

**The Senate Standing Committee on Legal and Constitutional Affairs  
Inquiry into Commonwealth Commissioner for Children and Young People Bill 2010**

Dear Ms. Dennett,

Many thanks for your invitation for us to make a submission to the Legal and Constitutional Affairs Legislation Committee, with reference to the inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010. I have attached our submission accordingly.

Yours Sincerely

Dr. Rebecca Newton

**Authors**

Dr. Rebecca Newton  
**Child Abuse Prevention Research Australia**  
Monash University  
Building 1, 270 Ferntree Gully Road  
Notting Hill, Victoria 3168  
Australia  
Tel: +613 9501 5507

Professor Chris Goddard  
**Child Abuse Prevention Research Australia**  
Monash University  
Building 1, 270 Ferntree Gully Road  
Notting Hill, Victoria 3168  
Australia  
Tel: +613 9501 5507

## **A Bill for Compliance, or a Bill for Children?**

### **A Submission in relation to the Commonwealth Commissioner for Children and Young People Bill 2010; A Bill to Establish an Independent Office of the Commonwealth Commissioner for Children and Young People, and for related purposes.**

Chris Goddard<sup>1</sup>

Rebecca Newton<sup>2</sup>

Child Abuse Prevention Research Australia (CAPRA)  
*Monash University*

## **1. Introduction**

On first reading, the *Commonwealth Commissioner for Children and Young People Bill 2010* (hereafter referred to as ‘the Bill’) satisfies the requirement for Australia to comply with its international obligations under the United Nations Convention on the Rights of the Child, and specifically Articles 2, 4, 6(1) and 12 of the Convention, in having a Commissioner for Children in post at the Federal level. However, a closer study the Bill highlights a number of issues that lead us to conclude that the legislation, in its current form, does not provide a Commonwealth Commissioner with the requisite powers or independence from Government to carry out their duties effectively.

In this paper are outlined the principal limitations the Bill as a practical piece of legislation. This will be achieved by a) quoting the potentially contentious aspects of the legislation, b) highlighting the principal concern, and c) pointing to solutions found in comparable legislation already enacted in other parts of the world which may improve the practicality the Bill. The paper concludes with a summary of our main concerns and recommendations.

## **2. Principal Limitations the Bill**

### **2.1 Object the Bill**

#### **Part 1—Preliminary**

##### **3 Object**

- (1) The object of this Act is to establish an independent statutory office of Commonwealth Commissioner for Children and Young People.
- (2) The Commissioner will:
  - (a) advocate at a national level for the needs, views and rights of people below the age of 18; and
  - (b) monitor the development and application of laws affecting children and young people; and
  - (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 the decisions that affect them.

#### *Discussion*

With regards to the object the Bill, s.3(2)(a) outlines the principal functions of the independent Commonwealth Commissioner. It is of interest to note that these functions are concerned with advocacy, monitoring, coordination and engagement, rather than ‘protecting’ *per se*.

This is similar to the *Human Rights Commission Act 2005*, which provides a statutory basis for the activities of the Children and Young People Commissioner in the Australian Capital Territory. Section 19B of this Act outlines the functions of the Commissioner and emphasizes consultation and accessibility. 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 principal 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, s.19(a) of the Victorian *Child Wellbeing and Safety Act 2005* specifies the importance of ‘child safety’ and ‘child-safe practices’. The provisions contained within the Western Australian *Commissioner for*

---

<sup>1</sup> Prof Chris Goddard, BA, C.Q.S.W., MSW(R), PhD. Director, Child Abuse Prevention Research Australia, Monash University.

<sup>2</sup> Dr Rebecca Newton, MA(Hons), Glasgow University, LLM, Strathclyde University, PhD, Victoria University of Wellington, School of Government, NZ. Research Associate, Child Abuse Prevention Research Australia, Faculty of Medicine, Nursing and Health Sciences, Monash University, Notting Hill, Victoria, Australia.

