

**Submission to the Senate Legal and Constitutional Affairs
Committee Inquiry into the Commonwealth Commissioner for
Children and Young People Bill 2010**

Mallesons Human Rights Law Group



20 December 2010

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

Executive Summary

In relation to the Commonwealth Commissioner for Children and Young People Bill 2010, the Mallesons Stephen Jaques Human Rights Law Group submits that:

- **Commissioner’s function include human rights education:** section 9(1) be amended to insert new sub-section (k) as follows:

“promoting understanding of and informed public discussion about the human rights, interests and well being of children.”

- **Broad-based consultation with children:** section 10(a) be amended to read:

“consult with children and young people from a broad cross-section of the community in ways appropriate to their age and maturity.”

- **Commissioner’s discretion to choose methods of engaging children:** the Commissioner should have discretion to determine the most appropriate methods of engaging with children.

- **Acting on its own initiative:** section 9(1)(c) be amended to read:

“advancing the status of children and young people in Australia, including Indigenous children and young people and other groups identified as being at risk, by:

(i) on its own initiative or when requested by a Minister, reviewing existing laws;

(ii) on its own initiative or when requested by a Minister, proposing new policies; and

(iii) on its own initiative or when requested by a Minister, conducting research, undertaking inquiries and reporting to Parliament.”

- **Independent reporting to the United Nations:** section 25 be amended to read:

“(1) The Commissioner, as the national advocate for children, is responsible for preparation of reports to the United Nations Committee on the Rights of the Child under the terms of the United Nations Convention on the Rights of the Child.

...

(4) Nothing in this section requires the Commissioner to report on behalf of the government, or prevents the Minister or another Minister of the Commonwealth from preparing and transmitting to the Secretary-General of the United Nations other reports to the United Nations Committee on the Rights of the Child on behalf of Australia.”

- **Response to Commissioner’s recommendations:** a new section be added after section 12 to read:

“Where the Commissioner has provided a report to the Parliament containing recommendations, the Commissioner may invite the relevant Minister to provide a response to those recommendations within a reasonable timeframe. Such a response may include the action proposed in relation to the recommendations and, where the proposal is contrary to the recommendations, reasons for the proposed course of action.”

- **Commissioner’s access to information:** a new section be inserted after section 9(2), providing:

“The Commissioner may, by notice in writing, require any government agency to provide the Commissioner with information (including documents) that is reasonably necessary for the performance of its functions under this Act. Where the production of such information would contravene legislation, including privacy law or legal professional privilege, or be contrary to national security interests, the relevant government agency will make the necessary redactions or otherwise explain the reason for non-production.”

- **The Commissioner be adequately resourced:** a new section be added following section 24 to read:

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

- **Minimum term of office:** section 14 be amended as follows:

“(1) The Commissioner holds office for the period specified in the instrument of appointment. The period must be a minimum of three years but not exceed five years.”

- **Consultation on appointment of Commissioner:** section 13(1) be amended as follows:

“The Commissioner is to be appointed by the Governor-General by written instrument, following consultation with children and organisations working with and for children.”

1 Introduction

The Mallesons Human Rights Law Group (“**Mallesons HRLG**”) welcomes the opportunity to make this submission in relation to the Commonwealth Commissioner for Children and Young People Bill 2010 (“**the Bill**”). This Bill seeks to establish an office that will provide important mechanisms for engaging with children and protecting children’s rights at the national level.

This submission was prepared by lawyers in the firm’s Sydney office. The content of this submission represents the views and opinions of the Mallesons HRLG, and does not necessarily represent the views of Mallesons Stephen Jaques 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 Commonwealth Commissioner for Children as proposed in the Bill.

2 Background

The purpose of this Bill is to:

“establish an independent statutory office of Commonwealth Commissioner for Children and Young People, to advocate at a national level for the needs, rights and views of people below the age of eighteen.”¹

The needs of children are obvious in a diverse range of situations: Indigenous children, those involved in the care and protection systems, children in immigration detention, children suffering the impacts of family breakdown and conflict, those caught in the criminal justice system, children facing disadvantage and youth who are homeless. The need for one national, independent, well-resourced Commissioner who can engage with the needs of children and provide momentum for evidence-based policy development and law reform is very real.

