

Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012

INTRODUCTION

The Australian Lawyers Alliance ("ALA") welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee on the *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* (Cth) ("the Bill").

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We support the passing of this Bill.

We note that the powers provided to the National Children's Commissioner parallel the powers provided to other Commissioners at the Australian Human Rights Commission (AHRC), including the powers to:

- Submit reports, including recommendations, to the Minister;
- Promote discussion and awareness of matters relating to the human rights of children in Australia;
- Undertake research and other programs for the purpose of promoting respect for the human rights of children in Australia;
- Examining existing and proposed Commonwealth enactments;
- Intervene as *amicus curiae* in Court proceedings.

The appointment of a Children's Commissioner is appropriate to provide greater focus on Australia's implementation of obligations under the *Convention on the Rights of the Child*.

We believe that such appointment will lead to increased ventilation of issues relating to human rights violations of children in Australia. However, we believe that there are still aching gaps that must be addressed in the way that Australia protects the rights of children.

ADDITIONAL RECOMMENDATIONS

SUPPORTING LEGISLATION IMPLEMENTING THE CONVENTION

The ALA recommend that legislation implementing the *Convention on the Rights of the Child* be introduced into domestic law.

The Explanatory Memorandum cites that 'the [Children's] Commissioner will have functions similar to the Aboriginal and Torres Strait Islander Social Justice Commissioner.'¹

¹ House of Representatives, Parliament of Australia, *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012*: Explanatory Memorandum, at 1.

The Aboriginal and Torres Strait Islander Social Justice Commissioner does not have supporting legislation implementing the *Declaration on the Rights of Indigenous Peoples* ("DRIP"). This may be given that DRIP itself was initially opposed by Australia.²

The Convention on the Rights of the Child has also not been implemented into domestic law, but can be read by judges in their interpretation of law.

All other specified Commissioners at the AHRC operate alongside federal legislation protecting individuals against discrimination. For example, Disability Discrimination Commissioner Graeme Innes AM 'leads the implementation'³ of the *Disability Discrimination Act 1992* (Cth) and associated disability standards on access to premises and education.

We affirm that the effective implementation of Australia's international obligations under the *Convention on the Rights of the Child* into domestic law, (and also in relation to DRIP) would assist the Commissioner to better protect and advocate for the rights of children in Australia.

It would also provide clarity about what constitutes breaches of child rights, and enable clearer complaints.

INCREASE POWERS

The ALA submits that there may also need to be an increase in the powers of the National Children's Commissioner.

The Statement of Compatibility with Human Rights to the Bill provides that:

*'Article 4 of the Convention on the Rights of the Child obliges States parties to "undertake all appropriate legislative, administrative and other measures for the implementation of rights recognised in the present Convention". The Committee on the Rights of the Child recommends that national human rights institutions (NHRIs) should include within its structure an identifiable commissioner specifically for children's rights.'*⁴

While we welcome the development of the National Children's Commissioner role as a positive step in undertaking appropriate legislative measures for the implementation of rights recognised in the Convention, this does not go far enough.

The above quotation cites General Comment No. 2 of the Committee on the Rights of the Child. However, it must also be noted that the same General Comment outlines that NHRIs must have:

'the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children.'

² For more information, see Australian Human Rights Commission, *Media release: UN declaration a milestone for Indigenous people*, Friday 14 September 2007. Accessed 31 May 2012 at http://www.hreoc.gov.au/about/media/media_releases/2007/66_07.html

³ Australian Human Rights Commission, 'Disability Rights', Accessed 1 June 2012 at http://www.hreoc.gov.au/disability_rights/

⁴ House of Representatives, Parliament of Australia, above n 1, at 3.

*In order to be able to effectively carry out such investigations, they must have **the powers to compel and question witnesses, access relevant documentary evidence and access places of detention.** They also have a **duty to seek to ensure that children have effective remedies** – independent advice, advocacy and complaints procedures – for any breaches of their rights. Where appropriate, NHRIs should **undertake mediation and conciliation of complaints**.⁵*

These powers are not provided to the National Children's Commissioner.

Some of the recommended components of NHRIs are fulfilled by this Bill, including clause 14(b), which states that NHRIs should be able to intervene in court cases. This is provided in part as *amicus curiae* status may be applied to the Commissioner.

However, in relation to individual complaints, accessing places of detention, ensuring effective remedies – in short, enforceable powers to protect the rights of children – it appears that the National Children's Commissioner is not vested with any of these. There is also no other Federal role that has these powers in relation to children.

It appears that some of the functions of NHRIs in relation to children aim to be fulfilled by the role of National Children's Commissioner. However, it is clear that there are large gaps in the protections afforded to children in Australia, especially in relation to complaints, effective remedies and mediation.

If these powers are considered unfit to be granted to the National Children's Commissioner, we consider that it may be the role of the National Children's Commissioner to examine best options for advocacy and support of children in relation to complaint mechanisms and guardianship.

COMPLAINT MECHANISMS

There is currently a need for increased opportunities for children to be able to make complaints in relation to breaches of their human rights.

