



Submission to inquiry into **AUSTRALIAN HUMAN RIGHTS COMMISSION AMENDMENT (NATIONAL CHILDREN'S COMMISSIONER) BILL 2012**

National Children's Commissioner

Justice for Children Australia (J4C) congratulates the government on having the courage to finally address the question of representation for children at a national government level.

For some years we have been advocating for a Minister for Children – not only children's services - and a Children's Ombudsman.

We thought that a National Children's Commissioner (NCC) would be a great idea too but not if, like the NSW Commissioner for Children and Young People, the office would not consider children involved with Family Law.

Looking at the explanatory Memorandum for the Bill, it seems that there is no barrier for the NCC being able to take these children into the scope of its office.

The objectives of establishing a National Children's Commissioner are to:

- *improve advocacy at a national level for the rights, wellbeing and development of children and young people up to the age of 18 years*
- *improve monitoring, by examination of enactments and proposed enactments of Commonwealth laws affecting the rights, wellbeing and development of children and young people*
- *promote cooperation between the Commonwealth, States and Territories to promote the rights, wellbeing and development of children and young people*
- *encourage the active involvement of children and young people in decisions that affect them, particularly administrative decisions and development of Government policies, programs and legislation.*
- *support Government agencies to develop mechanisms which enhance the active involvement of children and young people, and*
- *assist Australia in meeting its international obligations by promoting and advancing the rights of the child, in particular as enshrined in the **Convention on the Rights of the Child**.*

The reasons why we believe that the NCC should address the needs of these children as a priority is that they have nowhere else to go.

In 1997, the Human Rights Commission and the ALRC undertook a *National Inquiry into Children's rights in the Legal process*.¹

Its title ***Seen and heard: priority for children in the legal process*** was a fine thought but were any of its recommendations taken up? Looking at the cases that J4C sees every week, we would guess that nothing good came of this inquiry as far as children's rights are concerned.

We have wanted to ask the HRC to revisit this inquiry in relation to children having a voice and participating meaningfully in the Family Law and child protection process.

In May last year J4C issued this media release at the time UN Commissioner on Human Rights was in Australia. Unfortunately not enough has changed since and we are not sure that the Family Law Family violence provisions coming into effect on 7 June 2012 will make much difference to the treatment of these children.

A major concern is that ***Human rights policies can't help them unless Australia has a Bill of Rights.***

This is the text: Media release Justice for Children Australia 24 May 2011

Australia is not interested in human rights for children

Last night at Sydney Town Hall, Navi Pillay, UN Commissioner for Human Rights, seemed to say that apart from Indigenous people, most Australians would not feel any deprivation of human rights. She was very eloquent about the plight of refugees and Justice for Children agrees with her opposition to deprivation of liberty, detaining people who have not committed any crime, and the language problems often faced by asylum seekers.

Many others living in Australia have been detained against their will and silenced. The most tragic example is children whose lives have been ruined by Family Law decisions - the Law which is supposed to protect them.

Justice for Children calls on ***The UN Commissioner for Human Rights*** to focus the Australian government's attention on the serious damage to children's emotional, psychological and often, physical wellbeing caused by the family law process.

Important and reputable reviews have found that there are serious problems with Family Law - these problems have worsened considerably since the Howard government brought in their 'reforms' in 2006. In the courts there seems to be little or no accountability and the adversarial system does not focus on the best interests of children.

Suppression or 'gag' orders and the secretive nature of the Family Court is the reason why so few cases are reported in the media. The public does not know what's really happening.

¹ http://www.hreoc.gov.au/human_rights/children/family_law.html

These children need real, immediate and substantive protection. Many structures, jurisdictions, services and systems will have to be reformed to achieve such protection - that will take political will and courage.

In too many cases, the court makes decisions without heed to the realities of the children's future. There is no follow up to ensure the child is safe in their new home. Children can be and are denied (by the court), the right to counselling after separation or forced into counselling to make them accept the unacceptable. This is a direct contravention of The United Nations Convention on the Rights of the Child (UNROC) to which Australia is a signatory.

