



Australian
Human Rights
Commission

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

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE**

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Table of Contents

1	Introduction.....	3
2	Summary	3
3	Recommendations.....	3
4	Why does Australia need a National Children's Commissioner?	4
5	Key features of a National Children's Commissioner	5
6	Adequate resourcing	5
7	Title of the position.....	6
8	Explicit recognition of the <i>Convention on the Rights of the Child</i>	7
9	Explicit reference to state and territory children and young people's commissioners and guardians	7
10	Reference to the <i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>	8
11	Reference to the <i>Optional Protocols to the Convention on the Rights of the Child</i>	8

1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012.
2. The Bill amends the *Australian Human Rights Commission Act 1986* (Cth) to establish the office of National Children's Commissioner within the Australian Human Rights Commission.

2 Summary

3. The Commission welcomes the introduction of legislation to establish a national Children's Commissioner.
4. The Commission believes that a national Children's Commissioner can play an important role in protecting the rights of children and young people.
5. The key features of a national Children's Commissioner should be:
 - a. independence from government
 - b. statutory authority and power, including security of tenure
 - c. adequate resourcing
 - d. accessibility to children, including establishment of a child-appropriate complaints process
 - e. exclusive focus on children under 18 years of age
 - f. ability to act proactively and reactively and to direct his or her own agenda.
6. The Commission believes that this Bill would enable most these key features of the role to be fulfilled.
7. However, the Commission has concerns regarding the resource allocation for the position, the title of the position, explicit recognition of the *Convention on the Rights of the Child*, explicit reference to the state and territory children and young people's commissioners and guardians, and reference to relevant international human rights instruments in section 46MB(6)(b) of the Bill.

3 Recommendations

8. **Recommendation 1:** The Australian Government should establish an office of national Children's Commissioner with the primary function of monitoring, investigating and reporting on children's rights as set out in the *Convention on the Rights of the Child*.
9. **Recommendation 2:** The Bill should be amended so that the title of the position is 'Australian Children's Commissioner'.

10. **Recommendation 3:** The importance of the *Convention on the Rights of the Child* to the reporting function of the Children's Commissioner should be explicitly recognised in section 46MB(3)(a) of the Bill.
11. **Recommendation 4:** There should be explicit reference to state and territory children and young people's commissioners and guardians in section 46MB(5) of the Bill.
12. **Recommendation 5:** The *Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* and its *Optional Protocol* (OPCAT) should be included in section 46MB(6)(b) of the Bill
13. **Recommendation 6:** The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* should be included in section 46MB(6)(b) of the Bill.

4 Why does Australia need a national Children's Commissioner?

14. For several years, the Commission has called for the creation of a dedicated office at the national level tasked with monitoring and advocating for the protection and promotion of children's rights in Australia.
15. Under the *Australian Human Rights Commission Act 1986* (Cth), the Commission has a number of statutory functions to promote and protect human rights,¹ including those rights set out in the *Convention on the Rights of the Child* (CRC). The Commission has conducted a number of significant inquiries and projects on children's rights.² However, there is no specific commissioner dedicated to child rights. Moreover, the Commission is not specifically resourced to conduct policy work in children's rights.
16. While all states and territories in Australia have a commissioner or guardian for children and young people living in that state or territory, there is still a need for a national Children's Commissioner. Not only do the responsibilities of state and territory commissioners and guardians vary considerably,³ but there are some policy issues for which responsibility rests with the Commonwealth and which have a direct impact on the lives of children, including immigration, social security and family law.
17. In addition, many of the issues facing children in Australia, such as homelessness, abuse, violence and bullying, mental illness and access to justice affect children across all of Australia. These are national issues and they need to be understood, analysed and responded to from a national perspective.
18. The Commission has recommended the establishment of a national Children's Commissioner for several years:

- In October 2010, the Commission produced a Discussion Paper on an Australian Children's Commissioner (available at http://humanrights.gov.au/human_rights/children/index.html).
 - In December 2010, the Commission made a submission to the Senate Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010 (available at http://humanrights.gov.au/legal/submissions/2010/20101215_children_commissioner.html).
 - In August 2011, the Commission recommended the establishment of a national Children's Commissioner in a submission to the United Nations Committee on the Rights of the Child (available at http://humanrights.gov.au/human_rights/children/about_2011submission.html).
19. The United Nations Committee has also, in its 2005 Concluding Observations, expressed concern that there was no national commissioner with a specific mandate for monitoring children's rights in Australia, and has noted that there was no unit devoted to children's rights at the Commission.⁴
20. **Recommendation 1:** The Australian Government should establish an office of national Children's Commissioner with the primary function of monitoring, investigating and reporting on children's rights as set out in the *Convention on the Rights of the Child*.