*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, s. 11-14 of the New Zealand *Children’s Commissioner Act 2003* specifies in detail the functions of the Commissioner. Here the focus is on investigation, promotion, research and advocacy, including raising awareness and understanding of the convention. The legislation in Norway is similar, insofar as it also contains provisions for educating both the public and private sectors regarding children’s rights. Furthermore, the Norwegian *Act Relating to the Ombudsman for Children 1981* (amended 1998) emphasizes protecting the interests of children (s. 3a) and ensuring that legislation relating to the protection of children is observed (s.3b).

#### *Recommendation 1*

- It is recommended that the Object the Bill is revised in order to encompass a protective element, similar to that which is to be found within the New South Wales and Norwegian legislation.
- It is recommended that the legislation be amended in order to provide clarity in terms of function. In this regard, the New Zealand *Children’s Commissioner Act 2003* specifies in detail the functions of the Commissioner. This Act may provide a useful reference point in this regard.

#### *Discussion*

In terms of the provisions enabling the monitoring of laws affecting children and young people, s.3(2)(b) the Bill is particularly broad in scope. It is not articulated clearly whether this ‘monitoring’ function is applicable to Federal or State legislation, or both. Furthermore it is ambiguous as to whether it principally applies to the ‘development and application’ of new laws which may affect children or whether it also serves to encompass existing legislation, including that which governs the activities of State Children’s Commissioners. The New Zealand *Children’s Commissioner Act 2003* addresses such ambiguity whilst at the same time providing scope. Under the provisions of s.12 (1)(l) one of the general functions of the Commissioner is to ‘inquire generally into, and report on any matter, including any enactment or law, or any practice or procedure, that relates to the welfare of children.’

#### *Recommendation 2*

- It is recommended that the provisions enabling the monitoring of laws contained within s.3(2)(b) be revised in order to address the existing ambiguity whilst at the same time facilitating a broad scope.

## **2.2 Principles**

### **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
- (d) 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.

#### *Discussion*

The Principles underlying the Bill mirror those tenets contained within the preamble to the Convention on the Rights of the Child; in the light of our recommendations regarding the Object of the Bill above, we welcome the inclusion of a ‘protective’ element to the Principles of the Bill. We nevertheless suggest that there is scope for further clarifying the terms ‘abuse’, ‘exploitation’ and ‘discrimination’.

#### *Recommendation 3*

- It is recommended that s.4(c) be developed in order to specify types of abuse. In this regard, it may be appropriate for the wording of the Act to (in part) replicate that contained within Article 19(1) of the Convention on the Rights of the Child; 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’.

## **2.3. Interoperability of State and Territory Laws**

### **6 Operation of State and Territory laws**

This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

### *Discussion*

The concern with s.6 of the legislation is how the Bill will operate in relation to State or Territory legislation in practice. Specifically, no mention is made of existing State and Territory provisions for Children's Commissioners and how the Bill would operate, in practical terms in relation to this. The inherent assumption is that where practicable, the existing Commissioner legislation would remain. However, given the variance that exists in the established laws (evidenced in brief in s.2.1 'Discussion') it remains to be seen whether and to what extent the existing legislation would i) be genuinely capable of 'operating concurrently' with the existing legislation, and therefore ii) be of practical utility rather than merely symbolic.

### *Recommendation 4*

- It is recommended that s.6 of the Bill be amended in order 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 clarify this matter.

## **2.4 Functions and Powers of the Commissioner**

### **9 Functions and powers of Commissioner**

(1) The functions of the Commissioner are as follows:

- (a) providing national leadership in monitoring and advocating for the wellbeing of Australian children and young people;
- (b) promoting the rights of all children and young people nationally, to meet Australia's international obligations;
- (c) advancing the status of children and young people in Australia, including Indigenous children and young people and other groups identified as being at risk, by:
  - (i) reviewing existing laws; (ii) proposing new policies; and
  - (iii) conducting research, undertaking inquiries and reporting to Parliament;
- (d) promoting and protecting the rights of children and young people in immigration detention, or children whose parents or guardians are in immigration detention;
- (e) in appropriate cases, acting as the legal guardian of unaccompanied children and young people who arrive in Australia without the requisite visa or other authority for entry into Australia;
- (f) promoting public education programs about, and ensuring strong investment in, early childhood development;
- (g) proactively involving children and young people in decisions that affect them;
- (h) intervening in legal cases involving the rights of children and young people;
- (i) co-ordinating policies, programs and funding which impact on children and young people, between federal, state, territory and local governments;
- (j) undertaking any other function conferred on the Commissioner by this Act or any other law.

(3) To avoid doubt, the functions and powers of the Commissioner apply in relation to:

- (a) all children and young people who are Australian citizens;
- (b) all children and young people who are Australian residents;
- (c) all children and young people in Australia, including every external territory, regardless of their citizenship or residency status.

### *Discussion*

The functions and powers of the Commissioner are articulated in s.9 of the Bill. Within this section, 9(1) and 9(3) are of particular interest. To some extent, the provisions contained within these sections serve to augment the object of the Bill and the principal functions of the Commissioner detailed in s.3 and discussed in the foregoing section 2.1. Similarly to s.3, this aspect of the legislation is concerned with the promotion of advocacy, monitoring, coordination and engagement. In addition, the ambiguity that surrounds s. 3(2)(b) (discussed in section 2.1) remains in s.9(1)(c)(i) in terms of the provisions which enable the Commissioner to review existing laws. Similarly to Recommendation 2, the New Zealand *Children's Commissioner Act 2003* addresses such ambiguity whilst at the same time providing scope. Under the provisions of s.12(1)(l), one of the general functions of the Commissioner is to 'inquire generally into, and report on any matter, including any enactment or law, or any practice or procedure, that relates to the welfare of children.' It is recommended that similar wording be adopted, as under the current Act there is no explicit provision for the review of proposed policy and legislation.

### *Recommendation 5*

- It is recommended that the provisions enabling the monitoring of laws contained within s.9(1)(c)(i) be revised in order to address the existing ambiguity whilst facilitating a broad scope.

### *Discussion*

A further point of interest concerns s.9(1)(c)(iii) and specifically the provision enabling the Commissioner to 'undertake inquiries'. The nature of such inquiry is not specified.

### *Recommendation 6*

- In order to provide clarity the wording adopted in s.12(1)(1) of the New Zealand *Children's Commissioner Act 2003* may again be useful as a guide.

#### *Discussion*

The authors welcome the provisions contained within s.9(1)(d) which seek to promote and protect the rights of children and young people in immigration detention, or children whose parents or guardians are so detained. However, the wording of the remainder of s.9(1) means that, as written, children in any circumstance other than immigration detention only have their rights promoted, not protected.

#### *Recommendation 7*

- It is recommended that the term 'promoting the rights' used in s9.1 be replaced throughout with 'promoting and protecting the rights'. This is in order to ensure proper compliance with international obligations, by providing for the promotion *and* protection of the rights of children in Australia irrespective of their circumstances or ethnicity.

#### *Discussion*

The use of the term 'in appropriate cases' in s.9(1)(c) lacks clarity as the Bill fails to establish under what circumstances cases may be deemed to be 'appropriate'.

#### *Recommendation 8*

- An explanatory note accompanying the Bill may be useful to outline the circumstances necessary for such provisions to be enacted. Furthermore, it is worthwhile emphasizing that in acting in such a capacity, the Commissioner must undertake any such statutory duties independently and with regard to advocating for and protecting the rights, welfare and interests of the child.

#### *Discussion*

The powers contained within s.9(1)(h) are of interest as they enable the Commissioner to intervene 'in legal cases involving the rights of children and young people.' This contrasts directly with the provisions relating to investigations that are to be found within s.18(1)(2) of the New Zealand *Children's Commissioner Act 2003*. This Act specifies that the Commissioner may not investigate 'any decision or recommendation, or any act or omission, of a court or a tribunal' (s. 18(1)) and furthermore 'if any matter is the subject of proceedings before a court or a tribunal, the Commissioner may not commence or (if the Commissioner has commenced an investigation) continue an investigation into the matter until the proceedings are finally determined' s.18(2)).

