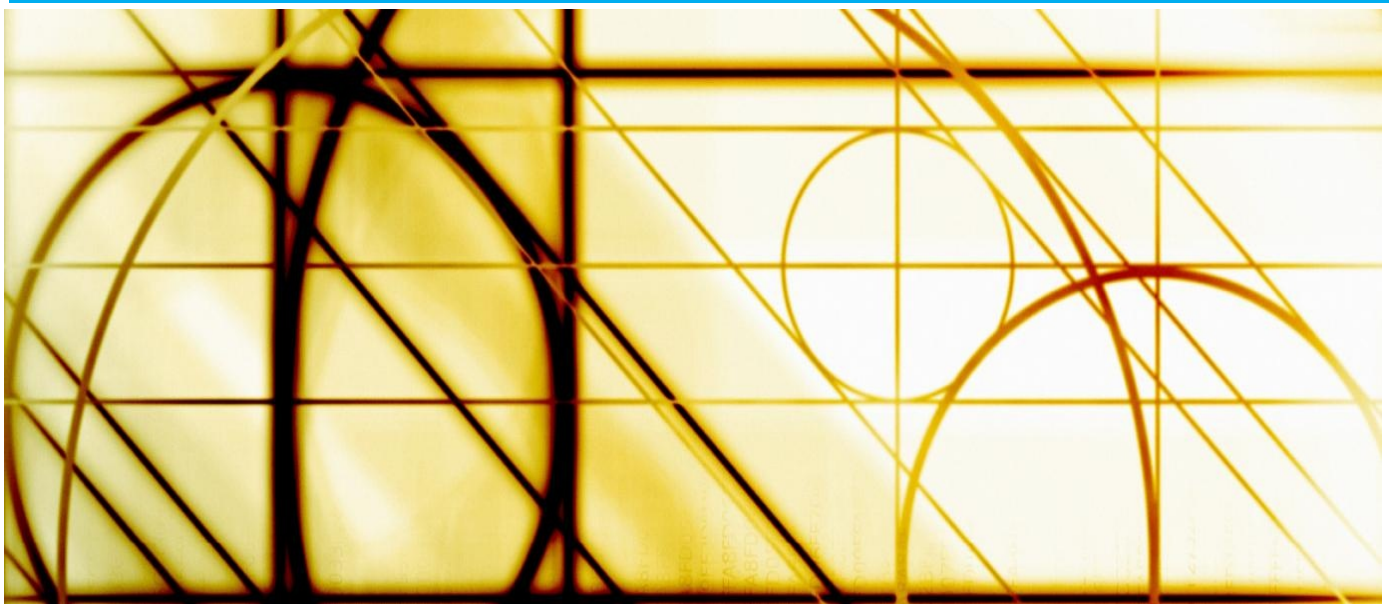


**Submission to the Senate Legal and Constitutional Affairs  
Committee Inquiry into the Australian Human Rights Commission  
Amendment (National Children's Commissioner) Bill 2012**

**King & Wood Mallesons Human Rights Law Group**



**5 June 2012**

The content of this submission represents the views and opinions of the King & Wood Mallesons Human Rights Law Group, and does not represent the views of King & Wood Mallesons or the views of the firm's clients.

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## Executive Summary

In relation to the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 (Cth) the King & Wood Mallesons Human Rights Law Group submits that:

- **Commissioner's independence be guaranteed:** section 46MB be amended to insert a new sub-section (7) as follows:
 

*In performing functions under this section the National Children's 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.*
- **Appointment following consultation:** section 46MC (1) be amended as follows:
 

*The National Children's Commissioner is to be appointed by the Governor-General by written instrument, on a full time basis, following consultation with children and organisations working with and for children.*
- **Minimum tenure:** section 46MD be amended as follows:
 

*The National Children's Commissioner holds office for the period specified in the instrument of appointment. The period must be for a minimum of 3 years and must not exceed 7 years.*
- **Commissioner to be adequately resourced** section 18A be inserted as follows:
 

*The Minister must ensure that each Commissioner is provided with the staff and other resources that the Commissioner reasonably needs for carrying out its functions under this Act*
- **Commissioner to consult with State and Territory Commissioners:** section 46MB be amended to insert a new sub-section (8) as follows:
 

