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# Commonwealth Commissioner for Children and Young People Bill 2010

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## **Senate Legal and Constitutional Affairs Committee**

6 January 2011

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## Table of Contents

<b>Acknowledgements</b> .....	<b>3</b>
<b>Executive Summary</b> .....	<b>3</b>
<b>Recommendations</b> .....	<b>4</b>
<b>Introduction</b> .....	<b>6</b>
<b>Key Provisions of the Bill</b> .....	<b>8</b>
Objects .....	8
Principles underlying the Bill .....	11
Definitions .....	13
Operation of State and Territory Laws .....	14
Extension to external Territories .....	14
Establishment of the Commissioner .....	14
Functions and Powers of the Commissioner .....	14
How the Commissioner is to perform functions .....	19
Exercising independence .....	21
Cooperation with Other Agencies .....	21
Appointment and Staffing for the Office of the Commissioner .....	21
Reporting requirements .....	22
Review .....	22
Privileges and Immunities .....	22
<b>Attachment A: Profile of the Law Council of Australia</b> .....	<b>23</b>

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## Acknowledgements

The Law Council acknowledges the assistance of the Law Institute of Victoria, the Law Society of South Australia, the Queensland Law Society and the NSW Bar Association in the preparation of this submission.

## Executive Summary

The Law Council considers that the *Commonwealth Commissioner for Children and Young People Bill 2010* (the Bill) is an important step towards implementation of Australia's international human rights obligations and addressing significant issues in relation to the rights of children and young people in Australian society.

The establishment of a Commonwealth Commissioner for Children and Young People (the Commissioner) would complement the important functions carried out by other Commonwealth Commissioners, who are members of the Australian Human Rights Commission (the AHRC). For this reason and a number of other reasons, the Law Council recommends that the Senate Legal and Constitutional Affairs Committee (the Committee) examine the advantages and disadvantages of the Commissioner being a member of the AHRC rather than a separate independent statutory officer as proposed in the Bill.

The establishment of the Commissioner would also complement the functions of Children's Commissioners and Guardians in the States and Territories although the Law Council notes that some of these Commissioners and Guardians have quite limited functions, particularly in South Australia. The Law Council supports the concurrent operation of State and Territory laws relating to Children's Commissioners and Guardians and relating to the rights of children generally, given the division of Constitutional responsibilities in this regard. Consequently, the Law Council considers that the Commissioner will need to focus on the interactions between Commonwealth, State and Territory laws and policies and avoid duplicating functions of State and Territory Children's Commissioners and Guardians in relation to relevant State and Territory laws and policies.

The Law Council is supportive of the concept of the Bill but has a number of concerns with the drafting of provisions of the Bill. These concerns would be resolved if the Commissioner was established as a member of the AHRC and the provisions of the legislation applying to the AHRC would therefore apply to the Commissioner. If the Commissioner is not established as a member of the AHRC, the Law Council makes a number of recommendations for amendments to the provisions of the Bill.

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## Recommendations

1. That the Committee examine the advantages and disadvantages of the Commonwealth Commissioner for Children and Young People (the Commissioner) being a member of the Australian Human Rights Commission (the AHRC).
2. That paragraph 3(2)(a) be amended to read that the Commissioner will 'advocate at a national level for the needs, view and rights of children and young people'.
3. That paragraph 3(2)(b) be amended to read that the Commissioner will 'monitor existing and proposed Commonwealth, State and Territory laws affecting children and young people with a particular focus on Commonwealth laws and their interaction with State and Territory laws'.
4. That paragraph 3(2)(c) be amended to read that the Commissioner will 'monitor and review related Commonwealth, State and Territory policies, programs and funding which impact on children and young people with a particular focus on Commonwealth policies, programs and funding and their interaction with State and Territory policies, programs and funding'.
5. That paragraph 3(2)(d) be amended to read that the Commissioner will 'proactively involve children and young people in the exercise of his or her functions'.
6. That sub-clause 3(3) be deleted and replaced with a clause that reads, 'The Commissioner will monitor Australia's legal obligations under the United Nations Convention on the Rights of the Child, its Optional Protocols and relevant international instruments'.
7. That clause 4 be deleted and replaced with a clause that reads, 'The principles to be applied by the Commissioner are to be drawn from the following articles of the United Nations Convention on the Rights of the Child:
  - (a) Non-discrimination in the applicability of children's rights (article 3);
  - (b) The primacy of the consideration of the child's best interests (article 4);
  - (c) The child's right to survival and development (article 6(2)); and
  - (d) The child's right to participation in decision-making (article 12)'
8. That the Committee consider whether 'children' and 'young people' should be defined as under certain ages.
9. That 'State' and 'Territory' be defined in the Bill.
10. That paragraph 9(1)(a) be amended to read, 'providing national leadership in monitoring and advocating for the wellbeing of children and young people in Australia, particularly Indigenous children and young people and children and young people to whom Australia has international obligations.'
11. That paragraph 9(b) be amended to read, 'promoting the rights of all children and young people nationally to meet Australia's international obligations, particularly under the United Nations Convention on the Rights of the Child, its Optional Protocols and other relevant international instruments'.
12. That paragraph 9(1)(c) be amended to read:

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- (a) To examine enactments and proposed enactments for the purpose of ascertaining whether the enactment or proposed enactment, as the case may be, are or would be, inconsistent with or contrary to the rights of children and young people and to report to the Minister the results of any such examination; and
  - (b) To undertake research and other programs on behalf of the Commonwealth, for the purpose of promoting the rights of children and young people, and to co-ordinate any such programs undertaken by any other persons, or authorities on behalf of the Commonwealth; and
  - (c) On his or her own initiative or when requested by the Minister, to report to the Minister as to action that should be taken by the Commonwealth, on matters relating to the rights of children and young people.
13. That paragraph 9(1)(d) be amended to read, 'promoting and protecting the rights of children and young people seeking asylum or in immigration detention in Australia, or children and young people whose parents or guardians are seeking asylum or in immigration detention in Australia'.
  14. That paragraph 9(1)(e) be deleted and that the Committee recommends that the Government examine alternatives to the Minister being the guardian of unaccompanied children and young people who arrive in Australia without the requisite visa or other authority for entry.
  15. That paragraph 9(1)(f) be amended to read, 'undertaking educational programs and other programs on behalf of the Commonwealth, for the purpose of promoting the rights of children and young people including the right to education, particularly early childhood education and to co-ordinate any such programs undertaken by any other persons, or authorities on behalf of the Commonwealth'.
  16. That paragraph 9(1)(g) be amended to read, 'proactively involving children and young people in the exercise of his or her functions'.
  17. That paragraph 9(1)(h) be amended to read, 'where the Commissioner considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, he or she may intervene in proceedings that involve the rights of children and young people and may act as *amicus curiae* in proceedings involving the rights of children and young people with the leave of the court'.
  18. That paragraph 9(1)(i) be amended to read, 'monitoring and reviewing related Commonwealth, State and Territory policies, programs and funding which impact on children and young people with a particular focus on Commonwealth policies, programs and funding and their interaction with State and Territory policies, programs and funding'.
  19. That the Committee consider whether the Bill should be amended to provide for expert, youth or advisory committees to assist the Commissioner in consulting with children, young people and other relevant persons and bodies.
  20. That the Committee review the necessity for paragraph 11(1)(b) providing that the Commissioner is not under the control or direction of the Minister.
  21. That the Committee consider whether voluntary agreements for the provision of information by State and Territory bodies will be sufficient and whether mandatory

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powers to obtain information are required. If mandatory powers are required, that the Committee consider necessary protections for those subject to the exercise of the powers.