In 1997, Sir William Deane said:

There would... be few who would not recognise that in Australia... we still have considerable distance to travel between the actual and the ideal before there is adequate protection of the ‘best interests’ of all children in all situations.²

The establishment of a Commonwealth Commissioner for children, which would coincide with the 21st anniversary of Australia’s ratification of the United Nations Convention on the Rights of the Child (“**CRC**”), would be an important step towards shortening this distance.

¹ Explanatory Memorandum, *Commonwealth Commissioner for Children and Young People Bill 2010* (Cth), 1.

² Sir William Deane, ‘Opening Address’ (Speech delivered at the First Asia Pacific Conference on Children’s Rights, Brisbane, 2-5 April 1997).

3 Rationale for the establishment of a Commonwealth Children's Commissioner

3.1 Widespread support

Since the CRC was drafted in 1989, there has been a world wide movement towards recognising the fundamental rights that all children should be universally afforded.

The United Nations has supported the enactment of national children's commissioners in member States by calling upon States to 'put in place effective national legislation, policies and action plans, [to] strengthen relevant governmental structures for children'³ by establishing an independent human rights institution dedicated to children's rights.

The establishment of such an institution is necessitated by the structural disadvantage faced by children. The National Children's and Youth Law Centre ("NCYLC") has echoed the comments of the United Nations Committee on the Rights of the Child, that children are often prevented from representing their own interests (for example, by virtue of their developmental state, lacking the relevant skills and experience to engage in the political process, not having a vote, wielding power or holding resources).⁴ Similarly, the former Chief Justice of the Family Court, Alistair Nicholson, has noted that "children and young people are uniquely disenfranchised in our democratic community and lack both power and a high political profile".⁵

One way of helping to address the structural disadvantage children face in engaging with decision-making processes is to have a dedicated institutional advocate for children. This can be expected to improve the manner in which legislation and policies take account of the interests, needs and views of children.

We commend the introduction of this Bill, which has widespread and consistent support from the UN Committee on the Rights of the Child, the Australian Human Rights Commission, UNICEF, Defence for Children International and the NCYLC.⁶

3.2 Reasons why a Commonwealth Children's Commissioner is necessary

Australia ratified CRC in December 1990, however since that time, there have been numerous reports identifying the persisting vulnerability of children. One example is the ongoing disadvantage faced by Indigenous children. As recently

³ United Nations General Assembly, *Promotion and Protection of the Rights of the Child* 3rd Committee, 60th session, Agenda item 67 (20 October 2005) 3.

⁴ Ibid 4; 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 sess, UN Doc CRC/GC/2002/2 (15 November 2002) at para 5.

⁵ Honourable Chief Justice Alistair Nicholson, 'Promoting the best interests of the child: the case for a children and young people's commission in Victoria', (Speech delivered at the Law Institute of Victoria/Pitcher Partners President's Luncheon, Melbourne, 24 October 2002) 9.

⁶ Australian Human Rights Commission *An Australian Children's Commissioner*, Discussion Paper (2010) 2; UNICEF, 'Stand up for children's rights in Australia', 18 November 2010, <<http://www.unicef.org.au/Act/Speak-Out/Stand-up-for-childrens-rights.aspx#>>; Defence for Children and International, *Australian Children's Rights News (Newsletter of the Australian Section of Defence for Children International)* Number 40, December 2005, 4 <<http://www.dci-au.org/acrn/ACRNDecember2005.pdf>>; National Children's and Youth Law Centre, *Why Australia Needs a Commissioner for Children* Discussion Paper, (1995) 5.

as 2009, the United Nations Special Rapporteur reported on the human rights and fundamental freedoms of indigenous people in Australia, and commending the government for particular initiatives, noted the “distressingly high rates of violence and poor living conditions” of Indigenous women and children.⁷ Other reports by the Australian Law Reform Commission, such as *Seen and Heard*, *Bringing them Home*, *A Last Resort* and *Little Children are Sacred*⁸ and the 2005 *Concluding Observations of the UN Committee on the Rights of the Child* all paint a consistent picture of the need for ongoing reform of policy and law as it relates to children.