This was acknowledged at an international level last year. On 19 December 2011, the UN General Assembly approved a third optional protocol on a Communications Procedure, which will allow children to submit complaints regarding specific violations of the rights under the Convention and its first two optional protocols.⁶ It was opened for signature in February 2012.

Australia is not yet a signatory of this optional protocol. The ALA recommend that Australia prioritise to sign, ratify and implement the third optional protocol into domestic law as soon as possible.

⁵ UN Committee on the Rights of the Child, General Comment No. 2 (2002) CRC/GC/2002/2 15 November 2002, at cl 13.

⁶ Office of the United Nations High Commissioner for Human Rights, 'Committee on the Rights of the Child – Monitoring children's rights'. Accessed 25 May 2012 at <http://www2.ohchr.org/english/bodies/crc>

In July 2011, 'the Queensland Commission for Children and Young People and Child Guardian was the only state commission able to provide a complaint mechanism in relation to the delivery of children's services.'⁷

The functions of the AHRC are 'to inquire into and attempt to conciliate, complaints of unlawful discrimination, and to deal with complaints lodged under Part IIC'⁸ (referral of discriminatory determinations). None of these functions relate specifically to the rights of the child, although some redress can be sought under the other discrimination acts, if the treatment falls under the purview of discrimination legislation.

The AHRC has power to consider human rights breaches by the Federal government or its agencies.

However, increased clarity is required as to whether children can bring complaints of human rights breaches against another person, whether that be a corporation or an individual, if that person is not the Commonwealth government or one of its agencies.

GUARDIANSHIP OF CHILDREN IN AUSTRALIA

Currently, state based children's commissioners and/or guardians operate in every state and territory. In most states and territories, 'the commissioner also acts as a guardian.'⁹ As Lamont & Holzer outline:

*'The role and activities of children's commissions/guardians differ between jurisdictions. Some take a broad focus and represent all children and young people, while others focus on children and young people who are at risk or those who come into contact with child protection systems.'*¹⁰

There needs to be clarity as to how the National Children's Commissioner will support and enrich the actions of the State based Children's Commissioners and Guardians.

However, there also needs to be clarity about the ways in which children may complain about breaches of human rights in Australia.

This is particularly the case in relation to unaccompanied minors.

General Comment No. 6 of the UN Committee on the Rights of the Child, on the treatment of unaccompanied and separated children outside their country of origin, states:

'States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied...child's best

⁷ Alister Lamont & Prue Holzer, 'Children's commissioners and guardians', Australian Institute of Family Studies, (July 2011), at 3.

⁸ *Australian Human Rights Commission Act 1986* (Cth), s11 (1) (aa), (ab).

⁹ Alister Lamont & Prue Holzer, 'Children's commissioners and guardians', Australian Institute of Family Studies, (July 2011), at 1.

¹⁰ Alister Lamont & Prue Holzer, 'Children's commissioners and guardians', Australian Institute of Family Studies, (July 2011), at 2.

*interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied... child is identified.*¹¹

Unaccompanied minors intending to reside in Australia are under the guardianship of the Minister for Immigration and Citizenship, as per section 4AAA and 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth).

The guardianship duty is fiduciary in nature and non-delegable. There is inherent conflict of interest between the Minister's responsibilities in managing Australia's borders and immigration policy; and his role as guardian of unaccompanied minors.

This runs antecedent to recommendations made by the UN Committee on the Rights of the Child in general Comment No. 6, which stated that:

*'Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.'*¹²

There is currently no effective advocate for the rights of unaccompanied minors in Australia.

On a similar note, Indonesian minors have been charged with people smuggling and placed in Australian adult prisons as a result of poor evidentiary practices such as wrist X-ray examination. These minors do not fall under the purview of the *Immigration (Guardianship of Children) Act 1946* (Cth). Many have been housed in Australian adult prisons, in direct violation of article 37(c) of the *Convention on the Rights of the Child*.

ABC News reported on 30 May 2012 that in the Northern Territory, children are waiting hours in the cells due to strains on court's facilities. There are no separate cells for children, even though it is required by law.¹³

There is currently no effective federal advocate for the rights of children in Australia.

We recommend that given the unique vulnerability of children, and the large disparities in the protection on Australian and non-citizen children in Australia that policy attention needs to be drawn to the creation of an effective guardian of child rights.

We recommend that there be canvassing of potential options for an effective guardian for children in Australia. We recommend that there be clarity in how this role will complement the National Children's Commissioner, and ensure greater protection of child rights in Australia of both Australian children and non-citizens.

CONCLUSION

Again, we commend this Bill as it presents an opportunity for greater awareness and scrutiny on the rights of children in Australia.

¹¹ UN Committee on the Rights of the Child, General Comment No. 6 (2005) *Treatment of Unaccompanied and Separated Children Outside Their Country or Origin*, CRC/GC/2005/6 1 September 2005, cl 33.

¹² Ibid.

¹³ ABC News, 'Court cell overcrowding hits crisis point', May 30 2012, <http://www.abc.net.au/news/2012-05-30/court-cell-overcrowding-hits-crisis-point/4041764?section=nt>

However, while this is a welcome first step, we assert that more needs to be done to protect and promote the rights of the child in Australia, and in accordance with international standards.