



The Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

14th December 2010

Dear Secretary

**Submission to the Senate Inquiry into the proposal for a  
Commonwealth Commissioner for Children and Young People**

Youthlaw commends Senator Hanson-Young for introducing the *Commonwealth Commissioner for Children and Young People Bill 2010* which we strongly support.

We thank the Senate Legal and Constitutional Affairs Committee for giving us the opportunity to comment to their Inquiry into the proposal for a Commissioner.

**1. About Youthlaw**

Youthlaw is Victoria's state-wide community legal centre for young people under 25 years. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework.

Youthlaw is located at Frontyard Youth Services in central Melbourne. This is a group of co-located services including crisis housing support, Centrelink, legal and health services, provided for young people who are homeless or at risk of becoming homeless.

Youthlaw is active in law reform and policy processes, where children and young people are affected by current laws, proposed amendments or new laws, policies and procedures. Our work relating to law reform processes is conducted within a child rights framework based on standards set in the United Nations Convention on the Rights of the Child (CROC). In particular Youthlaw's policy & project work is informed by the principle of youth participation embedded in CROC.

For many years Youthlaw has been calling for the establishment of an independent Commissioner for Children and Young People established by legislation with reference to CROC, with broad jurisdiction and powers to assist with the promotion, protection, monitoring and enforcing children and young people's rights. As far back as 2001 Youthlaw was part of a coalition which called for the establishment of a Children and Young People's Commission in Victoria.<sup>1</sup>

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<sup>1</sup> YACVic's *Are you Listening to us?* <http://www.yacvic.org.au/policy/items/2009/01/256894-upload-00001.pdf>

## **2. Why we need a Commissioner for Children and Young People**

### **a. Better protecting children and young people's rights**

A national Children's Commissioner will play an important role in better promoting and protecting the rights of all children in Australia, particularly those identified as being "at-risk". Youthlaw confirms the appropriateness of the Bill having particular focuses on indigenous children, children in detention, and unaccompanied asylum seeking children and young people. However we stress that the Commissioner should not only advance the status, but also ensure their office is accessible all children, especially those most vulnerable and disadvantaged including children in out of home care or detention, children from minority and indigenous groups, children with disabilities, children living in poverty, refugee and migrant children, and homeless children and young people etc.

In Youthlaw's experience there are a number of significant gaps in the protection currently afforded to human rights of children and young people. Last year Youthlaw contributed to the National Human Rights Consultation (Consultation).<sup>2</sup> The deficiencies in the current system of rights protection included:

- A failure to protect children and young people from a range of abuse and violence: especially in state care;
- Young people suffer a unique deprivation of their participation rights in the current structure and framework of Australian governance and legal processes; they have a lack of a voice in the decisions that affect them.
- Failure to provide the necessary support and services to promote the survival and development of children and young people, including a lack of housing, an inadequate youth income via social security, and high numbers of young people disengaged from the mainstream education system.
- Society's general "vilification" and "demonisation" of teenagers.

Children and young people do not have a high political profile in Australia and their rights and interests are not promoted in a systematic way. Previously the UN Committee on the Rights of the Child has urged States around the world to establish independent commissioners for children's rights:

*"While adults and children alike need independent NHRIs... [or Children's Commissioners]... to protect their human rights, additional justifications exist for ensuring that children's human rights are given special attention. These include the facts that children's developmental state makes them particularly vulnerable to human rights violations; their opinions are still rarely taken into account; most children have no vote and cannot play a meaningful role in the political process that determines Governments' response to human rights; children encounter significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights; and children's access to organizations that may protect their rights is generally limited."*<sup>3</sup>

### **b. Implementing the Convention**

An independent national Commissioner for Children and Young People would provide an important mechanism to promote and monitoring the implementation of CROC. We applaud the Bill for taking as its central reference point the United Nations Convention on the Rights of the Child.<sup>4</sup> Despite Australia signing the Convention on the Rights of the Child (CROC) 20 years ago, this convention has not been incorporated in our domestic law and Australia is still in breach of its obligations to

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<sup>2</sup> "Young People Having their say about human rights", Youthlaw Submission to the National Human Rights Consultation Committee

15 June 2009 at <http://www.youthlaw.asn.au/upload/nhrc-youthlawsubmission-june2009.pdf>

<sup>3</sup> General Comment no. 2 (2002) CRC/GC/2002/2,p2, para 5

<sup>4</sup> Clause 3(3) of the Bill

*“undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention”.*

*Additionally we recommend the objectives of the Bill should also have reference to CROC’s Optional Protocols and other relevant international human rights instruments.*

**c. Provide a strong independent advocate**

Youthlaw strongly supports a Commonwealth Children’s Commissioner that is independent and has a broad brief across all issues concerning children and childhood. The current Child Safety Commissioner in Victoria lacks this independence, being based in the Department of Human Services, and reporting to the government, rather than Parliament. The Child Safety Commissioner has no coercive powers to investigate matters and relies of the cooperation of the department and other agencies to perform its functions. Additionally the Child Safety Commissioner’s role is limited to children in out of home care or at least heavily involved with child protection.