Many of these issues - immigration, indigenous affairs, family breakdown and social security - are areas of Commonwealth responsibility. However, on such matters of Commonwealth responsibility, the state and territory children’s commissioners and guardians have limited influence.⁹

Furthermore, responsibility for policy development, law reform and service delivery is divided across federal, state and local government as well as between government and community sectors. Consider the issue of family breakdown involving child abuse and family violence: at one time, a family can be involved with the federal family law courts, the state child protection authorities, state criminal proceedings and police authorities, dealing with emergency social security payments and receiving emergency and long term services from local community charities. The range of these needs potentially involves the Commonwealth Attorney-General, Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs, state child protection authorities, state police, the Family Court, the Children’s Court, the criminal court, Centrelink, crisis accommodation services and health care providers.

This is a complex interplay of converging issues and overlapping responsible entities. While each individual agency may seek within its own area of expertise and function to support the needs of children, each agency may be constrained by institutional priorities that are unrelated to the interests of children. An important role can be played by a Commissioner with an independent statutory mandate to promote legislative and policy changes in the interests of children.

Important reforms and investigations have or are occurring in the areas of family law, social security, indigenous policy, mental health, child protection, homelessness, family violence, resulting in policies such as the National Framework for Protecting Australia’s Children, Closing the Gap and the National Out of Home Care Standards. With such important issues on the agenda, and with a consistent history of reports indicating that Australia can protect its children better, the inquiry into the Bill is timely.

⁷ James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Addendum Situation of indigenous peoples in Australia*, United Nations General Assembly, Human Rights Council, 15th session, Agenda Item 3, UN Doc A/HRC/15/37/Add.4 (1 June 2010) para 45.

⁸ Australian Law Reform Commission, *Seen and Heard: priority for children in the legal process*, Report No 84 (1997), Australian Human Rights Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997); Australian Human Rights Commission, *A last Resort? National Inquiry into children in immigration detention* (2004).

⁹ Melissa Dejong and Subhaga Amarasekara “Why Australia Needs a National Children’s Commissioner”, (2010) Human Rights Law Resource Centre Bulletin-*Special Child’s Rights Edition*, 8-9, <<http://www.hrlrc.org.au/content/publications-resources/hrlrc-e-bulletin/past-issues/special-childrens-rights-edition-of-the-human-rights-law-resource-centre-bulletin/#commissioner>>.

4 Functions and Powers of the Commissioner

4.1 Broad focus on children at risk

Section 9 of the Bill sets out the proposed functions and powers of the Commissioner. Particular mention is made of Indigenous children, children in immigration detention and unaccompanied children arriving in Australia without authority. These groups of children are indeed particularly at risk and the Commissioner ought to devote appropriate attention and resources to these groups. We commend the inclusion of these functions.

It is important, however, to note that the Commissioner is given responsibility for “advancing the status of children and young people in Australia, including Indigenous children and young people **and other groups identified as being at risk**” [emphasis added]. Examples of other groups of children at risk include those in the care and protection system, those at risk of harm, those involved in the criminal justice system, children with mental health concerns, homeless children, children living in poverty and children with disabilities. It is important that the Commissioner be equipped to advance the status and protect the rights of all children who are at risk.

We submit that the words “and other groups identified as being at risk” provide the Commissioner with sufficient breadth of focus and flexibility to respond to an extensive range of issues as they arise. The Bill provides, for the avoidance of doubt, that the functions and powers of the Commissioner relate to all children and young people located in Australia (section 9(3)). Ensuring that the Commissioner has a mandate to determine the scope and priority to be given to particular issues. In addition, the Commissioner should not be restrained by the references to particular groups of children at risk in the Bill. These together will enhance performance of the Commissioner’s functions.

4.2 Education and promotion of children’s rights

The provision of information to and for children is essential both in fulfilling Australia’s obligation under Article 42 of CRC (“States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike”) and to foster the child’s right to participation and information (Articles 12 and 13 of CRC).

Informing children about their rights (and the rights of others) creates the potential to engage children in ongoing dialogue about the implementation of those rights. The Commissioner should provide information to children, not only about the office and its role, but also about human rights.

The Government’s introduction of Australia’s Human Rights Framework which includes human rights education is commendable in this regard. The Commissioner, having a particular mandate to consult with children, will be an important actor in the implementation of the Framework.

However, the Bill as currently drafted does not specifically include a reference to human rights education. Accordingly, we submit that the functions of the Commissioner as set out in section 9 of the Bill should be amended to specifically include education about children’s rights.