*In performing functions under this section, the National Children's Commissioner must consult with all Children's Commissioners and Guardians of the States and Territories, as appropriate.*
- **Non-discrimination and accessibility:** section 46MB be amended to insert a new sub-section (4A) as follows:
 

*To avoid doubt, the functions and powers of the Commissioner apply in relation to:*

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

- **Statutory commitment to monitor and implement the Convention on the Rights of the Child:** section 46MB (1) be amended to insert a new sub-section (e) as follows:

*The following functions are conferred on the Commission:*

...

*(e) to monitor compliance with and ensure the effective implementation of the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4).*

- **Commissioner to have power to examine existing and proposed policies, programs and funding:** section 46MB (1)(d) be amended as follows:

*The following functions are conferred on the Commission:*

...

*(d) to examine existing and proposed Commonwealth enactments, policies, programs and funding, and their interaction with state and territory laws, policies, programs and funding, for the purpose of ascertaining whether the existing or proposed Commonwealth enactments recognise and protect the human rights of children in Australia, and to report to the Minister the results of any such examination.*

- **Positive duty to engage with children:** a new section 46MBA should be inserted as follows:

*The Commissioner must establish advisory committees consisting of children and young people, who the Commissioner considers are from a broad range of socio-economic and cultural backgrounds and age groups, to assist in the performance of the Commissioner's functions.*

- **Regard to particularly vulnerable or at risk children:** section 46MB (4) be amended as follows:

*In performing functions under this section, the National Children's Commissioner must give particular attention to, the interests and needs of:*

- (a) *Aboriginal and Torres Strait Islander children and young people; and*
- (b) *Children and young people who are vulnerable or disadvantaged for any reason.*

- **Minister to respond to Commissioner's report on exercise of human rights by children :** section 46MB be amended to insert a new sub-section (3A) as follows:

*As soon as practicable after the Minister receives the Commissioner's report in accordance with section 46MB (1)(a) of this Act:*

- (a) *the Minister will provide a written response to the Commissioner. The response may include the action proposed in relation to the recommendations or issues raised and, where the proposed action is contrary to the recommendations, provide reasons for such action.*
- (b) *The Minister's written response will be made publicly available through the Australian Human Rights Commission website.*

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## 1 Introduction

The King & Wood Mallesons Human Rights Law Group (“**King & Wood Mallesons HRLG**”) welcomes the opportunity to make this submission in relation to the Australian Human Rights Commission Amendment (National Children’s Commissioner) Bill 2012 (Cth) (“**the Bill**”). This Bill seeks to establish the statutory office of National Children’s Commissioner in the Australian Human Rights Commission that will provide important mechanisms for engaging with children and protecting children’s rights at a national level.<sup>1</sup>

This submission was prepared by a team of lawyers in the firm’s Perth office, led by Stephanie Puris and Jessica Bowman, on behalf of the King & Wood Mallesons HRLG.

The King & Wood Mallesons HRLG is a volunteer legal group established in 2001. The King & Wood Mallesons HRLG aims to systematically broaden and deepen the firm’s expertise in human rights law and corporate social responsibility.

The content of this submission represents the views and opinions of the King & Wood Mallesons HRLG, and does not necessarily represent the views of King & Wood Mallesons or the views of the firm’s clients.

Where the word “children” is used in this submission, it refers to both children and young people, unless the context requires otherwise. References to “the Commissioner” are references to the National Children’s Commissioner as proposed in the Bill.

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## 2 Overview

We commend the introduction of this Bill and the establishment of the office of a National Children’s Commissioner, an office which has widespread and consistent support from the UN Committee on the Rights of the Child, the Australian Human Rights Commission and other organisations such as the NGO Child Rights Taskforce.<sup>2</sup>

The lack of a National Children’s Commissioner in Australia has been the focus of much scrutiny, especially by the United Nations Committee on the Rights of the Child, which has expressed concern that there is no national commissioner with a specific mandate for monitoring children’s rights.<sup>3</sup>

The implementation of a National Children’s Commissioner was a key recommendation of the NGO Child Rights Taskforce in their report (Listen to Children), which was submitted to the United Nations Committee in May 2011.

