



Refugee Council  
of Australia

## **SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE COMMONWEALTH COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE BILL 2010**

The Refugee Council of Australia (RCOA) is the national umbrella body for organisations involved in supporting and representing refugees and asylum seekers, with a membership of more than 625 organisations and individuals. RCOA promotes the adoption of flexible, humane and constructive policies by government and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants.

RCOA welcomes the opportunity to contribute to the inquiry into the *Commonwealth Commissioner for Children and Young People Act 2010* (henceforth, the Bill). RCOA is particularly interested in the impact that this legislation will have on Australia's treatment of refugees, asylum seekers, stateless persons and all other humanitarian entrants, including those people located within Australian territories and particularly those in immigration detention settings.

The need for the establishment of an independent Office of the Commonwealth Commissioner for Children and Young People is pressing, and the issues regarding children who have sought asylum in Australia or have come through the Refugee and Humanitarian Program present a compelling case for this independent body, notwithstanding the other groups of children at risk of having their rights violated.

In *A last resort?, the report of the National Inquiry into Children in Immigration Detention*, the then Australian Human Rights and Equal Opportunity Commission (HREOC) found that the system failed to uphold the rights of children, with large numbers of children being held in high security immigration facilities for long periods of time. While there have been some positive changes both legislatively and in practice since this report, children are still subjected to indefinite mandatory detention, with over 800 children and young people currently in immigration detention settings.

The need for a national Children's Commissioner has been promoted and recommended by a number of key agencies and bodies and was even an endorsed action of the Council of Australian Governments (COAG) in their 2009 National Framework for Protecting Australia's Children.<sup>1</sup>

As the Australian Human Rights Commission (AHRC) points out in its discussion paper on an Australia Children's Commissioner (2010), a coordinated national approach to children's rights

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<sup>1</sup> See [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2009-04-30/docs/child\\_protection\\_framework.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf) for a copy of the strategies and actions outlined in the framework.

is required. This is particularly true for those children who seek asylum in Australia, as immigration matters fall under the Federal Government's mandate.

RCOA supports the establishment of a federal Office of the Commissioner for Children and Young People, with recommendations for further development against the functions and powers of the Child Commissioner outlined in the Bill set out below.

### **Section 9, part 1:**

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

##### **(d) promoting and protecting the rights of children and young people in immigration detention, or children whose parents or guardians are in immigration detention**

RCOA strongly supports the Child Commissioner having a mandate to promote and protect the rights of children and young people in immigration detention, as well as children whose parents and guardians are in immigration detention. Children undergoing the refugee determination process are particularly vulnerable (both those in immigration detention and those on bridging visas in the community), and an independent Children's Commissioner would provide an outlet for these children to seek advice regarding their treatment and experiences in Australia throughout the process.

The issues of children in immigration detention were brought to light in the AHRC's recent report concerning immigration detention on Christmas Island.<sup>2</sup> AHRC outlined a number of concerns regarding the mandatory, arbitrary and unnecessary detention of children in poor conditions, including concern that this detention is not required by the Migration Act and is in violation of the international Convention on the Rights of the Child (CRC).

Some of the issues regarding children raised in AHRC's report include:

- Families with children and unaccompanied minors are detained in a closed immigration detention facility (the Construction Camp). Community Detention is no longer available on Christmas Island. Further, in the vast majority of cases where families with children or unaccompanied minors are transferred to the mainland, they are placed in detention facilities rather than Community Detention.
- The Construction Camp is not an appropriate environment for families with children or unaccompanied minors. There has been a substantial increase in the number of people detained in the Construction Camp, significantly reducing the level of available and appropriate services.
- The issues of access to services (including educational opportunities) include the ending of the program to send young children to kindergarten; the insufficiency of the education program for 16-17 years olds (who are not allowed to attend local schools), as it has a waiting list of 114 students; the lack of open grassy areas in the camp for children to play on, and the lack of toys, games or other materials for children's independent play inside the Construction Camp.
- There continues to be a lack of clarity surrounding responsibilities and procedures relating to child welfare and protection for children in immigration detention on Christmas Island.