The amendment could be modelled on the Queensland *Commission for Children and Young People and Child Guardian Act 2000* which provides in

section 17(1)(m) that a function of the Commissioner is: “to promote understanding of, and informed public discussion about, the rights, interests and well being of children”.

We submit that section 9(1) be amended to insert new sub-section (k) as follows:

“promoting understanding of and informed public discussion about the human rights, interests and well being of children.”

We note that section 10(a) provides that the Commissioner, in performing its functions, must consult with children in ways appropriate to their age and maturity. The education function would be conducted in ways meaningful to, and engaging for, children. Strategies for fulfilling this function can therefore include creation of a youth friendly website, school information programs, television appearances and the use of social media. These methods have assisted in promoting the Commissioners profiles overseas¹⁰ and are likely to be assist in improving human rights awareness amongst children.

4.3 Participation

As noted above, section 10 of the Bill outlines the manner in which the Commissioner is to perform its functions. The Commissioner is to take a consultative approach and to engage appropriately with children (and adults that provide for and interact with children). This approach is to be commended and is essential in fulfilling Article 12 of CRC (commonly referred to as the “participation right”, and one of the objects of the Commissioner as set out in section 3(3) of the Bill).

One of the measures of the success of the Commissioner will be the extent to which this consultation and participation is implemented.¹¹ The effectiveness of this consultation and participation depends on its breadth (that is, engaging with different groups of children, including children of differing experiences, cultural, socio-economic and regional backgrounds) and the depth of its content.

An amendment could be considered to section 10(a) to ensure that a broad cross-section of children are consulted. Such an amendment could be modelled on the Western Australian *Commissioner for Children and Young People Act 2006*, which provides in s19(n) that a function of the Commissioner is to: “to consult with children and young people from a broad range of socio-economic backgrounds and age groups throughout Western Australia each year.”

We submit that section 10(a) be amended to read:

“consult with children and young people from a broad cross-section of the community in ways appropriate to their age and maturity.”

The experience of overseas children’s commissioners is instructive. For example, Wales’ Assembly’s initiative “Llais Infanc/Young Voice” established a

¹⁰ Nigel Thomas, Mandy Cook, Josey Cook, Hannah France, Joanne Hillman, Cerys Jenkins, Toby Pearson, Rhodri Pugh-Dungey, Ben Sawyers, Matthew Taylor and Anne Crowley, “Evaluating the Children’s Commissioner for Wales: Report of a Participatory Research Study”, (2010) 18(1) *The International Journal of Children’s Rights*, 19, 32.

¹¹ This function was noted as a measure of success in examining the Children’s Commissioner in Wales. See Kathryn Hollingsworth and Gillian Douglas, ‘Creating a Children’s Champion for Wales? The Care Standards Act 2000 (Part V) and the Children’s Commissioner for Wales Act 2001’ (2002) 65 *Modern Law Review* 1, 74.

consultation and information network where children use a website dedicated to asking questions about the Assembly and its work.¹² Further, in the UK children and organisations working with children are consulted on matters the Commissioner proposes to consider or research.¹³ This provision enhances the Commissioner's ability to engage with children's rights issues, by promoting communication between the organisations responsible for their care.

A more formal structure for engaging with children is seen in the Children's Rights Commissioner for London, which has established an advisory board of 15 children aged between 9 and 16 years. The board guide the day to day work of the Office.¹⁴ Similarly, the New Zealand Commissioner has a 'Young People's Reference Group' consisting of children aged 12 -18 years. The Group assists the Children's Commissioner with the development of its strategic direction and building regional networks within the country to consult and support the youth.¹⁵ While these methods may be instructive for an incoming Commissioner, they do not, in our submission, require legislative entrenchment, given the aforementioned obligations to consult widely.

We submit that the Commissioner have discretion to determine the most appropriate methods of engaging with children.

4.4 Complaints

Existing complaints mechanisms, including administrative complaints procedures and the courts, are not designed for use by children. The UN Committee on the Rights of the Child has outlined best practice for National Human Rights Institutions (or equivalent Children's ombudsman or commissioner) in promoting and protecting the rights of children ("**UN General Comment No. 2**"). Among other things, the Committee on the Rights of the Child recommends that the relevant National Human Rights Institution ("**NHRI**")¹⁶ have the power to:

*"consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children...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. When appropriate, NHRIs should undertake mediation and conciliation of complaints from children and investigate breaches of human rights."*¹⁷

We submit that there must be appropriate remedies and mechanisms for children's complaints to be heard and addressed. We submit that the

¹² Ibid 76.