*THAT Australia create and resource an independent National Children’s Commissioner tasked with roles including: establishing the strategic direction for evidence based policy development, monitoring the extent to which Australian children are realising their rights under the Convention, promoting those rights and promoting children’s participation as full citizens in Australian society.*<sup>4</sup>

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<sup>1</sup> Explanatory Memorandum, Australian Human Rights Commission Amendment (National Children’s Commissioner) Bill 2012 (Cth), 3.

<sup>2</sup> Australian Human Rights Commission, ‘An Australian Children’s Commissioner’, (Discussion Paper, 2010) 2; Child Rights Taskforce, ‘Listen to Children’, 2011 Child Rights NGO Report Australia (May 2011).

<sup>3</sup> Committee on the Rights of the Child, *Concluding Observations: Australia*, 40<sup>th</sup> Session, UN Doc CRC/C/15/Add.268 (20 October 2005); Committee on the Rights of the Child, *Concluding Observations: Australia*, 16<sup>th</sup> Session, UN Doc CRC/C/15/Add.79 (10 October 1997).

We strongly support the establishment of a National Children's Commissioner and the introduction of the Bill. We consider that such a Commissioner will help to promote and protect the human rights of children and help to ensure that children are taken into account in the development and review of law and policy at a national level.

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### **3 Recent initiatives providing guidance on the necessary powers and functions of the Commissioner**

#### **3.1 2011 NGO Roundtable and agreed key principles**

In September 2011, Australian Youth Affairs Commission and Australian Human Rights Commission hosted a Roundtable of Non-Government Organisations that work with children and young people, to gain a consensus on the structure and function of a National Commissioner for Children and Young People.

The Roundtable reached common agreement on some of the key principles of that Office. An NGO Sector Position Paper was published and has been endorsed by a number of organisations.<sup>5</sup>

We support this NGO Sector Position Paper and encourage the Legal and Constitutional Affairs Committee to review and implement these principles.

#### **3.2 Government consultation**

We commend the establishment of the Children and Family Roundtable. The first meeting was held on 30 November 2011, in Melbourne, and focused on strengthening the wellbeing of children and families through government policy.<sup>6</sup> It was announced at this Roundtable that consultations on a National Children's Commissioner would commence and a discussion paper was released.

We welcome the discussion paper and the consultation that was undertaken by the Department of Families, Housing, Community Services and Indigenous Affairs with key stakeholders in considering the establishment of a National Children's Commissioner. We look forward to seeing the findings of this consultation when such a report is produced.

#### **3.3 Senate review on Commonwealth Commissioner for Children and Young People Bill 2010**

The Senate's report on the Commonwealth Commissioner for Children and Young People Bill 2010 (Cth) ("**Senate Report**") provides a detailed summary of issues that were raised by the bill, and also more generally regarding the position of a National Children's Commissioner.<sup>7</sup> The Senate Report is a thorough examination of issues surrounding such a position, and provides a resourceful starting point for context on these matters.

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<sup>4</sup> Child Rights Taskforce, 'Listen to Children', 2011 Child Rights NGO Report Australia (May 2011), 2.

<sup>5</sup> Australian Youth Affairs Coalition et al, 'NGO Sector Position Paper: A National Commissioner for Australia's Children' (Position Paper, 22 December 2011) <[http://www.ayac.org.au/uploads/A%20National%20Commissioner%20for%20Australia\\_s%20Children%20-%20paper.pdf](http://www.ayac.org.au/uploads/A%20National%20Commissioner%20for%20Australia_s%20Children%20-%20paper.pdf)>

<sup>6</sup> The Hon Jenny Macklin, 'Exploring the future of children and family policy' (Media Release, 30 November 2011).

<sup>7</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Commonwealth Commissioner for Children and Young People Bill 2010*, (2011).

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## 4 Establishment and structure

### 4.1 Overview

The efficacy and efficiency of the National Children's Commissioner will largely be determined by its structure. The Commissioner must be independent from Government. Further, adequate resourcing and safeguards relating to the minimum tenure of the Commissioner must be guaranteed. We also submit that consultation with children themselves and the organisations that work closely with them should be conducted prior to the appointment of the Commissioner.