22. That clause 25 relating to the Commissioner being responsible for the preparation of reports on behalf of Australia to the Committee on the Rights of the Child be deleted or amended to clarify that the Commissioner's reports are not made on behalf of Australia and are in addition to the Government's reports.
23. That the Committee review clauses 28 and 29 relating to privileges and immunities and that clause 29(2) be amended to read, 'The person is not liable to an action or other proceeding for damages for or in relation to an act done, or omitted to be done, in good faith in performance, or purported performance, of any function, or in exercise or purported exercise of any power, conferred on the Commissioner'.

## Introduction

24. The Law Council welcomes the *Commonwealth Commissioner for Children and Young People Bill 2010* (the Bill) as a further step towards implementation of Australia's international human rights obligations. As the Law Council has previously noted, Australia is a signatory to the major international human rights treaties, including the United Nations Convention on the Rights of the Child (CROC) but, unlike all other Western democracies, has not implemented these treaties in a comprehensive piece of legislation, such as a Human Rights Act or in the Constitution.<sup>1</sup>
25. As the Commonwealth Government has not accepted the recent recommendation from the National Human Rights Consultation Committee for a Human Rights Act,<sup>2</sup> it must rely on implementation of its international obligations through specific statutes such as the *Australian Human Rights Commission Act 1986* (the AHRC Act) and those dealing with age, disability, race and sex discrimination.<sup>3</sup> It also relies on the operation of the common law and limited Constitutional protections to meet its international human rights obligations.<sup>4</sup>
26. The Law Council considers that gaps in the implementation of Australia's international human rights obligations remain, particularly in relation to CROC, the International Covenant on Civil and Political Rights (the ICCPR) and a number of other international instruments, which Australia has ratified or accepted. For

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<sup>1</sup> Law Council of Australia *Submission to the National Consultation on Human Rights*, 5 May 2009 available at [www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

<sup>2</sup> See [http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches\\_2010\\_21April2010-AddresstotheNationalPressClubofAustralia-LaunchofAustraliasHumanRightsFramework](http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2010_21April2010-AddresstotheNationalPressClubofAustralia-LaunchofAustraliasHumanRightsFramework)

<sup>3</sup> See *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*.

<sup>4</sup> Constitutional protections include the right to vote (s 41); the right to trial by jury (s 80); the prohibition on laws limiting the free exercise of religion (s 116); the requirement that property only be expropriated on just terms (s 51) and the prohibition on discrimination on the basis of State and residency (s 117). There are also a number of implied constitutional rights such as the implied freedom of political communication. There are a number of common law doctrines which underlie our legal system and can only be displaced by a clear parliamentary intent to do so such as the right against self-incrimination (see *Sorby v the Commonwealth* (1983) 152 CLR at 288 per Gibbs CJ); immunity from search without warrant (see *George v Rockett* (1990) 170 CLR 104 at 110-111 and the burden of proof in criminal proceedings (See *Woolmington v DPP* [1935] AC 462 at 481-482; *Brown v The King* (1913) 17 CLR 570 at 594).

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example there is no federal statutory requirement that juvenile offenders be separated from adult offenders when incarcerated.<sup>5</sup>

27. The Law Council considers that the establishment of a Commonwealth Commissioner for Children and Young People (the Commissioner) is an important step towards addressing gaps in the implementation of Australia's international human rights obligations in relation to children and young people. The Commissioner should be able to identify these gaps, to make recommendations to remedy them and to monitor implementation of any remedies adopted by the Commonwealth Government.
28. The Commissioner's functions would complement the important functions carried out by the Commonwealth Aboriginal and Torres Strait Islander Social Justice Commissioner (the ATSI Commissioner), the Disability Discrimination Commissioner, the Human Rights Commissioner, the Race Discrimination Commissioner, the Sex Discrimination Commissioner and the Commissioner responsible for age discrimination (the other Commonwealth Commissioners).<sup>6</sup>
29. The Commissioner's functions would also complement the functions of Children's Commissioners and Guardians in the States and Territories, although the limited role of the South Australian Guardian in relation to child protection matters only is noted and is of particular concern to the Law Council and one of its Constituent Bodies, the Law Society of South Australia.<sup>7</sup> The other State and Territory Commissioners have a range of functions relating to monitoring child protection systems; investigating or reviewing deaths of children in the child protection system; screening for people working with children; monitoring laws affecting children; investigating or monitoring individual complaints about services to children; advocating for youth detainees and general advocacy for children and young people.
30. While supportive of the concept of the Bill, the Law Council has a number of concerns with provisions of the Bill relating to:
  - (a) The establishment of an independent statutory office rather than the Commissioner being a member of the Australian Human Rights Commission (AHRC);
  - (b) The broad scope of some of the proposed objects of the Bill;
  - (c) The consistency of provisions with CROC obligations; and

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<sup>5</sup> See for example *Brough v Australia* (2006) UN Doc CCPR/C/86/D/1184/2003 (27 April 2006) where the UN Human Rights Committee found that Australia was in violation of: article 10(1) of the ICCPR, which requires that prisoners be treated humanely; article 10(3), which provides that juveniles be separated from adults in prison; and article 24(1) which requires that children be protected by society and the State without discrimination. CROC articles 37 (a) re humane treatment; 37 (c) re separation from adults and article 2 re protection by the State without discrimination are also relevant to this situation.

<sup>6</sup> It is noted that the Sex Discrimination Commissioner was appointed as the Commissioner responsible for age discrimination in September 2007. Section 55 of the *Age Discrimination Act 2004 (Cth)* allows the AHRC to delegate any of the powers conferred on it under the Act. It is also noted that the *Sex and Age Discrimination Amendment Bill 2010 (Cth)* seeks to establish the separate position of Age Discrimination Commissioner. The Bill has been read a third time in the House of Representatives and has been referred to the Senate Committee on Legal and Constitutional Affairs for inquiry and report by 10 February 2011.