5 Key features of a national Children's Commissioner

21. In its Discussion Paper on an Australian Children's Commissioner in 2010, the Commission outlined the features of a national Children's Commissioner which are essential to ensure that the role can make an effective contribution to the protection of children's rights in Australia. They are:
- independence from government
 - statutory authority and power, including security of tenure
 - adequate resourcing
 - accessibility to children, including establishment of a child-appropriate complaints process
 - exclusive focus on children under 18 years of age
 - ability to act proactively and reactively and to direct his or her own agenda.
22. The Commission is generally satisfied that the Bill enables these key features of the role to be fulfilled. However, the Commission has concerns about some of the provisions of the Bill, as outlined below.

6 Adequate resourcing

23. The Attorney-General has indicated that the office of National Children's Commissioner will be funded at \$3.5 million over four years. The Commission

welcomes this commitment of funding which will enable the Commission to provide a minimal level of staff for that Commissioner.

24. However, the Commission is concerned that the announced funding will not by itself meet the real cost of creating this position. For example, the Commission expects that there will be a rise in complaints of breaches of the CRC made to the Commission under the *Australian Human Rights Commission Act 1986* (Cth) and of discrimination made under the *Age Discrimination Act 2004* (Cth). There will also be additional demands made on other Commission staff, including on our legal and communications teams as well as on finance and personnel staff. This increase in the general workload of the Commission is not recognised in the amount of funding that has been provided for the creation of the position. Nor will the announced funding be adequate to allow the Commissioner to engage in any substantial project work. A high quality annual report would ideally be informed by work of this kind.
25. By way of example, the current funding of the Age Discrimination Commissioner, which is comparable to that allocated for the Children's Commissioner, enables the Commission to employ two policy staff and an executive assistant for the Commissioner. It covers basic overheads but does not take into account the flow on effects to other areas of the Commission. Since the full-time Age Discrimination Commissioner was appointed there has been a 15% increase in age discrimination complaints and a 38% increase in written and telephone enquiries in relation to age discrimination. To assist the Age Discrimination Commissioner to undertake substantial work in the area of stereotyping of older people in the media special funding of \$2.1m over four years has been provided to the Commission.
26. In addition, the Commission has concerns that the requirement that the Children's Commissioner produce an annual report to Parliament, as set out in section 46MB (1) of the Bill, is a resource-intensive approach to the role of Commissioner. While there is flexibility which can be applied in the production of a report, the experience of the Aboriginal and Torres Strait Islander Social Justice Commissioner has been that it takes considerable resources to produce on an annual basis a well-researched report that will have national impact.

7 Title of the position

27. The Commission notes that the Bill uses the title 'National Children's Commissioner'. The Commission preference is for the title to be changed to the 'Australian Children's Commissioner'.
28. In 2009, the Commission changed its name from the Human Rights and Equal Opportunity Commission to the Australian Human Rights Commission. At that time, the word 'Australian' clarified our role as a national human rights institution.
29. The Commission believes that it would be more appropriate for a Children's Commissioner based at the Commission to be called the 'Australian

Children's Commissioner'. Not only would this approach clearly distinguish the national Commissioner from state and territory children's commissioners, it would also identify the Commissioner internationally with this country.

30. **Recommendation 2:** The Bill should be amended so that the title of the position is 'Australian Children's Commissioner'.

8 Explicit recognition of the *Convention on the Rights of the Child*

31. The Commission notes that section 46MB(3)(a) of the Bill sets out the requirements for preparing the annual report. While not strictly necessary, consideration could be given to adding an additional requirement that explicitly ties the report to the CRC. For example, the report could be required to 'identify matters of compliance with Australia's human rights obligations, particularly under the *Convention on the Rights of the Child*'.
32. The CRC is the most significant human rights treaty for the protection of children's rights. It incorporates the whole spectrum of human rights – civil, political, economic, social and cultural – and sets out the specific ways these rights should be ensured for children.
33. While there is a reference to the CRC in section 46MB(6), it may be useful to give explicit recognition to its importance as a point of reference for the Commissioner in preparing his or her report.
34. **Recommendation 3:** The importance of the *Convention on the Rights of the Child* to the reporting function of the Children's Commissioner should be explicitly recognised in section 46MB(3)(a) of the Bill.