Other services (for example, DoCS, schools and police) often refuse to help children involved in family court matters.

*Children awarded to unsuitable parents are virtually in detention. Why is Australia so unwilling to stand up for these children's rights? **Human rights policies can't help them unless Australia has a Bill of Rights.***

Would international attention to Australia's secret shame of court-sanctioned child abuse make a difference?

Ariel Marguin

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We hope to be able to approach the HRC and the new NCC when appointed to ask for these children's rights to be front and centre of any policy and action initiated by the office.

This is one group of children that rarely get any attention in the media, Parliament or anywhere else.

When we try to tell friends, acquaintances or relatives what is happening to these children their reaction is invariably "Surely not!?"

An appeal to the NCC (if they are appointed – or to be optimistic – *when*):

We are not here to speak *for* these children. We are here to beg you to help us give them a safe space where *they* can speak and be heard.

We are also asking for much more realistic, humane and relevant way of assessing children's welfare, wellbeing, safety and happiness assessed in more child-focused environment - **outside the adversarial legal system.**

Many who hear the stories of these kids as told by their mothers, may say – there are two sides to the story. In the adversarial system that's all there is room for.

But there are three sides. The child is the third party who is not adequately (if at all) represented in many cases by the Independent Children's Lawyer.

You may have seen the study mentioned in news at the weekend about Family Law judges in Australia. Of those surveyed 86% had never met a child for the purpose of hearing their views. In NZ, Scotland and Germany most judges do meet the children.

UN Convention on the Rights of the Child is supposed to be considered when the changes to FLAW come in on 7 June 2012.

But judges are not **obliged** to take children's rights into account.

Justice for Children knows of many children who are suffering because they were taken from their loving, caring parent who had raised them since birth, who had not harmed them. The parent they loved and wanted to be with.

This separation enforced by Courts is child abuse.

Where can children in this situation turn for help?

They try Human Rights Commission, Kids Helpline, NCLYC (National Children's and Youth Law Centre), NSW Commissioner for Children and Young People, Shopfront Youth Legal centre, and many other organisations which say they help kids.

But not these kids.

How long are Australians going to turn a deaf ear and a blind eye to the agony and distress and grief and loss these children have to go through?

Jesus said "Suffer little children to come unto me" because nobody else cares about them.

Where is He now? Do these kids have to die and go to Heaven to get help?

This is a serious question – we can only hope that the NCC will be that source of help which children like these have needed for so long. Children have died as you know because of Family Law decisions and many more are suffering daily abuse and torment – including the pain of not seeing their beloved parent.

Young children and babies cannot perhaps speak for themselves but we believe that they can be assessed in a much more valuable and long-lasting way than currently happens in Family Law and child protection.

This is an essential part of the United Nations Convention on the Rights of the Child – the child's right to be heard. We would say that Article 12. Is not as powerful in allowing the child to speak for his or her self as is Article. 13.

We do not believe that Independent Children's Lawyers (ICLs) are often trained or inclined to consult with the child and take their views into account. Most cases that we know do not include any effort on the part of the ICL to go beyond what the family report writer, single expert or in some cases one parent only has to say about the child.

The slogan "Nothing about us with us" (*Nihil de nobis, sine nobis*) used by marginalised groups is particularly relevant to children involved in Famil Law.

One report – based on a meeting of less than one hour with the child by a single expert – can destroy the child’s life forever and often the child never understands why. So many children ask to speak directly to the judge. How many of them do?

Very few, according to our experience and according to research written up in the SMH last month. ²

Judges rarely meet young in parenting disputes, says study

Date: May 26 2012 Adele Horin

AUSTRALIAN Family Court judges and magistrates rarely meet the children whose fate they are deciding and many are reluctant to do so, a new study shows.

Unlike their counterparts in New Zealand, Scotland and Germany, who often have face-to-face meetings with children to hear their views, most of the Australian judges prefer to hear children's views second-hand - through special consultants or independent children's lawyers.