<sup>7</sup> The ACT Children and Young People Commissioner; the NSW Commission for Children and Young People; the NSW Office for Children – the Children's Guardian; the NT Children's Commissioner; the Queensland Commission for Children and Young People and Child Guardian; the South Australian Guardian for Children and Young People; the Commissioner for Children Tasmania; the Child Safety Commissioner Victoria and the Western Australian Commissioner for Children and Young People. The role of the South Australian Council for the Care of Children, which is an independent advisory body established by legislation is also noted.

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- (d) The need for the Commissioner to focus on Commonwealth laws and policies and their interaction with State laws and policies and avoid duplicating the functions of State and Territory Children's Commissioners and Guardians in relation to relevant State and Territory laws and policies.

## Key Provisions of the Bill

### Objects

31. The objects of the Bill are to establish the independent statutory office of the Commissioner who will:
- (a) Advocate at a national level for the needs, views and rights of people below the age of 18;
  - (b) Monitor the development and application of laws affecting children and young people;
  - (c) Co-ordinate related policies, programs and funding across Australia which impact on children and young people; and
  - (d) Proactively involve children and young people in the decisions that affect them.<sup>8</sup>
32. The objects clause in the Bill also states that the Parliament intends the establishment of the Commissioner as a measure to assist Australia in meeting its obligations under CROC particularly in relation to articles concerning:
- (a) Non-discrimination in the applicability of children's rights (article 2);
  - (b) The primacy of the consideration of the child's best interests (article 4);
  - (c) The child's right to survival and development (article 6(2)); and
  - (d) The child's right to participation in decision-making (article 12).<sup>9</sup>
33. The Law Council notes that the reference to CROC article 2 in sub-clause 3(3) should be a reference to article 3 and recommends that this reference be amended.
34. The Law Council generally supports the objects of the Bill but has concerns about the establishment of an independent statutory office of the Commissioner rather than the establishment of the Commissioner as a member of the Australian Human Rights Commission. The Law Council considers that there are advantages to the comprehensive approach to human rights protection fostered by the AHRC Act and the use of the framework provided by that Act for the work of the other Commonwealth Commissioners.
35. The Law Council notes that the AHRC currently has a role in relation to protecting children's rights. It may consider complaints of breaches of rights arising from CROC or other relevant international instruments; conciliate claims of discrimination involving children and young people on grounds relating to age, disability, race and sex and refer claims unable to be conciliated to court; examine laws for consistency

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<sup>8</sup> Cl 3 (1) and 3(2)

<sup>9</sup> Cl 3 (3)

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with CROC and other international instruments; promote public awareness of children's rights; conduct research or public inquiries into children's rights; make recommendations relating to children's rights; intervene in relevant court proceedings; and participate in processes relating to reporting to the United Nations about Australia's compliance with CROC and other conventions.<sup>10</sup> The establishment of the Commissioner as a member of the AHRC could build on and complement this work.

36. The Law Council notes the significant reports by the AHRC in relation to:
- (a) Homeless children;<sup>11</sup>
  - (b) The removal of Aboriginal and Torres Strait Islander children from their families;<sup>12</sup>
  - (c) Children in immigration detention.<sup>13</sup>
37. The Law Council notes that if the Commissioner was established as a member of the AHRC, the more detailed provisions of the AHRC Act would apply to matters such as the duties, functions and powers of the Commissioner as a member of the Commission, including functions in relation to intervention in legal proceedings. The use of the provisions in the AHRC Act would overcome some of the concerns relating to the drafting of provisions in the Bill, which are discussed below.
38. Possible disadvantages of the Commissioner being a member of the AHRC relate to the limited resources of the AHRC<sup>14</sup> and the practice of Commissioners acting in the role of other Commissioners. For example, the Disability Commissioner is currently acting as the Race Discrimination Commissioner, an arrangement which has been criticised by the United Nations Committee on the Elimination of Racial Discrimination.<sup>15</sup> The Sex Discrimination Commissioner is also currently the Commissioner responsible for age discrimination<sup>16</sup> although the Law Council notes that the *Sex and Age Discrimination Legislation Amendment Bill 2010 (Cth)* seeks to establish the separate position of Age Discrimination Commissioner.<sup>17</sup> The President of the Commission also acts as the Human Rights Commissioner.<sup>18</sup>
39. The Law Council also notes that the *Human Rights Commission Act 2005 (ACT)* (the ACT legislation) provides that the ACT's Children and Young People Commissioner is a member of its Human Rights Commission along with its Disability and Community Services Commissioner; Discrimination Commissioner; Health Services Commissioner and Human Rights Commissioner.<sup>19</sup> While other States

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<sup>10</sup> See [http://www.hreoc.gov.au/human\\_rights/children/hreoc\\_promote\\_rights\\_of\\_children.html](http://www.hreoc.gov.au/human_rights/children/hreoc_promote_rights_of_children.html) and [http://www.hreoc.gov.au/human\\_rights/children/aus\\_commitment\\_to\\_children\\_rights.html](http://www.hreoc.gov.au/human_rights/children/aus_commitment_to_children_rights.html)

<sup>11</sup> See [http://www.hreoc.gov.au/human\\_rights/housing/index.html](http://www.hreoc.gov.au/human_rights/housing/index.html)

<sup>12</sup> See [http://www.hreoc.gov.au/social\\_justice/bth\\_report/index.html](http://www.hreoc.gov.au/social_justice/bth_report/index.html)

<sup>13</sup> See [http://www.hreoc.gov.au/human\\_rights/immigration/index.html](http://www.hreoc.gov.au/human_rights/immigration/index.html)

<sup>14</sup> See Transcript of Hearing, Senate Legal and Constitutional Affairs Committee Inquiry into the National Security Legislation Amendment Bill 2010, 21 May 2010 at p 14 available at <http://www.aph.gov.au/hansard/senate/commtee/S13078.pdf>

<sup>15</sup> See Committee on the Elimination of Racial Discrimination Concluding Observations regarding Australia, 13 September 2010 at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/449/00/PDF/G1044900.pdf?OpenElement>

<sup>16</sup> See [http://www.hreoc.gov.au/about/president\\_commissioners/broderick.html](http://www.hreoc.gov.au/about/president_commissioners/broderick.html)

<sup>17</sup> See note 6 above

<sup>18</sup> See [http://www.hreoc.gov.au/about/president\\_commissioners/president.html](http://www.hreoc.gov.au/about/president_commissioners/president.html)

<sup>19</sup> *Human Rights Commission Act 2005 (ACT)*, s 12

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and Territories have different models, there appears to be merit in the 'collegiate nature' of the ACT model.<sup>20</sup>

