



INTERNATIONAL  
COMMISSION  
OF JURISTS

1 June 2012

Committee Secretary  
Senate Legal and Constitutional Affairs Committee

PO Box 6100  
Parliament House  
CANBERRA ACT 2600

**SUBMISSION TO THE INQUIRY INTO THE AUSTRALIAN HUMAN RIGHTS COMMISSION AMENDMENT (NATIONAL CHILDREN'S COMMISSIONER) BILL 2012**

The International Commission of Jurists (ICJ), founded in 1952, has as its mandate the promotion of the rule of law and the legal protection of human rights throughout the world. As a non-governmental organisation, it has many national sections and affiliates in all regions of the world, each of whom adhere to the ICJ mandate. The Australia Section of the International Commission of Jurists (ICJA) has branches in most States and Territories.

The ICJA wishes to respond to the call by the Senate Legal and Constitutional Affairs Legislation Committee for submissions to the Inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012.

The ICJA would like to congratulate the Australian Government for recognising the importance of the human rights of children, one of the most vulnerable groups in society. The ICJA is strongly supportive of the creation of a Commissioner position within the Australian Human Rights Commission (AHRC) with an exclusive focus on children's rights in

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The International Commission of Jurists, founded in Berlin in 1952, is an international non-governmental organisation with consultative status to the United Nations, UNESCO, the Council of Europe, and the Organisation of African Unity. Its headquarters are in Geneva, with autonomous national sections and affiliates around the world. The Australian Section was founded in 1958 by the then Chief Justice of the High Court of Australia, Sir Owen Dixon, OM, GCMG

Australia.

However, the ICJA is concerned about the limited scope of the Children's Commissioner's functions under the proposed section 46MB. Additional functions should be given to the Children's Commissioner to better reflect the needs of vulnerable children in Australia.

### **Guardianship**

The ICJA has significant concerns about the guardianship functions of the Minister for Immigration and Citizenship provided under section 6 of the *Immigration (Guardianship of Children) Act 1946*. The legal and moral responsibilities of a guardian are fundamentally incompatible with the exercise of Ministerial powers, such as the power to detain children who are non-citizens and the obligation of the Minister to act as respondent in appeal proceedings. The ICJA notes that the Minister's guardianship functions are routinely delegated to staff members of the Department of Immigration and Citizenship or relevant social welfare agencies operating at the State level.

The ICJA submits that this arrangement does not ensure that the best interests of the child, recognised as fundamental under Article 3 of the Convention on the Rights of the Child, are upheld. Giving these supervisory functions to the Children's Commissioner (who may then delegate them as necessary) would ensure that the rights of asylum seeker children are prioritised and subject to external scrutiny.

The ICJA notes that this function was provided in both variants of the *Commonwealth Commissioner for Children and Young People Bill 2010* in section 9(e):

*(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*

This function was provided alongside important ancillary functions including the right to intervene in legal cases, which has been acknowledged in the current Bill through an amendment to section 46PV.

The AHRC, in its submissions on the above Bill, recognised the importance of independent legal guardianship for unaccompanied minors and the concerns about the current framework.<sup>1</sup>

The ICJA has evaluated these matters in more detail in its submission to the Australian Human Rights Commission's Inquiry into the treatment of individuals suspected of people smuggling offences that say they are children. The ICJA's submission to the Inquiry is attached to this submission for the Committee's consideration.

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<sup>1</sup> AHRC Submission, *Commonwealth Commissioner for Children and Young People Bill 2010*, [39]-[42].

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## Complaints

The ICJA notes that an individual complaint mechanism for the Committee on the Rights of the Child, the international body responsible for administering the Convention on the Rights of the Child, has been established under the *Optional Protocol to the Convention on a Communications Procedure*. This Protocol and the mechanism it establishes came into force on the 28<sup>th</sup> of May 2012 (though Australia has not yet signed or ratified the Protocol).

The ICJA notes that the Commission has the power to inquire into complaints under the combined operation of sections 20(1)(b) and 11(f) of the *Australian Human Rights Commission Act 1986* (Cth). However, the ICJA submits that the role of the Children's Commissioner in responding to complaints (particularly where they require escalation to the international plane) should be reinforced and clarified in the new section 46MB.

## Funding

The ICJA submits that for the Children's Commissioner to function effectively, the AHRC needs sufficient funding to meet the direct and indirect costs of the new position. The ICJA is concerned about the current level of funding and the additional costs required for the Commissioner to fulfil these recommended additional functions. The ICJA is particularly concerned by the comments of AHRC President Catherine Branson that current funding levels "would not be adequate to assist with what we would expect to be a rise in complaints made under the convention on the rights of the child".<sup>2</sup> The ICJA submits that increased funding is required for the satisfactory discharge of the Children's Commissioner's functions as proposed and the additional functions submitted above.

Sincerely,

Steve Mark  
Chairperson, International Commission of Jurists (Australian Section)

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<sup>2</sup> Herald Sun, "AG announces National Children's Commissioner" (23 May 2012), available at <<http://www.heraldsun.com.au/news/breaking-news/ag-announces-national-childrens-commissioner/story-e6frf7jx-1226364504156>>