### 4.2 Independence

The proposed functions of the Commissioner necessarily include taking a view contrary to that of government on occasion. For example, the objectives of establishing a Commissioner include to:

- *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; and*
- *improve monitoring by examination of enactments and proposed enactments of Commonwealth laws affecting the rights, wellbeing and development of children and young people.*<sup>8</sup>

These objectives can only be achieved if the Commissioner is free to critique and recommend changes to current policy and practice as necessary.

The NGO Sector Position Paper notes that to ensure the Commissioner acts independently, a statutory mandate of independence, among other things, is required.<sup>9</sup> The Bill itself does not contain such a mandate and further, there is nothing in the *Australian Human Rights Commission Act 1986 (Cth)* ("**AHRC Act**") that expressly guarantees the independence of the Commission or the individual Commissioners that make up the Commission.

Concern was expressed in the Senate Report that care will be taken to ensure that the independence of the Commissioner is not affected, if the Commissioner is to sit under the Australian Human Rights Commission.<sup>10</sup>

To address this concern, **we submit** that a further sub-section be inserted to section 46MB of the Bill as follows:

*(7) In performing functions under this section the National Children's 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.*

### 4.3 Appointment

The proposed section 46MC provides that the Commissioner will be appointed by the Governor-General and that the Minister must be satisfied that the person has appropriate qualifications, knowledge and experience.

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<sup>8</sup> Explanatory Memorandum, *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 (Cth)*, 1-2.

<sup>9</sup> Australian Youth Affairs Coalition, above n 5, 7.

<sup>10</sup> Senate Legal and Constitutional Affairs Legislation Committee, above n 7, 65

**We submit** that the Commissioner should be appointed following consultation with non-government organisations responsible for children's rights and other organisations that work closely with children along with children themselves. Such a consultative process will enhance the independence, pluralism and efficacy of the Commissioner in accordance with the Principles relating to the Status of National Institutions adopted by the General Assembly in 1993.<sup>11</sup> This consultative process will further enable the office to be filled by someone with an appropriate level of expertise, experience and personal integrity.<sup>12</sup>

As highlighted by the Senate Report,<sup>13</sup> children have successfully been involved in the appointment of comparable children's commissioners overseas.<sup>14</sup> For example, children and adults collaborated in selecting the Irish Ombudsman for Children in 2003.<sup>15</sup> The Irish Public Appointment Service designed the appointment process and trained children in the necessary skills to assess candidates. Children were involved in the creation of a priorities list of qualities for the role, the making of advertisements for the position and the nomination of persons to the Steering Group and Short Listing Board. Ultimately, there was consensus amongst the three interviewing groups and the names of the candidates assessed as being suitable for the role were forwarded to the Minister. This demonstrates the potential for collaborative work between children and adults in respect to the appointment of a statutory children's officer.

**We submit** that section 46MC (1) be amended as follows:

*The National Children's Commissioner is to be appointed by the Governor-General by written instrument, on a full time basis, following consultation with children and organisations working with and for children.*

#### 4.4 Tenure

To adequately ensure the independence of the Commissioner, the appointment of the Commissioner must include suitable security of tenure.

The proposed section 46MD provides that the Commissioner holds office for the period specified in the instrument of appointment, not exceeding seven years. In our view, while the maximum term may be appropriate, a minimum term must be provided in the Act. Such a provision will ensure that the Commissioner's appointment is not subject to undue pressure (or perceived to be) by the Government of the day. The Commissioner must be free to determine their own agenda and objects of scrutiny.

**We submit** that section 46MD be amended as follows:

*The National Children's Commissioner holds office for the period specified in the instrument of appointment. The period must be for a minimum of 3 years and must not exceed 7 years.*

#### 4.5 Resourcing

The Commissioner must be adequately resourced and financially autonomous.

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<sup>11</sup> National institutions for the promotion and protection of human rights ("Paris Principles"), G.A. Res. 48/134, 48 UM GAOR Supp. No. 49 at 252, U.N. Doc. A/48/49 (20 December 1993)

<sup>12</sup> Australian Youth Affairs Coalition, above n 5, 10.