In Norway the Children’s Ombudsman is a statutory position, fully funded by the Norwegian government with a legislative mandate to investigate complaints brought by children and young people. The evidence is that the Office of the Children’s Ombudsman pursues complaints vigorously and transparently and that it has done a lot to make children and young people a far more visible part of the civic life of Norway. It has probably helped the work of the Children’s Ombudsman that Norway has also legislated to make the United Nations Convention on the Rights of the Child a part of Norway’s domestic statutes.

It appears from Norway’s experience that the key to effective functioning is that a Commissioner’s office must have adequate resources to do its job well. They must have adequate infrastructure, funding (including specifically for children’s rights,) staff, premises, and freedom from forms of financial control that might affect their independence.

Currently the Australian Human Rights Commission has specific legislative functions and responsibilities for the protection and promotion of human rights, and monitoring Australia’s compliance with its international human rights obligations via public education, inquiries<sup>5</sup> and complaints. Although CROC is considered, the Commission does not have specific resources for a child rights focus/ portfolio.

**3. Functions and powers of Commissioner for Children and Young People**

Youthlaw supports intent of clauses 9, 10 and 11 of the Bill which describe the various proposed functions and powers of the Commissioner. We make the following comments and suggestions in relation to some specific elements of the role.

**a. Reviewing existing laws clause 9 (1) c) (i)**

Would recommend expanding the description of this function to include:

*Monitoring, auditing and reviewing the laws, policies, programs and practices of government departments, public authorities and service providers that affect children for compliance with child rights in UNCROC.*

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<sup>5</sup> E.g. Bringing them home: Stolen Generation Report (1997) and A last resort - The national Inquiry into Children in Immigration

**b. Conducting research, undertaking inquiries, reporting to parliament clause 9 )1) c) iii)**

We recommend expanding the description of this function to include:

*Research - Promote, commission, undertake and publish research on matters relating to the rights of children and young people.*

*Inquiries - initiate and conduct inquiries into and make recommendations to Parliament and any body or person, on any matter, including any enactment or law or any practice or procedure, relating to the welfare of children & young people.*

*Reports - Provide a written report to Parliament which outlines all complaints under the Act and highlights issues which appear to be systemic.*

*The Commissioner should also be given the power to require bodies to respond to his/her recommendations.*

*In addition to the Commissioner having the power to conduct inquiries and publish reports, there needs to be an obligation placed on the government to consider the advice.*

**c. Coordinating policies, programs and funding.... Clause 9) 1)(i)**

We recommend an amendment to this clause. In its present working it very much sounds like the responsibility of government not a body that is independent of government.

*Promote harmonization of national legislation, regulations and practices with the Convention on the Rights of the Child, its Optional Protocols and other international human rights instruments relevant to children's rights and promote their effective implementation, including through the provision of advice to public and private bodies in construing and applying the Convention.*

**d. Public education programs ...Clause 9(1)(f)**

We recommend an amendment to this clause to expand from a focus on early childhood development to;

*Promote public understanding and awareness of the importance of children's rights and, for undertake human rights education which specifically focuses on children in partnership with the Australian Human Rights Commission and their curriculum resources.*

**e. Proactively involve children & young people in decisions that affect them... clause 9(1) (g)**

Youthlaw supports this clause which promotes the participation of children and young people in relevant decision making forums. The Commissioner's office should be a forum where children and young people can expect to be heard and listened to, and to be provided with opportunities to participate more fully in our community.

*We recommend that this participation should extend to having a say in regard to the appointment of the Commissioner.*

*The Commissioner should also have a key role to play in promoting respect for the views of children in all matters affecting them, as articulated in article 12 of the Convention, by Government and throughout society.*

**f. Individual complaints**

There is an additional component of the work of the Commissioner we can identify that will assist them to be effective in promoting the rights of children and young people, in particular investigate individual complaints from children about breaches of their human rights.

Currently in Australia, children and young people can make a complaint about only some human rights breaches. For example, children can make a complaint to the Australian Human Rights Commission if they feel they have been discriminated against on the grounds of age, race, sex or disability. The Australian Human Rights Commission has a more limited mandate to investigate complaints where an action by the Commonwealth is alleged to have breach or infringed a right contained in the CRC.

Youthlaw supports the UN Committee on the Rights of the Child recommendation that a Commissioner be mandated to investigate complaints from individual children concerning violations of their rights.

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

**g. Report to the UN Committee on the Rights of the Child**

In principle we support the Commissioner having a role in reports to the UN CRC. However in our view it is essential the Commissioner remain entirely free to set their own agenda and determine their own activities. The role of the Commissioner is to monitor independently Australia's compliance and progress towards implementation of CROC. This role is complementary to the role of non government organisations play in the reporting process. The Australian Government has ratified the Convention on the Rights of the Child and takes on obligations to implement it fully. The Government should not delegate its monitoring obligations to the Commissioner, and it is essential that Government respects the independence of both the Commissioner and NGOS in this process.

Therefore Youthlaw suggests an amendment of the clause such as:

*The Commissioner should contribute independently to the reporting process under CROC and other relevant international instruments and monitor the integrity of government reports to international treaty bodies with respect to children's rights.*

If you require any further clarification please contact Tiffany Overall on 9611 2422 or via email on [tiffany@youthlaw.asn.au](mailto:tiffany@youthlaw.asn.au)

Yours sincerely

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