¹³ *Children Act 2004* (UK) c 31, s 4(b).

¹⁴ Youth Affairs Council of Victoria Inc., *Are you listening to us? The case for a Victorian Children and Young People's Commission* (2001) 12.

¹⁵ Australian Human Rights Commission, *An Australian Children's Commissioner*, Discussion Paper (2010).

¹⁶ NHRIs are accredited by the International Coordinating Committee of National Human Rights Institutions (ICC of NHRIs). The Sub-Committee on Accreditation considers whether NHRIs are established and function as independent bodies in accordance with the Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993. The Paris Principles address the responsibilities, independence and method of operation of NHRIs. The role of NHRIs includes promoting and monitoring compliance with international human rights standards at a national level.

¹⁷ 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 sess, UN Doc CRC/GC/2002/2 (15 November 2002).

Commissioner would be suited to advocating for and designing effective complaints procedures, in addition to its other functions. The Commissioner may also be the appropriate person to receive complaints and oversee the complaints mechanism.

4.5 Legal proceedings and individual cases

The Bill gives the Commissioner the ability to intervene in legal cases involving the rights of children and young people (section 9(1)(h)). A similar function is given to the AHRC. Section 11(o) of the *Australian Human Rights Commission Act 1986* 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.”

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. We support the inclusion of this power.

Consistent with the approach of the AHRC, we would expect that guidelines be published as to the circumstances in which the Commissioner will intervene, including that the matter be of significance to a broad range of children, be 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.¹⁸ 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.

In addition to the ability to intervene, we note that the Commissioner could seek to intervene as an *amicus curiae* (“friend of the court”) with the leave of the relevant court. The role of an *amicus curiae* is to provide special assistance to a court to ensure that the court is “properly informed of matters which it ought to take into account in reaching its decision. Particularly this is so in judgments which may affect the community generally or persons other than the parties who are before it.”¹⁹ There may be particular circumstances in which it is appropriate for the Commissioner to do so.

Given that the power under the law to seek to act as *amicus curiae* already exists, we submit that no express legislative power is required to confer this function on the Commissioner.

¹⁸ *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).

¹⁹ *United States Tobacco Co v Minister for Consumer Affairs and Others* (1988) 83 ALR 79, 93.

4.6 Monitoring, conducting inquiries and reporting

The Bill provides in section 9(1)(a) and (c) that the Commissioner is responsible for monitoring, reviewing and investigating the wellbeing and status of children. This role is critical to the influence of the Commissioner on public policy and law and ideally should include:

- (a) reviewing bills and legislation, policies, and the allocation of resources;
- (b) investigating the practical effect that legislation, policy and resources have on children's rights;
- (c) promoting collection of data on children's health, wellbeing, education, development and participation to measure progress;
- (d) recommending how legislation should be amended; and
- (e) conducting inquiries into children's rights issues and reporting findings of inquiries to parliament.

We submit that section 9(1)(a) and (c) adequately provide for the Commissioner to undertake these crucial roles. However, an amendment is recommended to clarify that the Commissioner can conduct inquiries of its own initiative. An amendment could be modelled on that found in section 11(k) and (k) of the *Australian Human Rights Commission Act 1986*, which provides that the Commission may:

“(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...” [emphasis added]

We submit that the proposed amendment include references to “a Minister” rather than “the Minister” to provide for any Commonwealth Minister to request the assistance of the Commissioner.

We submit that section 9(1)(c) be amended to read:

“advancing the status of children and young people in Australia, including Indigenous children and young people and other groups identified a being at risk, by:

- (i) on its own initiative or when requested by a Minister, review existing laws;*
- (ii) on its own initiative or when requested by a Minister, propose new policies; and*
- (iii) on its own initiative or when requested by a Minister, conduct research, undertake inquiries and report to Parliament.”*

Section 25 of the Bill gives responsibility to the Commissioner for preparing reports on behalf of Australia to the United Nations Committee on the Rights of the Child. This is an important function and in relation to the reports supplied pursuant to Article 44 of CRC, extra funding should be granted.