It remains ambiguous as to whether the provisions contained within the Bill relate to intervention in legal cases involving the rights of children and young people, within the context of immigration or within the context of other legal cases. Furthermore, the precise nature of any such 'intervention' is unclear.

#### *Recommendation 9*

- It is recommended that the powers contained within this section are clarified to specify the nature of the cases which may be subject to intervention. Furthermore, it should be made clear that intervention in cases must not impact on due process.

## **2.5 Independence of the Commissioner**

### **11 Commissioner must act independently**

(1) In performing his or her functions, the Commissioner:

(a) must act independently and in a way that promotes and protects the rights, interests and well-being of children and young people; and

(b) is not under the control or direction of the Minister.

(2) The Commissioner may report to the Parliament on any matter related to his or her functions.

#### *Discussion*

The provisions contained within s.11 of the Bill are significant insofar as they stipulate that the Commissioner must act independently of the Minister. The requirements for reporting contained within the Bill are of interest. Whereas s.11(2) states that the Commissioner 'may' report to Parliament 'on any matter' related to their function independent of the Minister, under s.26(1) the Commissioner *must* provide the Minister with an annual report, which in turn, must be laid before Parliament within 15 days. The authors question whether the differences in reporting process may in practice limit the independence of the Commissioner.

## **2.6 Cooperation with other Agencies**

### **12 Cooperation with other agencies**

(1) The Commissioner and other Commonwealth agencies that provide or deal with services or issues affecting children and young people must work in cooperation in the exercise of their respective functions.

- (2) The Commissioner must consult with State and Territory Governments to develop agreements concerning cooperation and interaction between the Office of the Commissioner and relevant State and Territory bodies, including in connection with the provision of information or access to documents required by the Commissioner in relation to his or her functions.

#### *Discussion*

In addition to the requirement for the Commissioner to act independently, the Bill also specifies that those agencies which provide services or deal with issues affecting children must work in cooperation with the Commissioner. However, notwithstanding this requirement the Bill does not contain measures empowering the Commissioner to obtain information or documents. Rather, the Commissioner is required to engage in consultation with the individual State and Territory Governments and other bodies in order to develop provisions for information access. The absence of any measures to facilitate compliance with a request for information or documentation is of concern for two principal reasons. Firstly, in relying on consultation and cooperation with State Governments, it remains to be seen how the Commissioner can act independently, over and above the State Governments and agencies ‘and in a way that promotes and protects the rights, interests and well-being of children and young people’ in accordance with the requirements of s. 11(1)(a). Secondly, in engaging in consultation with individual State Governments and agencies, there is the very real probability of a lack of cohesion and commonality in terms of information sharing provisions, leading to children being disadvantaged because of varying arrangements.

#### *Recommendation 10*

- It is recommended that s.12 of the Bill be subject to substantial amendments in order that there are clear and cohesive provisions for information sharing. 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, 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.

## **2.7 Appointment of the Commissioner**

### **Part 3—Appointments and staffing for the Office of the Commissioner**

#### **Division 1—The Commissioner**

##### **13 Appointment**

(1) The Commissioner is to be appointed by the Governor-General, by written instrument.

Note: The Commissioner is eligible for reappointment: see subsection 33(4A) of the Bills Interpretation Act 1901.

(2) A person may only be appointed as the Commonwealth Commissioner for Children and Young People if the Minister is satisfied that:

- (a) the person has appropriate qualifications, knowledge or experience and is of good character; and
  - (b) the person has a demonstrated commitment to, and capacity to advance the rights, interests and well-being of, children and young people.
- (3) Whenever a vacancy occurs in the office of Commissioner, an appointment must be made to the office as soon as practicable.