40. The Law Council does not have a concluded view on whether the Commissioner should be a member of the AHRC rather than an independent statutory office holder but simply notes the advantages and disadvantages of membership of the AHRC. The Law Council recommends that the Committee examine these advantages and disadvantages in its inquiry into the Bill.
41. The Law Council also has some concerns about specific issues arising in relation to the paragraphs of clause 3. Paragraph 3(2)(a) relating to advocacy for the needs, views and rights of people under 18 does not include the term 'children and young people' which appears in the other paragraphs of clause 3 and in other parts of the Bill. The paragraph should be amended to include the term 'children and young people' as defined in clause 5 and used in other provisions of the Bill.
42. Paragraph 3(2)(b) refers to monitoring the development and application of laws affecting children and young people but does not refer to monitoring the operation of existing laws. The paragraph should be amended to refer to existing laws. The paragraph also does not specify whether the laws to be monitored are Commonwealth or State and Territory or both. The Law Council notes that laws affecting children include Commonwealth, State and Territory laws but that some State and Territory Children's Commissioners and Guardians have a role in monitoring State and Territory laws. As the Commissioner is also obliged to consult with relevant State and Territory bodies in performing his or her functions (sub-clause 10(a)), the Law Council recommends that Commissioner should have a particular focus on Commonwealth laws.
43. While it can be argued that the Commissioner should focus solely on Commonwealth laws, the division of powers between the Commonwealth and the States under the Constitution results in laws affecting children being made by the Commonwealth and the States and Territories with significant interaction between the laws, such as between Commonwealth family law and State and Territory child protection laws.<sup>21</sup> The Council of Australian Government's National Framework for Protecting Australia's Children 2009-2020 (the COAG Framework) recognises these significant interactions.<sup>22</sup> The Commissioner should monitor these interactions.
44. Paragraph 3(2)(c) is expressed very broadly in providing that 'the Commissioner will co-ordinate related policies, programs and funding across Australia, which impact on children and young people'. The Explanatory Memorandum and the Second Reading Speech do not provide details of the types of activities which are intended to be encompassed by such a broadly worded provision, which could overlap with some activities in the COAG Framework and require substantial resources to be committed to the Commissioner.<sup>23</sup>

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<sup>20</sup> *Human Rights Commission Act 2005 (ACT)*, s 13

<sup>21</sup> See Alistair Nicholson, 'Australia's Children: Does the Law Offer Them Sufficient Protection?', 2007 at [http://www.ssps.unimelb.edu.au/\\_data/assets/pdf\\_file/0006/93615/Lionel\\_Murphy\\_Memorial\\_Lecture\\_28\\_No\\_v\\_2007.pdf](http://www.ssps.unimelb.edu.au/_data/assets/pdf_file/0006/93615/Lionel_Murphy_Memorial_Lecture_28_No_v_2007.pdf)

<sup>22</sup> See the Council of Australian Governments National Framework for Protecting Australia's Children 2009-2020 at [http://www.fahcsia.gov.au/sa/families/progserv/Child\\_Abuse\\_Prevention/nfpac/Pages/gov\\_commitment.aspx](http://www.fahcsia.gov.au/sa/families/progserv/Child_Abuse_Prevention/nfpac/Pages/gov_commitment.aspx)

<sup>23</sup> *ibid*

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45. The only guidance to the meaning of paragraph 3(2)(c) offered by the Second Reading Speech is a statement that ‘...the Commission would monitor and review laws, policies and practices which impact on service provision.’<sup>24</sup> Paragraph 3(2)(b) states that the Commissioner will ‘monitor the development and application of laws affecting children and young people’. The Second Reading Speech statement suggests that clause 3(2)(c) should be amended to better align with paragraph 3(2)(b) by stating that the Commissioner will ‘monitor and review related policies, programs and funding which impact on children and young people’. The Law Council also recommends that the Commissioner have a particular focus on Commonwealth policies, programs and funding and the interaction between Commonwealth, State and Territory policies, programs and funding.
46. Paragraph 3(2)(d) refers to proactively involving ‘children and young people in decisions that affect them’ without specifying what those decisions might be. Clause 10 provides that in performing his or her functions the Commissioner should consult with children and young people; listen to and seriously consider their views; adopt work practices to ensure accessibility to the Commissioner and encourage their participation. The Law Council notes that some State and Territory legislation relating to Children’s Commissioners provides for similar forms of consultation and the appointment of children and young people to advisory committees and reference groups to assist the Commissioners in the exercise of their functions.<sup>25</sup> The Law Council suggests that the paragraph be amended to refer to the exercise of the Commissioner’s functions.

## Principles underlying the Bill

47. The Bill specifies that the following principles drawn from CROC are to be applied in exercising powers and performing duties under the Bill:
- (a) Every child is a valued member of society; and
  - (b) The family has the primary responsibility for the upbringing and development of its children and should be supported in that role; and
  - (c) Every child is entitled to form and express views and have those views taken into account in a way that has regard to the child’s age and maturity; and
  - (d) In decisions involving a child, the child’s best interests are of primary concern.<sup>26</sup>
48. The Explanatory Memorandum and the Second Reading Speech do not provide details of why these particular principles have been drawn from CROC and not other principles. These principles appear to reflect the preamble to CROC and articles 2, 3, 12 and 19.
49. The Law Council notes that other articles of CROC also appear relevant to the work of the Commissioner such as articles relating to:
- (a) The right to know and be cared for by both parents; not to be separated from parents; to enter and leave States for family reunification and to be brought up by both parents (articles 7, 9, 10 and 18);

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<sup>24</sup> *Senate Hansard*, 29 September 2010, p 278

<sup>25</sup> See s 19C of the *Human Rights Commission Act 2005 (ACT)* and s 10(3) of the *Commission for Children and Young People Act 1998 (NSW)*

