum Requirements* (2010) <<http://www.crae.org.uk/news-and-events/news/time-for-englands-children-and-young-people-to-get-a-strong-childrens-rights-champion.html>> at 8 December 2010.

⁷ Association of Children's Welfare Agencies, *Towards a Children's Commissioner* (1992) <http://www.acwa.asn.au/acwa/publications/issuepapers/Paper_07.html> at 7 December 2010.

- (c) provide for the demarcation of the roles of the Children's Commissioner vis-à-vis the commissioner's in the states and territories and outline how they are to interact.

6.1 Monitoring Compliance with International Obligations

27. The HRLRC considers that a primary function of the Children's Commissioner should be to monitor Australia's compliance with CRC. At present, the only reference to a "monitoring" role is outlined in clause 9(1)(a), by which the Children's Commissioner should provide "national leadership in monitoring and advocating for the wellbeing of Australian children and young people". The only reference to Australia's international obligations is in clause 9(1)(b), which confers on the Children's Commissioner the function of promoting the rights of children and young people to meet Australia's international obligations. Considering the emphasis in clauses 3 and 4 about the centrality of the CRC to the Bill, an explicit reference to the CRC and the role of the Children's Commissioner in monitoring Australia's obligations would serve to clarify and strengthen the Children's Commissioner's role in relation to the CRC.
28. The Bill does not specify what the Children's Commissioner's monitoring role is meant to entail, aside from monitoring the "wellbeing" of Australian children. There is no reference to the rights contained in the CRC or any of Australia's other international obligations. The HRLRC considers that the role of the Children's Commissioner should be clarified and expanded in relation to his or her ability to monitor Australia's the rights that are contained in the CRC.
29. Therefore, the HRLRC recommends that an additional provision should be inserted into clause 9 of the Bill that gives the Children's Commissioner the power to monitor Government policies and practices to ensure that they are consistent with Australia's international obligations. The Children's Commissioner should be permitted to fulfil this function by reviewing proposed and existing laws or policies, recommending new laws or policies, proposing amendments to existing laws or policies and conducting research, undertaking inquiries and reporting to Federal Parliament.

6.2 Inclusion of a Complaints Mechanism

30. The HRLRC believes that the Children's Commissioner should have the power to receive and investigate complaints from children and young people (or their representatives) who consider that their rights have been breached.⁸ At present, children can make a complaint to the AHRC. However, the AHRC has only has a limited mandate to investigate complaints in relation to breaches of children's rights. Further, children may be unwilling or unable to

⁸ 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.

effectively participate in the AHRC's complaints process, as it is not designed especially for addressing the needs of children and young people.

31. The HRLRC recommends that an additional provision be inserted into the Bill that provides for an accessible and effective complaints mechanism. Such a mechanism should be specifically designed for, and in consultation with, children. Once a complaints mechanism has been established, the Children's Commissioner should also have a role in monitoring the nature and level of complaints.
32. Such a mechanism would also support to the HRLRC's recommendation in Section 5.1 above that the Children's Commissioner role be conferred on the AHRC.

6.3 Inquiry and Reporting Procedure

33. The HRLRC considers that the Children's Commissioner should have the power to investigate and report publicly on particular issues that affect and are relevant to children and young people. Currently, clause 9(c)(iii) provides that the functions of the Children's Commissioner include "advancing the status of children and young people in Australia... by conducting research, undertaking inquiries and reporting to Parliament". The HRLRC believes that this provision could be enhanced by providing stronger powers in relation to this function.
 - (a) First, clause 9(c)(iii) should be amended to explicitly provide that the Children's Commissioner has the power to initiate its own motion inquiries and reports in addition to those requested by the Parliament.
 - (b) Secondly, the scope of when such action can be taken should be broadened. At present, the provision is only enlivened if the inquiry relates to "advancing the status of children or young people". The precise meaning of this provision is unclear and should be clarified. The HRLRC submits that the power to investigate should be enlivened where the rights, interests or well-being of children are affected. Once again, the HRLRC considers that specific reference should be made the rights contained in the CRC. This will enable the Children's Commissioner to conduct inquiries that directly consider the impact of government policies on the rights of children and propose new policies that better accommodate those rights.
 - (c) Thirdly, the Children's Commissioner should be given specific powers to access information or documents. Clause 9(2) currently states that, "[t]he Commissioner has power to do all things necessary or convenient to be done for or in connection with the performance of functions conferred by this section". While clause 9(2) is framed broadly, it should also specify that the Children's Commissioner's power includes the power to require persons to produce or furnish any documents or information that relate to the Children's Commissioner's performance of his or her investigative or reporting functions.