<sup>13</sup> Senate Legal and Constitutional Affairs Legislation Committee, above n 7, 33 [3.83]

<sup>14</sup> Senate Legal and Constitutional Affairs Legislation Committee, above n 7, 33.

<sup>15</sup> D Butler Scally, *Report on the Selection Process for the Appointment of the Irish Ombudsman for Children* (2004) 12.



The Commissioner must have adequate infrastructure, funding, staff, premises and freedom from other forms of financial control that might affect its independence.<sup>16</sup> As UN General Comment No. 2 points out, absent such resources and guarantees “the mandate and powers of [the Commissioner] may be meaningless, or the exercise of their powers limited.”<sup>17</sup>

The AHRC Act does not guarantee that Commissioners will be provided with adequate resources to fulfil their role and functions under the Act. As noted in the Senate Report,<sup>18</sup> an appropriate safeguard could be modelled on the South Australian *Children’s Protection Act 1993*. Section 52B of that Act provides that “[t]he Minister must provide the Guardian with the staff and other resources that the Guardian reasonably needs for carrying out the Guardian’s functions”.

**We submit** that a new section 18A be inserted as follows:

*The Minister must ensure that each Commissioner is provided with the staff and other resources that the Commissioner reasonably needs for carrying out its functions under this Act.*

#### **4.6 Relationship with state and territory commissioners and guardians**

As noted in the Senate Report, there concern regarding the relationship between the Commissioner and the state and territory commissioners and guardians.<sup>19</sup> To avoid duplication of resources, it is necessary to delineate between these roles and the roles should complement each other.

The Bill does not contain any reference to the state and territory commissioners and guardians or the relationship between the positions.

The proposed section 46MB (5) provides that the Commissioner may, in performing its functions, consult departments and authorities of the States and Territories and other organisations, agencies or persons as the Commissioner considers appropriate. Aside from this, the Bill does not address the relationship between the Commissioner and the state and territory commissioners and guardians.

The Senate Report considered that the scope of the Commissioner’s role, powers and functions must be clearly drafted in the legislation and the delineation between the Commissioner and state and territory commissioners and guardians must be unambiguous.<sup>20</sup>

The NGO Sector Position Paper proposes that the Commissioner should coordinate with state and territory commissioners and guardians and other relevant bodies to ensure that there is efficient and comprehensive monitoring, reporting and action.<sup>21</sup> It suggests that this could be accomplished by agreement on the jurisdiction of work and process of cooperation and interaction between the relevant bodies.

The Explanatory Memorandum states that the Commissioner *will work closely and collaboratively* with State and Territory counterparts and that the obligation to perform its functions efficiently under section 10A of AHRC Act means that duplication of work would be prevented.<sup>22</sup>

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<sup>16</sup> Committee on the Rights of Child, *General Comment No 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child*, 32nd session, UN Doc CRC/GC/2002/2 (15 November 2002) para 10.

<sup>17</sup> Ibid, para 11.

<sup>18</sup> Senate Legal and Constitutional Affairs Legislation Committee, above n 7, 32- 33 [3.80]

<sup>19</sup> Senate Legal and Constitutional Affairs Legislation Committee, above n 7, 64.

<sup>20</sup> Senate Legal and Constitutional Affairs Legislation Committee, above n 7, 64.

<sup>21</sup> Australian Youth Affairs Coalition, above n 5, 8.

**We submit**, that in the interests of clarity, section 46MB (8) be inserted as follows:

*In performing functions under this section, the National Children's Commissioner must consult with all Children's Commissioners and Guardians of the States and Territories, as appropriate.*

'Children's Commissioners and Guardians of the States and Territories' should be appropriately defined in the AHRC Act.

**We further submit** that to facilitate ongoing collaboration and consultation between the National Commissioner and the Children's Commissioners and Guardians of the States and Territories, guidelines should be published, setting out the following:

- (a) the relevant jurisdiction and responsibilities of the National Children's Commissioner and the Children's Commissioners and Guardians of the States and Territories;
- (b) the matters upon which the National Children's Commissioner will cooperate and interact with the Children's Commissioners and Guardians of the States and Territories; and
- (c) the exchange of information between the National Children's Commissioner and the Children's Commissioners and Guardians of the States and Territories.