<sup>26</sup> Clause 4

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- (b) The right to special protection and assistance from the State if deprived of the family environment and the right to periodic review if in care or receiving treatment (articles 20 and 25);
  - (c) The right not to be illicitly transferred abroad (article 11);
  - (d) Rights to freedom of expression; thought, conscience; religion; freedom of association, peaceful assembly, privacy and reputation (articles 13 to 16) ;
  - (e) The right to access to information (article 17);
  - (f) The right to appropriate protection if seeking refugee status (article 22);
  - (g) The right to a full and decent life for disabled children (article 23);
  - (h) Rights to the highest attainable standard of health; social security; education, an adequate standard of living; rest, leisure, play and recreation (articles 24, 26 to 31);
  - (i) Rights to protection from economic exploitation and hazardous work; illicit drugs; sexual exploitation and abuse; trafficking and other forms of exploitation; torture, cruel, inhuman or degrading treatment; capital punishment and life imprisonment (articles 32 to 37);
  - (j) Rights to humanity and respect and prompt access to legal assistance if deprived of liberty (article 37);
  - (k) Rights to be treated with dignity if alleged to have infringed the penal law, including fair trial rights (article 40).
50. The Law Council also notes that the preamble and a number of articles of CROC refer specifically to the rights of Indigenous children, including respect for their traditions, cultural values, language, religion and family and community relationships (articles 5, 7, 17, 29 and 30). These articles are of particular relevance to the work of the Commissioner given the vulnerable position of Indigenous children and young people in Australia and the Commonwealth's constitutional responsibility for Indigenous people.<sup>27</sup>
51. The Law Council has noted the submission by the Human Rights Law Resource Centre (HRLRC) on this Bill and agrees with its view that the articles of CROC cited in sub-clause 3(3) are commonly regarded as being the general principles of CROC. The Law Council agrees with the HRLRC recommendation that the current clause 4 be deleted and replaced with the current sub-clause 3(3). The Law Council also agrees that a new sub-clause 3(3) should be inserted relating to monitoring of legal obligations under CROC, its Optional Protocols and other relevant international instruments as an object of the Bill.<sup>28</sup>

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<sup>27</sup> The constitutional responsibility for Indigenous people was an outcome of the 1967 referendum which amended s 51(xxvi) of the Constitution, see Australian Parliamentary Library Research Brief No 11, 'The 1967 Referendum –History and Myths), 2007 at <http://www.aph.gov.au/library/pubs/RB/2006-07/07rb11.htm>

<sup>28</sup> The Law Council notes that Australia has ratified the First and Second Protocols to CROC. The Government is currently considering its role in the development of the Third Optional Protocol. The Law Council has made a submission which encourages the Government to support the Third Optional Protocol. The submission can be viewed at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=85AE494F-CB00-9F50-EFC1-DDE0CBC95048&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=85AE494F-CB00-9F50-EFC1-DDE0CBC95048&siteName=lca)

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52. As suggested by one of the Law Council's Constituent Bodies, the Law Society of South Australia,

*By ensuring that the rights based mandate of the Commissioner is clearly enshrined in the legislation, the role of the Commissioner to advocate for the needs, views and rights of children and young people in Australia is clearly established, with CROC providing the touchstone principles to be applied by the Commissioner in exercising powers and performing duties under the Act.<sup>29</sup>*

## Definitions

53. The definition of 'children and young people' as including all people below the age of 18 does not make any distinction between ages applying to 'children' and ages applying to 'young people' as some State and Territory legislation relating to Children's Commissioners and Guardians does. For example, the ACT provides that a 'child' is a person under 12 years and a 'young person' is a person 12 years or older but not yet an adult.<sup>30</sup> The Law Council does not have a concluded position on whether such a distinction is necessary or desirable but simply raises the matter for the consideration of the committee. The Law Council notes the submission of Ms Gillian Calvert AO (the former NSW Commissioner for Children and Young People), the National Foundation for Australian Women and the National Investment for the Early Years on the Bill which observes that from the early teenage years onwards young people prefer that descriptor to that of 'children'.
54. The Law Council supports the definition of 'children and young people' and the definition of 'child' when it is used in the Bill in relation to CROC as a person below the age of 18.
55. The Law Council notes that the definition of children and young people as persons under 18 is consistent with relevant State and Territory legislation relating to Children's Commissioners and Guardians.<sup>31</sup> The Law Council also notes that the Queensland Commission for Children and Young People has recently issued a policy statement in relation to the definition of child in the *Youth Justice Act 1992 (Qld)*. In that Act, a child is defined as a person under 17 years, which has resulted in some 17 year olds being held in adult prisons in Queensland. The United Nations Committee on the Rights of the Child has recommended that Australia remove children who are 17 from the adult justice system in Queensland.<sup>32</sup> The Queensland Law Society has advocated for this change for many years and the Queensland Commission for Children and Young People has recently urged the Queensland Government to make this change.<sup>33</sup>

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<sup>29</sup> Law Society of South Australia, 'Submission to the Law Council on the examination of the *Commonwealth Commissioner for Children and Young People Bill 2010*'.

<sup>30</sup> *Human Rights Commission Act 2005 (ACT)* s 3; *Children and Young Persons (Care and Protection) Act 1998 (NSW)* s 3

<sup>31</sup> See *Children and Young Persons (Care and Protection) Act 1998 (NSW)*; *Commission for Children and Young People Act 1998 (NSW)*; *Child Wellbeing and Safety Act 2005 (Vic)*; *Commission for Children and Young People and Child Guardian Act 2000 (Qld)*; *Care and Protection of Children Act 2007 (NT)*; *Children's Protection Act 1993 (SA)*; *Commissioner for Children and Young People Act 2006 (WA)*; *Children Young Persons and their Families Act 1997 (Tas)*; *Human Rights Commission Act 2005 (ACT)*.

<sup>32</sup> *Youth Justice Act 1992 (Qld)* s 4; Concluding Observations of the Committee on the Rights of the Child, Australia, 2005 at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?OpenDocument)

<sup>33</sup> See <http://www.cypcg.qld.gov.au/about/news/2010/november/policy-position-paper.html>

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## Operation of State and Territory Laws

56. Clause 6 provides that the Bill is not intended to exclude or limit the operation of the law of a State or Territory that is capable of operating concurrently with the Bill when enacted.
57. This clause is worded similarly to provisions in Commonwealth discrimination legislation which also overlaps with State and Territory laws in the field of discrimination.<sup>34</sup> The Law Council supports the concurrent operation of such laws to the greatest extent possible.<sup>35</sup>
58. The Law Council notes that other Commonwealth laws which provide for concurrent operation usually provide a definition of 'State' which includes the ACT and the Northern Territory and a definition of 'Territory' which generally refers to external Territories. These definitions usually have significance for the operation of other provisions in the legislation. The Law Council recommends that such definitions be included in the Bill.

## Extension to external Territories

59. Clause 7 extends the operation of the Bill to every external Territory. The Explanatory Memorandum states that this clause is intended to ensure that the Bill applies to asylum seekers on Christmas Island. The Law Council supports this clause.

## Establishment of the Commissioner

60. As noted above, the object of the Bill is to establish an independent statutory office of the Commissioner. Clause 8 sets out that this statutory office is to be established as a Statutory Agency with the Commissioner to hold an office equivalent to that of a Secretary of a Department. The Commissioner is to be assisted by Deputy Commissioners and public servants. As noted above the Law Council recommends that the Committee considers whether the Commissioner should instead be established as a member of the AHRC.