6.4 Interaction with State and Territory Children's Commissioners

34. All Australian states and territories currently have a commissioner or guardian for children and young people living in that state or territory. However, the responsibilities and functions of these commissioners differ considerably across the jurisdictions.
35. In some jurisdictions, such as Queensland and South Australia, the Commissioner's terms of reference focus on specific groups of disadvantaged children, such as children in government care or children with no one to act on their behalf. In contrast, other jurisdictions, such as the Australian Capital Territory, have a broader mandate to protect and promote the rights of all children and young people.
36. In light of these disparities, the Children's Commissioner should seek to coordinate a national approach to children's rights.⁹ Clause 9(1)(i) goes some way to addressing this but a greater role may be required in order to ensure the commissioners at a state and territory level can work effectively with the Children's Commissioner and that the powers, roles and functions of all the commissioners are properly defined and complementary.

7. How the Commissioner is to Perform His or Her Functions

7.1 Consultation with Children and Young People

37. The HRLRC supports the strong emphasis in clause 10 on consulting and involving children and young people in the work of the Children's Commissioner. We note that the provisions of this clause reflect elements of equivalent legislation from other jurisdictions as well as language from the CRC. The HRLRC submits that it is essential for young people to be genuinely involved in questions which affect their rights and interests, and we expect that the provisions of clause 10(a)-(c) will assist with the Children's Commissioner's function of 'proactively involving children and young people in decisions that affect them' (clause 9(1)(g)).
38. The HRLRC notes that clause 10 of the Bill is almost identical to clause 20(b)-(g) of the National Commissioner for Children Bill proposed by Senator Bartlett in 2008. In this context, it is unclear why the Bill does not include an equivalent to clause 20(a), which provided that the commissioner must:

have special regard to and, where appropriate, report specifically on the needs and interests of children and young people who are:

- (i) of Aboriginal or Torres Strait Islander origin; or
- (ii) disadvantaged or vulnerable because of disability, geographic isolation, homelessness or poverty'.

⁹ See the Council of Australian Government's National Framework for Protecting Australia's Children 2009-2020.

39. The HRLRC recommends that a provision similar in effect to the omitted text above be included in the Bill.

7.2 Sensitivity to Ethnic and Cultural Identity

40. The HRLRC recommends that clause 10 should include a provision requiring the Children's Commissioner to conduct his or her functions in a way that is attentive and sensitive to children and young people's ethnic and cultural identities.
41. The HRLRC notes that there are similar provisions in section 10 of the *Human Rights Commission Act 2005* (ACT) (**ACT Act**) and section 23(1)(d) of the *Commission for Children and Young People and Child Guardian Act 2000* (Qld) (**Queensland Act**). Under the Queensland Act, the Queensland commissioner is required to "be sensitive to the ethnic or cultural identity and values of children including, in particular, Aboriginal and Torres Strait Islander children".
42. The Bill rightly emphasises the need to listen to young people and make the office of the Children's Commissioner accessible to them (clause 10(1)(a)-(c)). However, it is likely that engagement with the Children's Commissioner will be more difficult for children from disadvantaged or minority backgrounds unless specific measures are taken by the Commissioner to conduct his or her work sensitively and inclusively. Therefore the Bill should expressly refer to this.
43. The HRLRC believes that requiring the Children's Commissioner to conduct his or her activities in this way will assist with functions such as advancing the status of Aboriginal and Torres Strait Islander children (clause 9(1)(c)) and asylum seeker children (clause 9(1)(d)-(e)).
44. Such a provision would also generally further the protection of children's rights to practice their own culture, religion and language under article 30 of the CRC, and assist in complying with the obligation in article 2 of the CRC to ensure that children's rights are protected regardless of their race, language, religion, ethnic origin or other attributes.