#### **4.7 Non-discrimination and Accessibility**

It is essential that the Commissioner's functions apply in respect to all children within Australia, to enable powers to be exercised in a non-discriminatory manner and in a way which facilitates accessibility. Section 46MB (4) of the Bill requires the Commissioner to give particular attention to children who are at risk of vulnerable when exercising their functions (see further at section 5.7 of this submission). The Commissioner must represent the interests of children regardless of their parent or guardian's race, gender, disability, language, religion, political or other opinion, nationality or residency status.<sup>23</sup>

**We submit** that section 46MB be amended to insert a new sub-section (4A) as follows:

*To avoid doubt, the functions and powers of the Commissioner apply in relation to:*

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

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

### **5.1 Overview**

We endorse the list of functions provided in the NGO Group Position Paper, which include:

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<sup>22</sup> Explanatory Memorandum, Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 (Cth), 7 [13], [15].

<sup>23</sup> Australian Youth Affairs Coalition, above n 5, 9.

- (a) reviewing proposed and existing laws, policies and resource allocations relating to children and young people;
- (b) making recommendations to relevant Ministers about laws which should be made or amended;
- (c) conducting inquiries and reporting to Parliament;
- (d) advocating for effective data collection on children's health, wellbeing, development and participation; and
- (e) assisting governments by analysing key policies to ensure they are consistent with Australia's international obligations.

We note that some of these functions are provided for under section 11 of the AHRC Act. However, such functions vest in the Commission rather than the Commissioner. **We submit** that the parliament should consider the extent to which such functions should be expressly included in the proposed section 46MB(1), so that they vest in the Commissioner.

**We submit** that a number of the functions and powers currently drafted in the Bill can be strengthened in order to enhance the protection of the rights of the child, and to ensure compliance with the *Convention on the Rights of the Child*.

## 5.2 Commitment to monitoring and implementing the Convention on the Rights of the Child

The Explanatory Memorandum states that the Commissioner will “*promote the rights of children as set out in the Convention on the Rights of the Child and other core human rights treaties.*”<sup>24</sup>

However, this is not expressly provided for in the Bill.

**We submit** there needs to be a specific statutory commitment to the monitoring and implementation of the *Convention of the Rights of the Child*, as a function of the Commissioner.

**We submit** that section 46MB (1) be amended to insert a new sub-section (e) as follows:

*The following functions are conferred on the Commission:*

...

*(e) to monitor compliance with and ensure the effective implementation of the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4).*

## 5.3 Power to intervene on behalf of children

The power to intervene on behalf of children is given to the Commission under section 11 (1)(o) of the AHRC Act, which provides that:

*where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues.*

<sup>24</sup> Explanatory Memorandum, Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 (Cth), 3.

The ability of the Commissioner, as an expert on children's rights, to intervene in legal proceedings is important to ensure that the Commissioner's expertise is appropriately utilised in all decision-making forums, including the courts. The Commissioner's right to intervene under section 11 is, appropriately, in addition to the common law right of *amicus curiae*.

Consistent with the approach of the Commission, we would expect guidelines to be published setting out the circumstances in which the Commissioner will consider intervening, including where the matter is of significance to a broad range of children, is a novel or particularly significant issue or where the parties are unable to ventilate the issue themselves. These requirements are similar to those which apply to the Children's Commissioners in Wales and England.<sup>25</sup> Such guidelines would ensure that the Commissioner's intervention is an effective use of resources and would guard against any possible compromise of the Commissioner's independence.

#### **5.4 Power to review laws, policies and practices**

Schedule 1 of the Bill inserts section 46MB into the AHRC Act, thereby giving the Commissioner the power, amongst other things, to:

*examine existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of children in Australia, and to report to the Minister the results of any such examination.*

The power to review existing and proposed laws is crucial and we support its inclusion in the Bill.