The AHRC, having accreditation as Australia's NHRI, has a specific role to play in preparing reports to the United Nations under human rights Conventions that Australia has ratified. Some of the reports prepared by the AHRC in the last two years include reports relating to the International Convention on the Elimination of all forms of Racial Discrimination, Convention on the Elimination of all forms of Discrimination Against Women, International Covenant on Economic, Social and Cultural Rights, as well as to the Universal Periodic Review. These reports have been prepared independently by the AHRC in consultation with the community.

UN General Comment No. 2 outlines the importance of the independence of the report from NHRIs:

“It is appropriate for State parties to consult with independent human rights institutions during the preparation of reports to the Committee. However, State parties must respect the independence of these bodies and their independent role in providing information to the Committee. It is not appropriate to delegate to NHRIs the drafting of reports or to include them in the government delegation when reports are examined by the Committee.”²⁰

The Bill envisages a similar function for the Commissioner in relation to the CRC. However, the drafting of the Bill does not make it clear that the Commissioner is to provide its own independent report as the national advocate for children. We submit that this should be clarified to ensure that the Commissioner is not required to prepare the report on behalf of the government, as this would compromise its independence.

We submit that section 25 of the Bill be amended to read:

“(1) The Commissioner, as the national advocate for children, is responsible for preparation of reports to the United Nations Committee on the Rights of the Child under the terms of the United Nations Convention on the Rights of the Child.

...

(4) Nothing in this section requires the Commissioner to report on behalf of Australia, or prevents the Minister or another Minister of the Commonwealth from preparing and transmitting to the Secretary-General of the United Nations other reports to the United Nations Committee on the Rights of the Child on behalf of Australia.”

4.7 Powers of the Commissioner

Section 10(2) of the Bill provides the Commissioner with “power to do all things necessary or convenient to be done for or in connection with the performance of functions conferred by this section.” This power is very broad and enables the

²⁰ 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 sess, UN Doc CRC/GC/2002/2 (15 November 2002) para 21.

Commissioner to adequately fulfil its functions. However, there are two specific powers that we submit should be included to safeguard the Commissioner's powers: response from government and production of information.

We submit that an amendment be made to further encourage timely consideration of the Commissioner's recommendations. Section 11(2) of the Bill provides that "The Commissioner may report to the Parliament on any matter related to his or her functions." However, the effectiveness of this function may be increased by including a power for the Commissioner to invite the relevant Minister to respond within a reasonable timeframe. This would assist in ensuring that the Commissioner's work is considered in a timely way and encourage dialogue between the Commissioner and the relevant Minister.

We submit that a new section be added after section 12, to read:

"Where the Commissioner has provided a report to the Parliament containing recommendations, the Commissioner may invite the relevant Minister to provide a response to those recommendations within a reasonable timeframe. Such a response may include the action proposed in relation to the recommendations and, where the proposal is contrary to the recommendations, reasons for the proposed course of action."

Second we submit that the Commissioner should have the power to compel the production of information. The AHRC, NSW Commissioner for Children and Young People and the Children's Commissioners in the UK each have power to require information be produced as relevant to their function.²¹

In order to accurately investigate and make appropriate recommendations, the Commissioner must have at its disposal all relevant information, including information from government departments and statutory offices not otherwise available using freedom of information mechanisms.

We submit that a new section be inserted after section 9(2), providing:

"The Commissioner may, by notice in writing, require any government agency to provide the Commission with information (including documents) that is reasonably necessary for the performance of its functions under this Act. Where the production of such information would contravene law, including privacy law, legal professional privilege and national security requirements, the relevant government agency will make the necessary redactions or otherwise explain the reason for non-production."

5 Structural Features

5.1 Overview

The efficacy and efficiency of the Commonwealth Commissioner for Children and Young People will largely be determined by its structure. The Commissioner must be independent from Government. Further, adequate resourcing and safeguards relating to the tenure of the Commissioner must be guaranteed.

²¹ *Australian Human Rights Commission Act 1986* (Cth) ss 21- 22; *Commission for Children and Young People Act 1998* (NSW) s 14A; *Children Act 2004* (UK) c 31, ss 2(10), 5(2), 6(2), 7(2).