## Functions and Powers of the Commissioner

61. The functions and powers of the Commissioner are detailed in sub-clause 9 (1) as:
  - (a) Providing national leadership in monitoring and advocating for the wellbeing of Australian children and young people;
  - (b) Promoting the rights of all children and young people nationally, to meet Australia's international obligations;
  - (c) 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) Reviewing existing laws;

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<sup>34</sup> See *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*.

<sup>35</sup> See Submission on the Sex and Age Discrimination Legislation Amendment Bill 2010 at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=532A7A5C-C91E-AA92-A102-02FEBC627269&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=532A7A5C-C91E-AA92-A102-02FEBC627269&siteName=lca)

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- (ii) Proposing new policies; and
  - (iii) Conducting research, undertaking inquiries and reporting to Parliament;
- (d) Promoting and protecting the rights of children and young people in immigration detention, or children whose parents or guardians are in immigration detention;
  - (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;
  - (f) Promoting public education programs about and ensuring strong investment in early childhood development;
  - (g) Proactively involving children and young people in decisions that affect them;
  - (h) Intervening in legal cases involving the rights of children and young people;
  - (i) Co-ordinating policies, programs and funding which impact on children and young people between federal, state, territory and local governments;
  - (j) Undertaking any other function conferred on the Commissioner by this Act or any other law.
62. Sub-clause 9 (2) is an incidental power and sub-clause 9 (3) clarifies that the Commissioner's functions and powers apply to all children and young people who are Australian citizens, Australian residents or in Australia, including in an external territory.
63. As noted above in relation to the objects of the Bill, some of the functions and powers of the Commissioner are expressed very broadly, for example, those relating to reviewing laws; proposing policies; conducting research and inquiries; reporting; promoting education; proactively involving children; intervening in legal cases and co-ordinating policies, programs and funding.
64. As noted above, the Law Council has raised for the Committee's consideration the issue of whether the Commissioner should be established as an independent statutory office or as a member of the AHRC. If the Commissioner was established as a member of the AHRC, the following more specific functions, which apply to all members of the AHRC, would cover the above broadly expressed functions in the Bill:
- (a) To examine enactments, and (when required to do so by the Minister) proposed enactments for the purpose of ascertaining whether the enactment or proposed enactment, as the case may be, are or would be, inconsistent with or contrary to any human right and to report to the Minister the results of any such examination (the AHRC Act s 11(1)(e));
  - (b) To undertake research and educational programs and other programs on behalf of the Commonwealth, for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other persons, or authorities on behalf of the Commonwealth (the AHRC Act s 11(1)(h));
  - (c) 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

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should be taken by the Commonwealth, on matters relating to human rights (the AHRC Act s 11 (1)(j));

- (d) 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 any relevant international instrument (the AHRC Act s 11 (1)(k));
  - (e) 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 AHRC Act s 11(1)(o).
65. In the same way as some additional specific functions are set out in the AHRC Act for the ATSI Commissioner, additional functions which relate to the wellbeing and rights of children and young people could be specified if the Commissioner was a member of the AHRC.<sup>36</sup>
66. Alternatively, if the Commissioner is established as a separate statutory office, the Law Council suggests that the relevant functions and powers in sub-clause 9(1) be redrafted in line with the language of the corresponding functions and powers in the AHRC Act.
67. The Law Council also has some concerns about specific issues arising in relation to other paragraphs of clause 9. Paragraph 9(1)(a) refers to monitoring and advocating for the wellbeing of Australian children and young people. This wording may exclude a function of monitoring and advocating for children and young people in immigration detention or in external Territories or in the regional processing centre proposed by the Government.<sup>37</sup> The Law Council recommends that the wording be amended to ensure that the Commissioner's functions extend to children and young people in these situations by referring to children and young people in Australia or towards whom Australia has international obligations.
68. The Law Council notes that paragraph 9(1)(b) allows the Commissioner to promote the rights of all children and young people nationally to meet Australia's international obligations. As a number of submissions on this Bill have observed, other international instruments, such as the Convention on the Rights of Persons with Disabilities are also relevant to Australia's international obligations in relation to children and young people in addition to CROC.<sup>38</sup> The Law Council recommends that the paragraph refer to CROC, its Optional Protocols and other relevant international instruments.
69. The Law Council recommends that paragraph 9(1)(c) be amended to read:
- (a) To examine enactments and proposed enactments for the purpose of ascertaining whether the enactment or proposed enactment, as the case may be, are or would be, inconsistent with or contrary to the rights of children and young people and to report to the Minister the results of any such examination; and

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<sup>36</sup> See Part IIA of the AHRC Act. It is also noted that functions for the other Commonwealth Commissioners are set out in the *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*.

<sup>37</sup> See <http://www.abc.net.au/news/stories/2010/07/06/2945913.htm>

<sup>38</sup> See submissions of Blind Citizens Australia, People with Disability

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- (b) To undertake research and other programs on behalf of the Commonwealth, for the purpose of promoting the rights of children and young people, and to co-ordinate any such programs undertaken by any other persons, or authorities on behalf of the Commonwealth; and
- (c) On his or her own initiative or when requested by the Minister, to report to the Minister as to action that should be taken by the Commonwealth, on matters relating to the rights of children and young people.
70. The Law Council notes that paragraph 9(1)(c) as currently drafted refers particularly to advancing the status of Indigenous children and young people. The Law Council and one of its Constituent Bodies, the NSW Bar Association consider that the Commissioner should have a particular focus on the rights of Indigenous children and young people and recommends that a specific reference to them be included in paragraph 9(1)(a) as redrafted.
71. The Law Council notes that paragraph 9(1)(d) allows the Commissioner to promote and protect the rights of children and young people in immigration detention or children whose parents or guardians are in immigration detention. The Law Council recommends that the paragraph be broadened to also include children and young people who are seeking asylum or whose parents and guardians are seeking asylum in Australia. The Law Council notes the Government's recent announcement that some children and families seeking asylum will be released from immigration detention facilities into community facilities.<sup>39</sup> The Law Council recommends that it be made clear that the Commissioner can promote and protect the rights of these children and young people.
72. The Law Council notes that paragraph 9(1)(e) provides that the Commissioner in appropriate cases will act as the legal guardian of unaccompanied children and young people who arrive in Australia without the requisite visa or other authority for entry. The Law Council further notes that the Minister for Immigration is currently the guardian of unaccompanied children and young people pursuant to the *Immigration (Guardianship of Children) Act 1946*. The Minister also has functions under the *Migration Act 1958* in relation to the detention of certain people, including children and young people, and in relation to determining whether to allow applications for visas and whether to grant visas. The Law Council agrees with a number of submissions on the Bill which suggest that there may be a conflict of interest between the Minister's role as guardian and decision-maker.<sup>40</sup>
73. The Law Council also agrees with a number of submissions on this Bill that providing for the Commissioner to act as the legal guardian of unaccompanied children and young people may also represent a conflict of interest with the Commissioner's duty to act independently and to monitor laws and policies affecting children and young people.<sup>41</sup> The Law Council notes that a number of alternatives are proposed such as a role for the Minister for Families, Housing, Community Services and Indigenous Affairs with delegation to a panel of advisers staffed by a community organisation or agreements with State Government agencies with relevant specialist and technical knowledge.<sup>42</sup> The Law Council recommends that paragraph 9(1)(e) be deleted and that the Committee recommends that the