The Explanatory Memorandum to the Bill states that:

*The National Children's Commissioner will also examine Commonwealth legislation, policies and programs that relate to children's rights, wellbeing and development.*<sup>26</sup>

However, the proposed section 46MB (1)(d) does not provide such a broad power. Additionally, the May 2011 report of the Legal and Constitutional Affairs Legislation Committee on the Commonwealth Commissioner for Children and Young People Bill 2010 (Cth) recommended at 5.19 that the Commissioner's powers include:

*monitoring and examining Commonwealth laws, policies, programs and funding, and their interaction with state and territory laws, policies, programs and funding*" (emphasis added).

**We submit** that proposed section 46MB should include the power for the Commissioner to consider the interaction of existing and proposed Commonwealth laws with state and territory laws, policies, programs and funding. Such an amendment would reflect the reality that the Commissioner will work in a federal system, and hopefully assist in avoiding unnecessary or wasteful use of State and Commonwealth resources.

**Our submission** is that section 46MB (1)(d) should be amended as follows:

*The following functions are conferred on the Commission:*

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<sup>25</sup> *Children Act 2004* (UK) c 31, s 3(1) requires that the 'case of an individual child in England raises issues of public policy of relevance to other children' the Commissioner may undertake an inquiry. The same provision applies to the Commissioner in Wales under *Children Act 2004* (UK) c 31 s 5(4).

<sup>26</sup> Explanatory Memorandum, Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 (Cth), 3.

...

*(d) to examine existing and proposed Commonwealth enactments, policies, programs and funding, and their interaction with state and territory laws, policies, programs and funding, for the purpose of ascertaining whether the existing or proposed Commonwealth enactments recognise and protect the human rights of children in Australia, and to report to the Minister the results of any such examination.*

## **5.5 Power to set agenda and instigate inquiry**

Sub-sections 11(1) (j) and (k) of the AHRC Act empower the Commission to:

*(j) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights; and*

*(k) on its own initiative or when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument.*

The Bill does not include a specific power for the Commissioner to set its own agenda and to instigate inquiries that relate to the human rights of children and young people. Although it is arguable that such a power is conferred on the Commission by virtue of the general powers allocated by sub-sections above, nothing in the Act as it stands specifically assigns such a role to the Commissioner (as opposed to the Commission as a whole).

**We submit**, that in the interests of clarity, the Bill should include a provision specifying that the Commissioner may direct his or her own agenda, independently initiate inquiries relating to the human rights of children and young people and undertake any function or activity the Commissioner deems necessary for the fulfilment of his or her legislative duty. The Commissioner should have the power to report directly to Parliament on any matter related to his or her functions.

## 5.6 Engagement with children

The proposed section 46MB (5)(a) provides that the Commissioner *may* consult with children in the performance of its functions.

The Explanatory Memorandum states that it is expected that the Commissioner *will consult directly with children*.<sup>27</sup> Similarly, the NGO Sector Position Paper emphasises that the Commissioner should “proactively involve and consult children from diverse groups with different needs”, through various means.<sup>28</sup>

Consultation with children is essential in fulfilling Article 12 of the *Convention on the Rights of the Child*, which is commonly referred to as the “participation right”. Article 12 gives children the right to participate in decision-making processes that may be relevant in their lives and to influence decisions taken in their regard.

**We submit** that the object of the proposed section 46MB (5)(a) could be strengthened by amending the Bill to:

- (a) require that the Commissioner consult with children from a broad cross-section of the community in ways appropriate to their age and maturity; and
- (b) require the Commissioner to formally establish an advisory committee.

This would reinforce the objective of the Commissioner to encourage the active involvement of children and young people in decisions that affect them,<sup>29</sup> by providing a mechanism through which young people could contribute to the Commissioner’s activities.