##### **(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**

The role of the Minister for Immigration as legal guardian of unaccompanied minors has long been a matter of concern for RCOA and its members. The guardianship arrangements for unaccompanied minors seeking asylum, as well as those unaccompanied minors who have been resettled in Australia, has been a topic raised by a number of investigations, reports and

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<sup>2</sup> See [http://www.hreoc.gov.au/human\\_rights/immigration/idc2010\\_christmas\\_island.pdf](http://www.hreoc.gov.au/human_rights/immigration/idc2010_christmas_island.pdf)

submissions by agencies like the AHRC and has been a major point of concern in reports such as Professor Mary Crock's *Seeking Asylum Alone: Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children*.<sup>3</sup>

RCOA and others believe that a greater level of support is needed for unaccompanied minors as they move through the asylum process and after a decision is made as to their refugee status. The Minister for Immigration's guardianship obligations under the Immigration (Guardianship of Children) Act 1946 (IGOC Act) are, we believe, in conflict with the Migration Act, which gives the Minister powers to detain and to determine status. It is not reasonable to give the Minister responsibility simultaneously for guardianship, detention and status determination for the same young people. We believe the IGOC Act needs to be reviewed to resolve this conflict. However, the establishment of a Children's Commissioner would be the first step toward reforming the current arrangements, providing a viable alternative system of guardianship.

The United Nations High Commissioner for Refugees (UNHCR) recognises<sup>4</sup> that unaccompanied minors need additional support during and after the refugee determination process. The current delegation of guardianship does not ensure that a person who is primarily concerned with the best interests of the child has responsibility for the child for as long as he/she remains in Australia or until the child reaches 18 years old. There is no designated individual who can:

- ensure that the child is properly represented during the refugee status determination procedures and take legal responsibility for signing documents on his/her behalf;
- act as an advocate for the child if there are problems in the refugee status determination process, with welfare or other issues;
- oversee the care and management of the child;
- ensure that the child is not exposed to abuse or neglect.

RCOA strongly maintains that the needs of unaccompanied can only be met where there is active oversight by a legal guardian, supplemented by a comprehensive program of care and protection.

While the current system does allow for the appointment of a legal guardian for unaccompanied and separated minors who are seeking asylum in Australia, the Minister for Immigration has conflicting and contradictory responsibilities which obstruct him from focusing exclusively on protecting the best interests of the child. The Minister then delegates his responsibility to unaccompanied minors in immigration detention to others who have similar conflicting interests and to people who are in rotating positions, thereby ensuring no continuity of care or support.

The failure of the current system to provide effective guardianship means that unaccompanied minors are left without the independent advocacy, protection and care that they need and to which they are entitled. To ensure that Australian practice is compliant with the Convention on the Rights of the Child and the 1951 Convention Relating to the Status of Refugees, reform of the guardianship arrangements is necessary. The establishment of a Children's Commissioner with a mandate to act as a legal guardian is a necessary step in improving the system.

### **Section 9, part 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;**

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<sup>3</sup> Report available at <http://idcoalition.org/australia-report-mary-crock-seeking-asylum-alone/>

<sup>4</sup> UNHCR Guidelines on Unaccompanied Children.

**(c) all children and young people in Australia, including every external territory, regardless of their citizenship or residency status.**

RCOA strongly supports the application of the functions and powers of the Commissioner to all children and young people who are Australian citizens, residents and all of those children in Australian territory regardless of their residency status. This inclusive application is important, as some of the most vulnerable children in the Australian community and on excised Australian territory do not have Australian residence or citizenship (as they are in the process of having visa applications assessed).

#### **Section 10:**

##### **How the Commissioner is to perform functions**

**In performing the Commissioner's functions, the Commissioner must:**

- (a) consult with children and young people in ways appropriate to their age and maturity; and**
- (b) listen to and seriously consider the concerns, views and wishes of children and young people; and**
- (c) adopt work practices that ensure the Office of the Commissioner is accessible to children and young people and encourages their participation;**
- (d) consult with parents and guardians of children and young people; and**
- (e) consult with educators; and**
- (f) consult with relevant Commonwealth agencies, State and Territory bodies and other organisations**

RCOA supports the elements of the Bill which outline how the Commissioner is to perform the functions of the role, including consulting with children and young people in appropriate ways and adopting work practices that ensure the Office is accessible to children and encourages their participation. RCOA recommends that, in order for the Office of the Commissioner to be able to engage fully with all children, a youth participation approach be taken, with practices which maximise the inclusion of children and young people from a refugee, asylum seeker and humanitarian background. These children and young people have specific needs, so an inclusive approach that recognises and responds to these needs is vital. RCOA recommends that the Office of the Commissioner work with agencies which specialise in working with multicultural young people to develop approaches in line with best practice.

RCOA would also like this inclusive approach to be utilised when working with parents and guardians of refugee background, and to include the community sector organisations and agencies that work with and for young people from a refugee background and those seeking protection in Australia.

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

RCOA agrees that it is essential that the Commissioner be given the ability to act independently and supports the Commissioner's reporting requirements to Parliament in order to progress any necessary reforms. To enable this to occur, it is essential that the Office of Children's Commissioner be adequately resourced to ensure effective fulfilment of its many duties.

RCOA commends all those in the development of this Bill and recommends that it be supported by the Parliament.