The study's author, Michelle Fernando, believes the failure of the judges to hear from children directly may contravene Australia's obligations under the United Nations Convention on the Rights of the Child for children to be heard.

"Where we are falling down is that children don't necessarily know they are being heard when they are talking through a family consultant or independent children's lawyer," she said. "They are asking to speak to the judge."

Dr Fernando, a lecturer in family law in the school of law at the University of South Australia, surveyed the judges in the Family Court of Australia and the Family Court of Western Australia and the magistrates in the Federal Magistrates Court.

Of the 44 respondents, 86 per cent had never met a child for the purpose of hearing their views. This was despite such meetings being within a judge's discretion. In New Zealand, 65 per cent of Family Court judges said they often, very often or always met a child who was the subject of a parenting dispute.

Dr Fernando said Australia was lagging behind other countries in attitudes to children meeting with judges.

The well-documented benefits included children disclosing information that might not otherwise be available and judges being better able to focus on their needs.

In particular, the meeting satisfied children's well-documented desire to meet the person making the decision about them.

"If children feel they have been part of the decision, even if it doesn't go along with their view, they feel happier," she said.

² See attachment B

The survey revealed nearly half believed judicial meetings with children might yield useful evidence of children's views. Yet few expected they would meet with a child in the future.

A surprising 25 per cent made it clear they were completely opposed to the idea. "Judges should NOT speak with or to children," a family court judge wrote.

Most believed they lacked the skills and this applied even when a family consultant, whose job is to interview children to provide the court reports, was present.

Dr Fernando said lack of confidence did not affect the New Zealand or Scottish judges. "In any event, the problem of lack of training can be easily solved," she writes in the paper, What Do Australian Family Law Judges Think about Meeting with Children?

Not only are children as young as three, allowed or even asked to speak in other jurisdictions eg *Three-year-old becomes youngest trial witness article in the UK Independent 12/11/2011 by Jonathan Brown* and are subject to criminal charges from the age of 10, in Australian Family Law they seem to be considered merely as chattels who can be allowed no opinions.

Article 12

- 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.**
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.**

Article 13

- 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.**
- 2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
 - (a) For respect of the rights or reputations of others; or**
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.**

Article 14

- 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.**

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Here is a brief excerpt from a paper on this topic published in 2007.

<http://www.aifs.gov.au/nch/pubs/brief/rb6/rb6.html>

Participation of children and young people in care in decisions affecting their lives

Dr Alexandra Osborn and Dr Leah Bromfield

A key tenet of the United Nations Convention on the Rights of the Child is that children and young people's views should be taken into account in any decision that is likely to affect their wellbeing or position in life (Delfabbro, Barber, & Bentham, 2002). In recognition of this, there has been a shift in the focus of research projects to include the views, opinions and experiences of children and young people in care - in particular to inform practice and service delivery. Participation in research can also empower children and young people and can give researchers better knowledge, information and understanding of issues directly relating to them (New South Wales Office of the Children's Guardian, 2004).e

We commend the inclusion of the United Nations Convention on the Rights of the Child in the material which judges are supposed to consider in the changes to the Family Law Family but as mentioned above – who will oblige them to do this?

Have the judicial officers had any training recently on how to deal with the new provisions?

Judges and judicial officers generally are not mandatory reporters. This means that allegations of abuse made in front of them do not have to be notified to child protection services.

Family Law is able to investigate allegations but rarely does because they seem to think the state jurisdiction will take care of it. But in many cases, the state either does nothing or waits for the outcome of the Family Law decision – by which time it's too late.

As Richard Chisholm's research showed in 2010, Form 4 (supposed to be submitted in cases of violence and abuse) was lodged about 5 times in a 1,000 cases. (sorry haven't got exact figures, a very small proportion considering how many cases involve violence and abuse).

This apparently occurred because victim's lawyers advised against lodging the form 4 ('unfriendly parent' provision) or nobody was aware of it.