Advisory boards have been implemented in other jurisdictions, for example the Children’s Rights Commissioner for London established an advisory board of 15 children aged between 9 and 16 years. The New Zealand Commissioner has a “Young Peoples Reference Group” consisting of children aged 12 to 18 years of age. Similarly the majority of the states and territories commissioners and guardians are required to or have the capacity to establish a youth advisory committee.<sup>30</sup>

**We submit** that a new section 46MBA, similar to section 52(2) of the *Commissioner for Children and Young People Act 2006* (WA), should be inserted as follows:

*The Commissioner must establish advisory committees consisting of children and young people, who the Commissioner considers are from a broad range of socio-economic and cultural backgrounds and age groups, to assist in the performance of the Commissioner’s functions.*

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<sup>27</sup> Explanatory Memorandum, Australian Human Rights Commission Amendment (National Children’s Commissioner) Bill 2012 (Cth), 8 [21].

<sup>28</sup> Australian Youth Affairs Coalition, above n 5, 7, 10.

<sup>29</sup> Explanatory Memorandum, Australian Human Rights Commission Amendment (National Children’s Commissioner) Bill 2012 (Cth), 1.

<sup>30</sup> The following states *must* establish an advisory committee or similar: New South Wales Commissioner for Children and Young People, South Australian Guardian for Children and Young Persons, Tasmanian Commissioner for Children, and Western Australia Commissioner for Children and Young People. The following *may* establish an advisory committee or similar: ACT Children & Young People Commissioner, Queensland Commission for Children and Young People and Child Guardian, Victorian Minister for Children. Victoria has established a Children’s Council under the *Child and Wellbeing Safety Act 2005* (Vic). Queensland and the ACT currently do not have children or youth advisory councils.

## 5.7 Consideration of children who are vulnerable or at risk

The proposed section 46MB (4) of the Bill provides that the Commissioner may *give particular attention to children who are at risk or vulnerable*, when performing functions under that section.

The Explanatory Memorandum further clarifies that this includes, but is not limited to, children with a disability, Aboriginal and Torres Strait Islander children, homeless children and those who are witnessing or subjected to violence.

We echo the concerns referenced in the Senate Report<sup>31</sup> and note the latest statistics collected by the Council of Australian Governments<sup>32</sup> that indicate that Aboriginal and Torres Strait Islander children are more likely to suffer from multiple disadvantage, with well-documented links between youth offending, mental illness, intellectual disability and homelessness. In this context, a discretionary power may be insufficient to protect the particular needs of Aboriginal and Torres Strait Islander children, as a sector of particularly vulnerable or at risk children.

Accordingly, **we submit** that section 46MB (4) is amended to read as follows:

*In performing functions under this section, the National Children's Commissioner must give particular attention to, the interests and needs of:*

- (a) *Aboriginal and Torres Strait Islander children and young people;*  
*and*
- (b) *Children and young people who are vulnerable or disadvantaged for any reason.*

## 5.8 Make recommendations and require responses

The proposed section 46MN (1)(a) requires the Commissioner to submit a report to the Minister on matters relating to the exercise of human rights by children in Australia,

In addition to this obligation, there needs to be a counter- obligation placed on the Minister or government to provide a response to the report and /or report on any action taken in respect of the recommendations. This counter-obligation would increase the effectiveness Commissioners function to make recommendations.

**We submit** that a new sub-section (3A) be inserted into section 46MB as follows:

*As soon as practicable after the Minister receives the Commissioner's report in accordance with section 46MB(1)(a) of this Act:*

- (a) *the Minister will provide a written response to the Commissioner. The response may include the action proposed in relation to the recommendations or issues raised and, where the proposed action is contrary to the recommendations, provide reasons for such action.*
- (b) *The Minister's written response will be made publicly available through the Australian Human Rights Commission website.*

<sup>31</sup> Senate Legal and Constitutional Affairs Legislation Committee, above n 7, 48- 49 [4.36-4.39].

<sup>32</sup> Productivity Commission Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators*, (2011).

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## 6 Conclusion

This inquiry into the establishment of a National Children's Commissioner provides an opportunity to design effective mechanisms for protecting the rights of one of the most structurally vulnerable groups in Australia - children. Working in consultation with the existing State and Territory Children's Commissioners, the National Children's Commissioner has an important role to play in respect to monitoring, examining and coordinating, at a national level, the laws, policies and practices that affect children and their exercise of human rights.

Our submissions aim to strengthen and build upon what is a commendable Bill.

***Human Rights Law Group  
King & Wood Malletsons  
5 June 2012***