

16 December 2010

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

Email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Sir or Madam

**Review of the *Commonwealth Commissioner for Children and Young People Bill 2010***

The Law Institute of Victoria (LIV) welcomes the opportunity to provide comment on the *Commonwealth Commissioner for Children and Young People Bill 2010* (“the Bill”).

The LIV is Victoria’s peak body for lawyers and those who work with them in the legal sector, representing over 15,000 members. Many of our members provide legal services to children and young people in both the Criminal and Family Divisions of the Children’s Court. Our members also provide legal services to parents and family members involved in these cases. These comments are based on the experiences of those practitioners.

The LIV has a strong commitment to promoting the rights of children and young people in Victoria.

In April 2010, the LIV provided comments to the Victorian Law Reform Commission on the *Review of Victoria’s Child Protection Legislative Requirements*. In that submission the LIV strongly supported the establishment of an Independent Statutory Commissioner whose aim is to strengthen the rights of children and young people.

The LIV commends the main objective of the Commonwealth Commissioner which is “to advocate at a national level for the needs, views and rights of people below the age of 18”.<sup>1</sup>

The LIV is pleased that this Bill draws upon the principles of the United Nations Convention on the Rights of the Child (CRoC). These principles include that every child is a valued member of society and that every child is entitled to be protected from abuse, exploitation and discrimination, the family has the primary responsibility for the upbringing and development of children and should be

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<sup>1</sup> *Commonwealth Commissioner for Children and Young People Bill 2010*, Section 3 (2) (a).

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supported in that role, and every child is entitled to form and express views and be involved in any decisions.<sup>2</sup>

The LIV also welcomes S.3 of the Bill which states that the Commissioner is to assist Australia in meetings its obligations under the CRoC.

The LIV notes that the Commonwealth Commissioner may at Division 2, Section 9 (1) (h) of the Bill intervene in legal cases involving the rights of children and young persons. This section offers a great opportunity for the promotion and advancement of the rights of children and young persons. However, serious thought will need to be given to how such a mechanism might operate in practice. Consideration into the operation of Section 9 (1) (h) may include whether the Commissioner would become a party to the legal proceedings or simply advise as a "friend to the court" (*amicus curiae*) which allows the commissioner to assist the court on points of law in a particular case and but may not file pleadings or lead evidence and or lodge an appeal.

Section 9(1) (h) of the Bill would also allow the Commissioner to intervene in matters in the Children's Court of Victoria relating to state intervention in the family unit. How such a process would work is unclear, however the LIV believes this option would provide greater incentive for State agencies to consider fully the rights of children and young person's when making their case in the Courts.

The LIV believes that if the Commonwealth Commissioner's intervention in cases involving children and young persons was common the budget and practical questions raised would be large, and may conflict with the duties and obligations of groups such as the Department of Human Services and Independent Children's Lawyers. The LIV suggests that the Commissioner's right to intervene be more circumscribed so we have some idea what it means, e.g. the commissioner may intervene in cases of substantial general interest, public interest, significant novelty, or in which it appears that the child's interests or views are not being adequately represented.

The LIV welcomes the concept of a Children's Commissioner as we have long had concerns that the Commonwealth has been in breach of its obligations under CRoC in that children in the Family Court system have not had their views heard in a jurisdiction which has significant and lasting impact on outcomes for children. This is despite the fact that there is currently a mechanism through the appointment of an Independent Children's Lawyer to promote the best interests of children in Family Court proceedings. There has been an ongoing and serious deficiency of legal aid dollars available to facilitate the appointment of Independent Children's Lawyers in the Family Courts (both the Family Court and the Federal Magistrates Court) and this has been particularly prevalent in Victoria. Depending on when a case in any given month is dealt with, this determines whether or not there is sufficient Legal Aid dollars left in the monthly budget to appoint an Independent Children's Lawyer. Funding habitually runs out during the course of each month thus creating a roulette of representation of children in our Court system. Furthermore, in circumstances where legal aid has been granted an Independent Children's Lawyer is not funded to instruct counsel at the final hearing therefore denying the right of the child's views to be expressed at Court.

It should be noted that whilst we support the concept of the introduction of the Commissioner for Children, this should not be construed as supporting substitution of Independent Children's Lawyers in Family Court or Federal Magistrates Courts matters. As we understand the role, it is one of

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<sup>2</sup> *Commonwealth Commissioner for Children and Young People Bill 2010*, Section 4 (a) to (e).

oversight and as such we anticipate being able to assist any Commissioner appointed pursuant to this proposed legislation with regard to issues surrounding the way in which children's views are currently being taken into account and indeed our concerns about the current failure to properly and adequately take children's views into account in the Family Law jurisdiction.

Further consideration would need to be given to when in the legal proceedings would the Commissioner become involved; and whether the Commissioner could become involved only at the behest of the Court or Tribunal, by its own motion or at the invitation of a party. Further, would the Commissioner be limited to intervening in cases where a child was a party or to all cases where children and young person's rights were an issue?

The mechanism governing the coordination of the Commissioner's activities with State and Territory governments in domestic proceedings will similarly require careful consideration. The LIV notes that a key forum for children and young persons' rights in each State will be the Children's Courts, which operate under State jurisdiction.

The Victorian Law Reform Commission's review of the child protection laws in Victoria suggest that a Commissioner empowered to advocate and promote the rights of children and young persons will be a welcome addition in promoting the welfare and the rights of vulnerable children and young persons at risk.

The LIV is supportive of the Bill and we thank you for the opportunity to provide comment. We would appreciate the opportunity for further input as the consultation proceeds

If you would like to discuss any of the matters raised in the submission, please contact Laura Muccitelli, Lawyer, Family Law Section on (03) 9607 9375 or by email [lmuccitelli@liv.asn.au](mailto:lmuccitelli@liv.asn.au)

Yours sincerely,

**Steven Stevens**  
President  
Law Institute of Victoria