5.2 Independence

The particular functions proposed for the Commissioner necessarily include taking a view contrary to that of government. For example, the object of the Bill is to “assist Australia in meeting its international obligations under the United Nations Convention on the Rights of the Child” (s 3(3)) and the Commissioner will “monitor the development and application of laws affecting young people” (s 3(2)(b)). This objective can only be achieved if the Commissioner is free to critique and recommend changes to current policy and practice.

The Bill provides in section 11(1) that the Commissioner “must act independently ... and is not under the control or direction of the Minister.” We commend the Bill for guaranteeing the independence of the Commissioner. We note that in Western Australia, the Minister has the capacity to give directions to the Commissioner²² and must be provided with draft copies of reports, on which he or she can comment.²³ These provisions have the potential to undermine the independence and integrity of the Commissioner. We submit the independence of the Commissioner as currently provided in the Bill should be maintained.

5.3 Resourcing

The Commissioner must be adequately resourced and financially autonomous.

The Commissioner must have adequate infrastructure, funding, staff, premises and freedom from forms of financial control that might affect its independence.²⁴ 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.”²⁵

Although the Bill makes appropriate provision for the remuneration of the Commissioner, the Bill makes limited reference to how the Commissioner should be resourced. For example, while the Commissioner is empowered to engage consultants to “assist in the performance of the functions and the exercise of the powers of the Commissioner” (s 24), there is no guarantee that reasonable funding will be provided to reward those consultants. It is imperative that the Children’s Commissioner be adequately resourced from the outset.

We consider that an appropriate safeguard could be modelled on the South Australian *Children’s Protection Act 1993*. Section 52B of that Act provides that “The Minister is obliged to 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 be added following section 24 to read:

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

²² *Commissioner for Children and Young People Act 2006* (WA) ss 26, 27.

²³ *Commissioner for Children and Young People Act 2006* (WA) s 48.

²⁴ 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 sess, UN Doc CRC/GC/2002/2 (15 November 2002) para 10.

²⁵ 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 sess, UN Doc CRC/GC/2002/2 (15 November 2002) para 11.

5.4 Appointment Procedures

The appointment process contained in the Bill appropriately includes consideration of the requisite qualifications of the Commissioner (section 13 of the Bill), appropriate grounds on which the Commissioner's appointment can be terminated (section 19) and remuneration determined by the Remuneration Tribunal (section 16). We commend the inclusion of these provisions in the Bill. However, to adequately ensure the independence of the Commissioner, the appointment of the Commissioner must include suitable security of tenure.

Section 14 of the Bill provides that the Commissioner holds office for the period specified in the instrument of appointment, not exceeding five 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 14 be amended as follows:

“(1) The Commissioner holds office for the period specified in the instrument of appointment. The period must be a minimum of three years but not exceed five years.”

We further submit that the Commissioner should be appointed following consultation with non-governmental organisations responsible for children's rights, concerned social and professional organisations, universities and qualified experts, parliament, government departments and children themselves. Such a consultative process will enhance the actual and perceived 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 1993.²⁶

An example of effective consultation with children occurred during the appointment of the Irish Ombudsman for Children in 2003. This involved collaboration between children and adults in selecting the representative.²⁷ The 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 prioritised list of qualities for the role, the making of the advertisement 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 three candidates were assessed to be suitable to the post and their names forwarded to the Minister. This demonstrates the potential for collaborative work between adults and children.

We submit that section 13(1) be amended as follows:

“The Commissioner is to be appointed by the Governor-General by written instrument, following consultation with children and organisations working with and for children.”

²⁶ *Principles relating to the Status of National Institutions (The Paris Principles)*, GA Res 48/134, UN GAOR (20 December 1993).

²⁷ D Butler Scally, *Report on the Selection Processes for the Appointment of the Irish Ombudsman for Children* (2004) 12.

6 Conclusion

This inquiry into the establishment of a Commonwealth Commissioner for Children offers the opportunity to design effective mechanisms for protecting the rights of one of the most structurally vulnerable groups of people in Australia - children.

Our submissions build on what is a commendable Bill. It is hoped that following this consultation, a broadly-supported Bill will be put forward and passed by the Parliament.

*Human Rights Law Group
Mallesons Stephen Jaques
20 December 2010*