#### *Discussion*

Section 13(2) of the Bill outlines the provisions for the appointment of the Commissioner. Notwithstanding the fact that the Commissioner must act independently and they are appointed by the Governor-General, their appointment is reliant on the Minister being satisfied that they have the appropriate background and qualifications and that the candidate has demonstrated both a commitment and a capacity to advance the rights of young people. Although such a requirement is welcomed, the authors remain concerned as to whether and to what extent the Commissioner can act with *genuine* independence, given their appointment has been sanctioned by the Minister.

#### *Recommendation 11*

- It is recommended that s.13(2) be amended in order to ensure that appointment *processes* remain distinct from Government influence.

## **2.8 Acting Appointments**

### **20 Acting appointments**

(1) The Minister may, by written instrument, appoint a person to act as Commissioner:

- (a) during a vacancy in the office of Commissioner, whether or not an appointment has previously been made to the office; or
- (b) during any period, or during all periods, when the Commissioner:
  - (i) is absent from duty or from Australia; or
  - (ii) is, for any other reason, unable to perform the duties of the office of Commissioner.

(2) A person appointed to act during a vacancy mentioned in paragraph (1)(a) must not act for more than 12 months.

(3) A person must not be appointed to act as Commissioner unless the Minister is satisfied that he or she is qualified, as mentioned in subsection 13(2), to be appointed as Commissioner.

### *Discussion*

Similarly to the discussion undertaken in the foregoing section, s.20 of the Bill facilitates Ministerial appointment, thus preventing the Commissioner from acting with *genuine* independence. This provision differs from those 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 12*

- It is recommended that s.20(1) be amended in order to ensure that appointment processes remain distinct from Government influence.

## **2.9 Deputy Commissioners**

### **22 Appointment of Deputy Commissioners**

(3) A person may only be appointed as a Deputy Commissioner for Children and Young People if the Minister is satisfied that:

- (a) the person has appropriate qualifications, knowledge or experience and is of good character; and
- (b) the person has a demonstrated commitment to, and capacity to advance the rights, interests and well-being of, children and young people.

### *Discussion*

Similarly to the discussion undertaken in the foregoing sections, s.22(3) of the Bill facilitates Ministerial appointment, thus preventing the Deputy Commissioner from acting with *genuine* independence.

### *Recommendation 13*

- It is recommended that s.22(3) be amended in order to ensure that appointment processes remain distinct from Government influence.

## **2.10 UN Reporting**

### **25 Report to the United Nations Committee on the Rights of the Child**

- (1) The Commissioner is responsible for preparation of reports on behalf of Australia to the United Nations Committee on the Rights of the Child under the terms of the United Nations Convention on the Rights of the Child.
- (2) In preparing such reports, the Commissioner must consult with all relevant Commonwealth agencies, State and Territory bodies and non-government organisations.
- (3) Each report prepared by the Commissioner under subsection (1) must be given to the Minister who must transmit the report to the Secretary-General of the United Nations as soon as practicable after receiving it.
- (4) Nothing in this section prevents the Minister or another Minister of the Commonwealth from preparing and transmitting to the Secretary-General of the United Nations other reports to the United Nations Committee on the Rights of the Child on behalf of Australia.

### *Discussion*

Part 4 of the Bill outlines the requirement for the Commissioner to report to the United Nations Committee on the Rights of the Child. A point of interest here concerns the measures contained within s.25(2) which require the Commissioner to 'consult with all relevant Commonwealth agencies, State and Territory bodies and non-government organisations in preparing the report. Furthermore, the Bill specifies that the report must be transmitted via the Minister and empowers the Minister, or 'another Minister of the Commonwealth' to prepare and transmit other reports to the United Nations Committee. The provisions are of interest as, once more, the extent to which the Commissioner is *genuinely* independent from Ministerial control is highly questionable. In addition, the powers contained within s.24(4) render it likely that the Minister could potentially submit two conflicting reports.