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<sup>39</sup> See <http://www.abc.net.au/pm/content/2010/s3041526.htm>

<sup>40</sup> For example, submissions by, ChilOut, Refugee Council of Australia, United Nations High Commissioner for Refugees

<sup>41</sup> For example see submissions by ChilOut, SA Council for the Care of Children

<sup>42</sup> Submissions by ChilOut and Australian Children's Commissioners and Guardians

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Government examine alternatives to the Minister being the guardian of unaccompanied children and young people.

74. The Law Council notes that the *Migration Amendment (Detention of Minors) Bill 2010* also provides for the appointment of the Children's Commissioner as the guardian of minors following the enactment of this Bill.<sup>43</sup> The Law Council has the same concerns in relation to the provisions of the *Migration Amendment (Detention of Minors) Bill 2010* as expressed above.
75. Paragraph 9(1)(f) provides a function for that the Commissioner to promote public education programs about and ensure strong investment in early childhood development. The Law Council recommends that this paragraph be amended to provide a function for the Commissioner to undertake educational programs and other programs on behalf of the Commonwealth, for the purpose of promoting the rights of children and young people including the right to education, particularly early childhood education and to co-ordinate any such programs undertaken by any other persons, or authorities on behalf of the Commonwealth.
76. Paragraph 9(1)(g) refers to proactively involving children and young people in decisions that affect them and uses the same wording as paragraph 3(2)(d) which has been addressed above.
77. Paragraph 9(1)(h) refers to intervening in legal cases involving the rights of children and young people. The Law Council is aware of the separate submission by one of its Constituent Bodies, the Law Institute of Victoria, which raises questions about how this paragraph would operate and the need for it to be more circumscribed.<sup>44</sup> The Law Council notes that, with the court's leave, the AHRC intervenes in selected cases which raise significant human rights issues, such as the interpretation of Commonwealth human rights laws.<sup>45</sup> This intervention function under s 11 (1)(o) of the AHRC Act is separate from the function of the other Commonwealth Commissioners to appear as *amicus curiae* or 'friends of the court' in unlawful discrimination matters under s 46PV of the AHRC Act. *Amicus curiae* do not generally file pleadings or lead evidence.
78. The Law Council recommends that paragraph 9(1)(h) be amended to read that the where the Commissioner considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, he or she may intervene in proceedings that involve the rights of children and young people and may act as *amicus curiae* in proceedings involving the rights of children and young people with the leave of the court.
79. Paragraph 9(1)(i) relates to co-ordinating policies, programs and funding which impact on children and young people between federal, state, territory and local governments. This paragraph uses similar wording to paragraph 3(2)(c) which has been addressed above.
80. Paragraph 9(1)(j) is an inclusive provision which allows the Commissioner to perform other functions conferred by the Bill or any other law.

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<sup>43</sup> Proposed s 197AH of the *Migration Act 1958*

<sup>44</sup> See submission by the Law Institute of Victoria

<sup>45</sup> See AHRC Annual Report 2009-10 at pp 62-63

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## How the Commissioner is to perform functions

81. Clause 10 of the Bill provides that in performing his or her 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; and
  - (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; and
  - (g) Refer any individual matters to the appropriate authority.
82. The Law Council notes that sub-clauses 10(a),(b) and (c) are very similar to provisions in the ACT legislation.<sup>46</sup> That legislation also provides for the establishment of advisory committees which may include children and young people as well as people with experience or expertise in relation to services for children and young people.<sup>47</sup> Other State and Territory legislation also provides for expert, youth or advisory committees.<sup>48</sup> Such committees appear to be a mechanism for the consultation with parents, guardians and educators referred to in sub-clauses 10(d) and (e). Such committees appear to operate very effectively<sup>49</sup> and the Law Council recommends that the Committee consider whether the Bill should be amended to provide for consultative committees.
83. Some provisions in State and Territory legislation establishing expert, youth or advisory committees allow for membership from a very broad range of people with relevant skills and experience.<sup>50</sup> The inclusion of such provisions in the Bill would overcome some of the limitations in clause 10 such as the restriction to consultation with educators in sub-clause 10(a).
84. The Law Council and one of its Constituent Bodies, the NSW Bar Association also raise for the Committee's consideration the difference in emphasis between the requirement for the Commissioner to 'seriously consider' the views of children and young people and the apparently less onerous obligation to consult with other entities. The underlying basis and justification for this difference is unclear.
85. The Law Council considers that the provision in sub-clause 10 (f) for consultation with relevant Commonwealth agencies, State and Territory bodies and other

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<sup>46</sup> *Human Rights Commission Act 2005 (ACT)*, s 19(1)

<sup>47</sup> *Human Rights Commission Act 2005 (ACT)*, s 19(2)

<sup>48</sup> *Commission for Children and Young People and Child Guardian Act 2000 (Qld)*, s 149; *Commission for Children and Young People Act 1998 (NSW)*, s 8; *Children Young Persons and Their Families Act 1997 (Tas)*, s 84; *Commissioner for Children and Young People Act 2006 (WA)*, s 52.