We notice a very damaging trend in Family Law which is to shoot the messenger who alleges violence and abuse rather than investigating if the child is actually at risk. Even if the mother has not directly made allegations – the child may have disclosed abuse to a doctor or teacher – they are blamed for it – having 'coached' the child etc.

Mothers who make such allegations are often labelled 'delusional' or worse even though until they met the 'single expert' they had been considered good mothers and never had any adverse findings against them.

Mothers are subjected to forensic microscopic examination by these experts who are rarely qualified in adult psychiatry or psychology.

Fathers are often ignored or summarised as "he seemed very pleasant".

There are many structural and systemic reasons why these children end up in situations which are absolutely NOT in their best interests.

A short list of some of these:

Previous parenting history seems to have no bearing on how parents might behave in future.

Suppression orders – silencing those who would speak up to protect children and suppressing questionable material such as single expert reports which are often based on fleeting impressions (gained in less than one hour).

Lack of natural justice – children and their protectors cannot respond to any allegations or finding reported by family consultant or single expert unless the judge allows them to do so. And this is at the judge's discretion.

Huge costs for the protective parent trying to defend a child's interests in Family Law.

Jurisdiction issues – child protection and domestic violence is a state responsibility and there is no onus on Family Law system to make sure allegations are investigated.

Most women we know have lost everything – their homes, their work, their social circles (which often revolved around their children), their health, their self-esteem, their reputation (there must be something wrong with you if you don't have your kids) – their lives. And their kids.

Children have lost 'meaningful contact' with the person who brought them up from birth as their primary carer – usually their mother – and if they can see her, it is under humane and difficult circumstances.

What do the children feel about being deprived of the parent they love and want to be with and who has done them no wrong?

To us this deprivation is child abuse. It is irrational and cruel and there is no way that it can be explained to the child in terms they can understand or willingly accept.

Even with Family Law provisions as they now exist, what possible justification can there be for such deprivation?

I don't know if we can explain what the problem is in a way that you can feel the urgent need of these kids as we do.

What we would like to ask you is – how can you help change the system so that these children's voices can be heard before it's too late? For many it is already too late. You may have some idea how many have died because of bad decisions made under Family Law. But how can anyone – except people who have personal experience – know how many are being irreversibly harmed by their current and past experiences?

These children have nowhere to go. Some of them have tried to get help for themselves and have come up against a series of brick walls.

Let's hope the National Children's Commissioner won't be just another such wall.

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Attachment A

Perhaps this **Media release from Justice for Children** will explain our points further.

23 April 2012

Nobody listens to children in the Family Court – and the silence only protects abusers

Today another child has run away from and is now somewhere on the street.

This child is less than 12 years old, has no money, no mobile, is scared to go to protective and caring relatives because the abuser (who has custody) has threatened that they will be sent to prison if the child goes to see them.

*Many media stories cover child abuse in one form or another. Many inquiries have been conducted on how badly children have been treated. The Stolen Generation, Child Migrants, children whose mothers were coerced into giving them up for adoption, children abused by pedophile priests. The list of **past** sins against children goes on.*

*But you hardly ever hear anything about the **present** suffering children are enduring because of cruel and inhumane decisions made under Family Law. You almost never hear anything from the children themselves. When a protective parent raises allegations of abuse in the Family Court, all too often the response is to label that parent delusional or worse. This seems to apply to mothers in particular. Why aren't the allegations investigated thoroughly regardless of who makes them?*

If the 'best interests of the child' are paramount as Family Law pretends, how can abusive parents gain not only unsupervised access to the child but often sole custody?

Children affected by Family Law decisions are silenced and their abuse is hidden until some horrendous tragedy occurs. Family Law is a federal matter but child protection is the states' responsibility and children are severely damaged because of the gaps between these systems. Child protection is not doing its job either.

Abuse and violence happens in many families and children are at risk all over this country. It is surely the duty of the law to protect the vulnerable and not – as the Family Law system too often does – deliberately expose them to harm.

ATTACHMENT B

Judges rarely meet young in parenting disputes, says study

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