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. Under s. 10 of this 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.

#### Recommendation 14

- It is recommended that the Commissioner be required to directly report to Parliament annually, under the terms of s. 11 of the Bill, immediately following completion of the report.

### 3. Conclusion

This paper has provided a review of the proposed federal legislation concerning the appointment of a Federal Commissioner for Children and Young People. Whilst the authors welcome the intended provision of a Commonwealth Children's Commissioner, the Bill has a number of limitations, which we summarise below:

#### Summary of Limitations and Recommendations

**Limitation 1: The Object of the Bill** With regards to the object of the Bill, s.3(2)(a) outlines the principal functions of the independent Commonwealth Commissioner. It is of interest to note that these functions are concerned with advocacy, monitoring, coordination and engagement, rather than 'protecting' *per se*. **Recommendation:** It is recommended that the Object of the Bill is revised in order to encompass a protective element, similar to that which is to be found within the New South Wales and Norwegian legislation. Furthermore, it is recommended that the legislation be amended in order to provide clarity in terms of function. In this regard, the New Zealand *Children's Commissioner Act* 2003 specifies in detail the functions of the Commissioner. This Act may provide a useful reference point in this regard.

**Limitation 2: The Monitoring of Laws** In terms of the provisions enabling the monitoring of laws affecting children and young people, s.3(2)(b) of the Bill is particularly broad in scope. It is not articulated clearly whether this 'monitoring' function is applicable to Federal or State legislation, or both. Furthermore it is ambiguous as to whether it principally applies to the 'development and application' of new laws which may affect children or whether it also serves to encompass existing legislation, including that which governs the activities of State Children's Commissioners. **Recommendation:** It is recommended that the provisions enabling the monitoring of laws contained within s.3(2)(b) be revised in order to address the existing ambiguity whilst at the same time facilitating a broad scope.

**Limitation 3: Definition of Key Terms** The Principles underlying the Bill mirror those tenets contained within the preamble to the Convention on the Rights of the Child. We suggest that there is scope for further clarifying the terms 'abuse', 'exploitation' and 'discrimination' that are to be found within s.4(c). **Recommendation:** It is recommended that s.4(c) be developed in order to specify types of abuse. In this regard, it may be appropriate for the wording of the Act to (in part) replicate that contained within Article 19(1) of the Convention on the Rights of the Child; 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'.

**Limitation 4: Interoperability** The concern with s.6 of the legislation is how the Bill will operate in relation to State or Territory legislation in practice. Specifically, no mention is made of existing State and Territory provisions for Children's Commissioners and how the Bill would operate, in practical terms in relation to this. **Recommendation:** It is recommended that s.6 of the Bill be amended in order 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 clarify this matter.

**Limitation 5: Powers of Review** Ambiguity remains in s.9(1)(c)(i) in terms of the provisions which enable the Commissioner to review existing laws. **Recommendation:** It is recommended that the provisions enabling the monitoring of laws contained within s.9(1)(c)(i) be revised in order to address the existing ambiguity whilst facilitating a broad scope.

**Limitation 6: The Nature of 'Inquiries'** A further point of interest concerns s.9(1)(c)(iii) and specifically the provision enabling the Commissioner to 'undertake inquiries'. The nature of such inquiry is not specified. **Recommendation:** In order to provide clarity the wording adopted in s.12(1)(1) of the New Zealand *Children's Commissioner Act* 2003 may again be useful as a guide.

**Limitation 7: Constraints on the Capacity to Protect Children** The authors welcome the provisions contained within s.9(1)(d) which seek to promote and protect the rights of children and young people in immigration detention, or children whose parents or guardians are so detained. However, the wording of the remainder of s.9(1) means that, as written, children in any circumstance other than immigration detention only have their rights promoted, not protected. **Recommendation:** It is recommended that the term 'promoting the rights' used in s.9.1 be replaced throughout with 'promoting and protecting the rights'. This is in order to ensure proper compliance with international obligations, by providing for the promotion *and* protection of the rights of children in Australia irrespective of their circumstances or ethnicity.