<sup>49</sup> See NSW Commission for Children and Young People submission to the Statutory Review of the *Commission for Children and Young People Act 1998* at p 17

<sup>50</sup> See *Commission for Children and Young People Act 1998 (NSW)*, s 8

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organisations will be particularly important in the context of the proposed object of the Bill for the Commissioner to monitor compliance with CROC and other international instruments. The Law Council notes that many of the matters covered in Australia's reports regarding its compliance with CROC and in the Concluding Observations of the Committee on the Rights of the Child relate to State and Territory matters.<sup>51</sup>

86. The Law Council also considers that the provision in sub-clause 10(g) for referral of individual matters to the appropriate authority will be important for the Commissioner to maintain a focus on providing national leadership and advocacy and promoting the rights of children and young people in Australia. There are a range of authorities dealing with individual matters at present such as the AHRC; Commonwealth, State and Territory Ombudsmen; Commonwealth, State and Territory Privacy Commissioners; and State and Territory Children's Commissioners and Guardians (although the limited role of some Children's Commissioners and Guardians, particularly the South Australian Guardian and the South Australian Council for the Care of Children are noted).<sup>52</sup>
87. The Law Council notes that the Committee on the Rights of the Child has identified the consideration of individual complaints as a function for a Children's Commissioner or National Human Rights Institution such as the AHRC to fulfil.<sup>53</sup> I
88. If the Commissioner is established as a member of the AHRC, the referral of complaints which could be actioned under s 11 (breaches of human rights), Part IIIB (unlawful discrimination) or Part IIIC (discriminatory industrial awards and determinations) of the AHRC Act should be seamless. Even if the Commissioner is not established as a member of the AHRC, the Law Council considers that there are strong arguments in favour of the referral of individual complaints to the AHRC and other appropriate authorities and bodies. The Law Council notes the limitations of the s 11 process in not affording the complainant a right to take the matter to court if conciliation is unsuccessful and observations that the AHRC process is not child specific.<sup>54</sup> However, the Law Council considers that there will be significant resource implications for the Commissioner's office unless he or she is able to refer individual matters and that it may be preferable for the limitations of the AHRC complaints handling process to be addressed rather than establishing a separate complaints handling process for the Commissioner.
89. The Law Council considers that referral of individual matters is also necessary to foster interaction with the State and Territory Children's Commissioners, particularly with those who deal with individual complaints. In this regard, the limited powers of the South Australian Guardian are again noted as a matter of concern to the Law Council and the Law Society of South Australia. The Law Council supports the long-standing advocacy by the Law Society of South Australia for the establishment of a Children's Commissioner in that State.<sup>55</sup>

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<sup>51</sup> See Concluding Observations of the Committee on the Rights of the Child, Australia. 2005 at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?OpenDocument)

<sup>52</sup> Law Society of South Australia, 'Submission to the Law Council on the examination of the *Commonwealth Commissioner for Children and Young People Bill 2010*'. See also submission by the SA Council for the Care of Children.

<sup>53</sup> See General Comment 2 at <http://www.unhcr.ch/tbs/doc.nsf/%28symbol%29/CRC.GC.2002.2.En?OpenDocument>

<sup>54</sup> See submission by the Human Rights Law Resource Centre

<sup>55</sup> See note 52

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## Exercising independence

90. Paragraph 11(1)(a) provides that the Commissioner must act independently and in a way that promotes and protects the rights, interests and well-being of children and young people. Paragraph 11(1)(b) provides that the Commissioner is not under the control or direction of the Minister.
91. The Law Council supports the concept of independence for the Commissioner. However, if the Commissioner is established as a member of the AHRC, there may be a conflict between paragraph 11(1)(b) of the Bill and some paragraphs of s 11 of the AHRC Act such as paragraph 11(1)(e) which provides that a function of the AHRC is to examine enactments and when requested to do so by the Minister to examine proposed enactments for consistency with human rights. There are other roles for the Minister under the AHRC Act such as convening a meeting of the AHRC which may also conflict with paragraph 11(1)(b) of the Bill.
92. Even if the Commissioner is not a member of the AHRC, paragraph 11 (1)(a) together with clause 8 and Part 3 may be sufficient for establishing the independence of the Commissioner without the necessity for paragraph 11(1)(b). The Law Council recommends that the Committee review the necessity for paragraph 11(1)(b).

## Cooperation with Other Agencies

93. Clause 12 provides for cooperation between the Commissioner and other Commonwealth agencies that provide or deal with services or issues affecting children and young people. It also provides that the Commissioner must consult with State and Territory Governments to develop agreements concerning cooperation and interaction between the Commissioner and relevant State and Territory bodies including in connection with the provision of information or access to documents required by the Commissioner in relation to his or her functions.
94. As discussed above, the Law Council considers that interaction between the Commissioner and State and Territory Children's Commissioners and Guardians will be crucial to the Commissioner fulfilling his or her functions. Similarly, the Law Council considers that interaction with relevant Commonwealth agencies will be important.
95. The Law Council and one of its Constituent Bodies, the NSW Bar Association raise for the Committee's consideration the issue of whether voluntary agreements for the provision of information by State and Territory bodies will be sufficient and whether mandatory powers to obtain information may be required. The Law Council notes that a number of other submissions have raised similar issues.<sup>56</sup> If the Committee considers that mandatory powers are necessary, the Law Council would also urge the consideration of necessary protections for persons or bodies subject to the exercise of the powers.

## Appointment and Staffing for the Office of the Commissioner

96. Part 3 of the Bill deals with the appointment of the Commissioner and staffing.

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<sup>56</sup> See submissions by the Human Rights Law Resource Centre, Youthlaw

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97. If the Commissioner is established as a member of the AHRC, the provisions of the AHRC Act would apply in a similar manner to the establishment of the ATSI Commissioner under that Act.
  98. Even if the Commissioner is established as a separate independent statutory officer, the provisions in the Bill are similar to those applying to the ATSI Commissioner under the AHRC Act. However, as discussed above there would appear to be advantages for the establishment of the Commissioner as a member of the AHRC arising from the membership of the other Commonwealth Commissioners and the staffing associated with those Commissioners and the general operations of the AHRC.

## **Reporting requirements**

99. Clause 25 provides for the Commissioner to be responsible for reports on behalf of Australia to the Committee on the Rights of the Child relating to compliance with CROC.
100. The Law Council notes that article 44 of CROC requires States Parties to report and that it therefore seems inappropriate for the Commissioner to have the responsibility for the preparation of the report. Such a role would also appear to be inconsistent with the Commissioner's independence and functions. The Law Council recommends that the clause be deleted or amended to clarify that the Commissioner's reports are in addition to the Government's reports.

## **Review**

101. Clause 27 provides that the Minister must cause a review of the operation of the Act within 2 years of its commencement and table a written report on the review in Parliament within 15 days of receiving the report.
102. The Law Council supports the transparency and accountability encompassed by this review mechanism.

## **Privileges and Immunities**

103. Clause 28 provides that the Office of the Commissioner has the privileges and immunities of the Crown and clause 29 provides that the Commissioner or a person acting under his or her direction or authority is not liable to an action, suit or proceeding in relation to an act or omission done in good faith in the exercise of his or her functions.
104. If the Commissioner is established as a member of the AHRC, a more limited form of immunity would apply in relation to actions or proceedings for damages for acts or omissions done in good faith in the performance of functions.<sup>57</sup>
105. The Law Council questions the need for the broad scope of the privileges and immunities provisions in the Bill and recommends that the immunity clause be limited in the same way as that applying to the AHRC even if the Commissioner is established as a separate statutory officer.

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<sup>57</sup> The AHRC Act, s 48(2)

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.