9 Explicit reference to state and territory children and young people's commissioners and guardians

35. The Commission notes that the Explanatory Memorandum to the Bill refers, in paragraph 13, to the importance of collaborating with state and territory children and young people's commissioners and guardians. However, the Bill does not make reference to these bodies specifically, although section 46MB(5) states that in performing its functions, the National Children's Commissioner may consult with state and territory 'departments and authorities'.
36. Given the relevance of the work performed by the state and territory children and young people's commissioners and guardians to the Children's Commissioner, the Commission suggests that they be explicitly noted in section 46MB(5).
37. **Recommendation 4:** There should be explicit reference to state and territory children's and young people's commissioners and guardians in section 46MB(5) of the Bill.

10 Reference to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

38. The Commission notes that section 46MB(6)(b) refers to six instruments to which the National Children's Commissioner must have regard. This list omits the *Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and the *Optional Protocol to this Convention* (OPCAT).
39. The Commission considers that CAT and OPCAT are highly relevant instruments for the national Children's Commissioner, especially in light of Australia's signature of OPCAT. Our signing of OPCAT signals our intention to establish a system of regular preventive monitoring of all places of detention, including juvenile detention facilities and immigration detention facilities where children may be detained. This omission appears inconsistent with paragraph 22 of the Explanatory Memorandum to the Bill.
40. **Recommendation 5:** The *Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* and its *Optional Protocol* (OPCAT) should be included in section 46MB(6)(b) of the Bill.

11 Reference to the *Optional Protocols to the Convention on the Rights of the Child*

41. The Commission notes that there is no reference in the Bill to the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.
42. These Optional Protocols have been ratified by Australia and form part of Australia's binding obligations in respect of children under international law. The Commission recommends that they be included in section 46MB(6)(b) of the Bill.
43. **Recommendation 6:** The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* should be included in section 46MB(6)(b) of the Bill.

¹ See *Australian Human Rights Commission Act 1986* (Cth), s 11(1), (e), (f), (g), (h), (j), (k), (m), (n), (o) and (p).

² See, for example, Australian Human Rights Commission and the Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (1997). At http://www.humanrights.gov.au/human_rights/children/seen_and_heard.html; Australian Human Rights Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004). At http://www.humanrights.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf (viewed 5 July 2011); Human Rights and Equal Opportunity Commission, *Rights of Passage: A Dialogue with Young Australians about Human Rights* (2005). At http://www.humanrights.gov.au/human_rights/rights_passage/index.html; Human Rights and Equal

Opportunity Commission, *Recommendations: National Inquiry into Rural and Remote Education* (2002). At http://www.humanrights.gov.au/pdf/human_rights/rural_remote/Rec_book.pdf; See also Australian Human Rights Commission webpages on children's rights. At http://www.humanrights.gov.au/human_rights/children/index.html; the Commission also makes submissions to court cases relevant to children's rights: see <http://www.humanrights.gov.au/legal/submissions/index.html>.

³ For example, some offices, such as the Queensland Commission for Children and Young People and Child Guardian and the South Australian Office of the Guardian for Children and Young People, focus on certain groups of disadvantaged children, including children in government care or children with no one to act on their behalf. The ACT Commission, in contrast, has a much broader mandate to promote and protect the rights of all children and young people in the ACT. For further information see the websites of state and territory children's commissioner and guardians at the following hyperlinks: Queensland Commission for Children and Young People and Child Guardian (2011). At <http://www.ccypcq.qld.gov.au>; New South Wales Commission for Children and Young People (2011). At <http://kids.nsw.gov.au>; The Victorian Office of the Child Safety Commissioner (2011). At <http://www.ocsc.vic.gov.au>; ACT Children and Young People Commissioner (2011). At <http://www.hrc.act.gov.au>; Commission for Children and Young People (2011). At <http://www.ccyp.wa.gov.au>; Office of the Children's Commissioner Northern Territory (2011). At <http://www.childrenscommissioner.nt.gov.au>; South Australian Office for Youth (2011). At <http://www.officeforyouth.sa.gov.au>.

⁴ United Nations, *Committee on the Rights of the Child Concluding Observations: Australia* (20 October 2005). At [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6f6879be758d0e8ec12570d9003340ba/\\$FILE/G0544374.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6f6879be758d0e8ec12570d9003340ba/$FILE/G0544374.pdf).