7.3 "Best Interests of the Child" in Decision-Making

45. We note that clause 11(1)(a) requires the Children's Commissioner to act in a way that promotes and protects the rights, interests and well-being of children and young people. Prioritising children's best interests is relevant for all of the Commissioner's functions, but in particular those which are likely to involve making decisions affecting individual young people, such as acting as legal guardian (clause 9(1)(e)) and intervening in legal cases (clause 9(1)(h)).

46. Accordingly, we recommend the inclusion of a provision requiring the Commissioner to make decisions affecting individual young people in a way which is consistent with their best interests. The provision could be similar to section 8(1) of the ACT Act, which provides:

In making a decision under this Act in relation to a particular child or young person, the decision-maker must regard the best interests of the child or young person as the paramount consideration.

7.4 Broader Consultation

47. The HRLRC supports the requirement for the Children's Commissioner to consult with parents, educators, and government agencies in the performance of the Children's Commissioner's functions. In addition, we recommend that the list in clause 10(d)-(f) of people and organisations with whom the Children's Commissioner must consult be extended to include:

- (a) community-based or other non-government agencies who provide services to young people (particularly disadvantaged young people); and
- (b) other entities concerned with the rights, interests and wellbeing of children.

48. In the HRLRC's view, non-government agencies who work with young people, provide services or assistance with young people, or are otherwise interested in or informed about issues affecting children and young people, are a valuable source of information which will not necessarily be captured by consultation with the entities currently listed in clause 10(d)-(f). We think that the Children's Commissioner should be able to benefit from consultation and other forms of engagement with a wide range of groups involved in issues affecting children and young people.
49. We note that the Queensland Act (sections 23(1)(f), 23(2)(a)(i)) and the *Commission for Children and Young People Act 1998* (NSW) (section 14(1)) and contain provisions recognising the importance of co-operating with non-government service providers and other entities concerned with issues affecting children and young people.

8. Reporting to the Committee on the Rights of the Child

50. Under clause 35 of the Bill, the Children's Commissioner is "responsible for preparation of reports on behalf of Australia" to the Committee. It is very unusual to require an independent body to prepare reports to a UN treaty body *on behalf of* a State party. Periodic reporting under UN human rights treaties is a function that is to be conducted by the state party itself.
51. Under article 44(1) of the CRC, states parties are required to report on "the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights". In other words, the report is intended to be the government's

- account of its compliance with its own obligations under the treaty, not an independent assessment of the government's performance.
52. Clause 25 of the Bill envisages that the Children's Commissioner is responsible for Australia's reporting obligations *on behalf of* the Australian Government. In our view, clause 25 therefore imposes an inappropriate function on the Children's Commissioner, and one which might compromise, or be seen to compromise, the Children's Commissioner's independence from the Australian Government and interfere with the Children's Commissioner's other important functions.
53. We note that the discussion paper *An Australian Children's Commissioner* published by the Australian Human Rights Commission in October 2010 (**AHRC Paper**) suggests that a national children's commissioner could have responsibility for preparing reports to the CRC. However, the AHRC Paper suggests that such a report "would be presented to the Committee alongside the government report and the non-government report". The HRLRC supports this formulation of the Children's Commissioner's reporting function that is separate to and independent of the Australian Government's obligations under the CRC.
54. The HRLRC therefore recommends that clause 25 either be deleted or replaced with a clause providing that "The Commissioner may prepare reports on the human rights of children in Australia to the United Nations Committee on the Rights of the Child and under the Convention on the Rights of the Child and to other United Nations human rights treaty bodies and mechanisms."