**Limitation 8: Definition of ‘Appropriate Cases’** The use of the term ‘in appropriate cases’ in s.9(1)(c) lacks clarity as the Bill fails to establish under what circumstances cases may be deemed to be ‘appropriate’. **Recommendation:** An explanatory note accompanying the Bill may be useful to outline the circumstances necessary for such provisions to be enacted. Furthermore, it is worthwhile emphasizing that in acting in such a capacity, the Commissioner must undertake any such statutory duties independently and with regard to advocating for and protecting the rights, welfare and interests of the child.

**Limitation 9: The Nature and Extent of Intervention** The powers contained within s.9(1)(h) are of interest as they enable the Commissioner to intervene ‘in legal cases involving the rights of children and young people.’ It remains ambiguous as to whether the provisions contained within the Bill relate to intervention in legal cases involving the rights of children and young people, within the context of immigration or within the context of other legal cases. Furthermore, the precise nature of any such ‘intervention’ is unclear. **Recommendation:** It is recommended that the powers contained within this section are clarified to specify the nature of the cases which may be subject to intervention. Furthermore, intervention in cases must not impact on due process.

**Limitation 10: No Powers to Obtain Information** The Act does not contain measures empowering the Commissioner to obtain information or documents. In relying on consultation and cooperation with State Governments, it remains to be seen how the Commissioner can act independently, over and above the State Governments and agencies. Furthermore in engaging in consultation with individual State Governments and agencies, there is the very real probability of a lack of cohesion and commonality in terms of information sharing provisions. **Recommendation:** It is recommended that s.12 of the Bill be subject to substantial amendments in order that there are clear and cohesive provisions for information sharing. 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, 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 11: The Extent of Commissioner Independence** Given that the appointment of the Commissioner must be sanctioned by the Minister, the authors remain concerned as to whether and to what extent the Commissioner can act with *genuine* independence. **Recommendation:** It is recommended that s.13(2) be amended in order to ensure that appointment *processes* remain distinct from Government influence.

**Limitation 12: Ministerial Appointment of Acting Commissioner** With regards to the appointment of Acting Commissioners, s.20 of the Bill facilitates Ministerial appointment, thus preventing the Commissioner from acting with *genuine* independence. **Recommendation:** It is recommended that s.20(1) be amended in order to ensure that appointment processes remain distinct from Government influence.

**Limitation 13: Ministerial Appointment of Deputy Commissioner** Similarly, s.22(3) of the Bill facilitates Ministerial appointment, thus preventing the Deputy Commissioner from acting with *genuine* independence. **Recommendation:** It is recommended that s.22(3) be amended in order to ensure that appointment processes remain distinct from Government influence.

**Limitation 14: Potential for Conflicting Reports** The provisions for reporting contained within s.24 are of interest as, once more, the extent to which the Commissioner is *genuinely* independent from Ministerial control is highly questionable. In addition, the powers contained within s.24(4) render it likely that the Minister could potentially submit two conflicting reports to the UN. **Recommendation:** It is recommended that the Commissioner be required to directly report to Parliament annually, under the terms of s.11 of the Bill, immediately following completion of the report.

**Limitation 15: Powers of Investigation** In comparison with other legislation enacted in other parts of the world, there is no power of investigation conferred by the Bill. **Recommendation:** It is recommended that the English, Scottish, New Zealand and Norwegian legislation be consulted for guidance on enshrining provisions for the Children’s Commissioners to conduct investigations into specific cases in the course of their duties.

In sum, our principal concern with the Bill as presently written is that it remains symbolic rather than practical. That is, it’s primary purpose seems to be compliance with UN charters as opposed to the provision of genuinely effective powers. 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. The establishment of a fully independent Commonwealth Children’s Commissioner should be seen as a first step towards a national legislative framework that ensures discrepancies in existing legislation in different States no longer constrain Australia’s capacity to protect its children effectively.