

We welcome the opportunity to comment on the Bill and see it as an opportunity to strengthen Australia's support of and response to a group of nonvoting citizens.

### Rationale for a Commissioner

The problems experienced by some children particularly in relation to family violence are often given as the rationale for Australia establishing a children's commissioner. While this is an important reason it is ultimately a pathologising view of children and childhood, one which sees the primary role of the state and its instruments as stepping in to fix the problems of children when their family is unable to, and hence not the optimal basis for considering a positive approach to policies for children and young people.

Certainly it is the family who love, care and 'grow up' children, who are the most important institution in children's lives and for achieving wellbeing. This doesn't justify the state withdrawing from a direct role in promoting children's wellbeing, rather it suggests that the state adopt mechanisms and policies that actively support families raising children as a primary channel for achieving children's wellbeing,.

There is a further view of children and young people which sees them as citizens where the state plays a range of roles and offers a range of direct supports such as transport infrastructure to assist with movement; parks and sports areas to assist with leisure and recreation; taxation to assist with material basics; education to assist with learning; and social supports to assist with a range of social issues. It is this broader view of children as citizens with a direct albeit nonvoting relationship with the state, and to who the family is of uttermost importance, which children and young people themselves prefer.

This view is evident in the research that the NSW Commissions for Children and Young People (2007) and WA Commission for Children and Young People (2010) separately carried out into children's views of wellbeing, where children described their wellbeing in wide terms and in particular the importance of being taken seriously in both the private and the public sphere.

Further when the NSW Cabinet Office was consulting with children as to their preferred role for the NSW Commission, they clearly stated they wanted the role to be broader than child protection: and for it to be for all children. One child said "you know it's our Commission too". Any proposed Commissioner should therefore work within a wellbeing framework.

The wellbeing of children and young people includes their care, development, education, health and safety and covers their physical, mental, emotional and spiritual life. The perspective is about seeing children as citizens, not as problems that need to be solved. It is an encompassing term that is wider than rights but is inclusive of rights.

Any proposed Commission should not be limited to a specific rights-based framework. While rights are an important contributor to children's wellbeing, they are not the primary determinant. As the NSW (2007) and WA (2010) Commission for Children and Young Peoples research shows, from children's and young people's perspectives relationships are overwhelmingly the primary determinant of their wellbeing. The role and actions of any proposed Commissioner should therefore respect and reflect the importance children and young people place on relationships.

Rights tend to address legally established minimums. One of the consequences of using a rights-based framework is the tools and instruments that flow from the use of the language and legislation ultimately operate within a legal framework. Yet this framework is not part of the everyday life of

Australian children and young people, and does not fit easily with how children and young people view their world or operate within it.

Further, families, parents, guardians and other important carers in a child or young person's life can feel marginalised when children's rights are promoted. This approach can appear to ignore the others in the family group and some in the community feel it interferes with the important roles the family group plays in care, support, guidance, and decision-making.

The Australian community may be divided about whether or not improving children's rights is the most important outcome for Australia's children; however, community support for promoting children's wellbeing is unequivocal.

Currently, the Australian Government does not have a single unifying set of policies and programs encompassing such a view of children and young people. There are Ministers and Parliamentary Secretaries with responsibilities for school age children, for early childhood education and care, for youth, for sport, for health, for families, for social inclusion. Summaries of programs prepared by Departments for the recent ARACY hosted workshop on an Action Plan for Young Australians make the lack of focus across the age range quite clear.

*We recommend that the object of the Bill is to promote and advocate for the wellbeing of children and young people and that this is set out in the Bill reflected throughout the Bill.*

#### Roles and duties

Currently the Bill gives the Commissioner a number of roles: as advocate, monitor, co-ordinator (s3(2)(a-c)), guardian (s9(1)(e)) and intervener (s9(1)(h)). These roles are potentially in conflict with each other and in any case some more properly belong with the elected Government than a statutory officer.

Monitoring the application of laws when you're responsible for coordinating services and acting as a legal guardian that arise from those very laws you are monitoring is potentially a conflict. Similarly intervening in legal cases when you're also monitoring the application of those laws is a potentially a conflict. Further reporting to the UN Committee on the Rights of the Child on Australia's performance under UN Convention on the Rights of the Child when you're also responsible for the guardianship and legal rights of some of those children and young people is a conflict.

It is inappropriate and impossible for an independent statutory officer to coordinate related policies, programs and funding across Australia that impact on children and young people. Almost all policies impact on children and young people: for example taxation, environment, transport as well as education health and justice. Such a role requires shifting significant powers such as the power to access and direct expenditure, from the elected Government to the Commissioner so the Office could give effect to this role. This effectively substitutes a statutorily appointed decision maker for the elected Government that is traditionally responsible for this.

Certainly coordination and integration are emerging as important features of systems that successfully promote children's wellbeing. For example, the UK has moved to much stronger integration for children's services and supports under *Every Child Matters* recognising that integration must occur at the front-line of service delivery; in the processes which support front line staff; in the overarching strategies for children; and in the governance of arrangements for children.

The Commissioner should encourage governments at all levels to continue to improve integrated approaches to children's services, however they should not have responsibility for all policies impacting on children nor should they be responsible for executing that coordination.

The Commissioner should primarily have a systemic analysis orientation rather than an individual case management or service orientation. They should work to place the wellbeing of children and young people higher on the nation's priorities, help place the wellbeing of children and young people at the centre of policy development, legislation, program development and service delivery and change how we value and treat our children and young people.

Currently as we have noted above there is no national entity within Government to promote child-focused policy, legislation, program and service development or to support a coordinated policy framework for children and young people. Given the Government's responsibilities touch the lives of children and young people in so many ways; creating a position that advocates for children's wellbeing is an important step towards better outcomes for children and young people.

The Commissioner should ensure that the impact of legislation, government policies, legislation, program development and services practices on children and young people is understood by decision makers and that unforeseen consequences do not affect children and young people negatively.

The Bill recommends the Commissioner act as the legal guardian for unaccompanied minors. As discussed earlier, this individual case management role conflicts with the Commissioner's primary orientation towards systemic analysis. There is however a further difficulty with this proposal.

Improving the response to unaccompanied minors is more complex than simply transferring guardianship. It has implications for the development and funding of suitable services, negotiating with relevant state and territory departments regarding their role, accessing and funding legal services, interacting with the Australian Federal Police, complaints handling, access to income support to identify a few.

This complexity suggests that unaccompanied minor children would be better served if the Commissioner's role was to assist the various government agencies develop an improved systemic response to unaccompanied minors, rather than provide individual case management that other agencies are more suited to providing.

The Bill also makes reference to a number of specific groups that must be consulted e.g. educators with no clear reason given for mentioning them over other groups e.g. early education and care workers for young children, youth workers, health workers.

The Bill also requires rather than allows the Commissioner to consult with certain groups which could be onerous given the breadth of issues and number of agencies. Yet the one group the Commissioner should consult with i.e. state and Territory Commissioners are not identified. This should be rectified.

*We recommend that the Bill be redrafted to reflect that the Commissioner's functions are as follows:*

- *To advocate for children and young people nationally, across Government, in the community and the business sector about matters relating to their wellbeing;*
  - *For example by raising the issues for children in developing and monitoring media advertising standards.*
- *To showcase best practice responses which enhance the wellbeing of children and young people;*
  - *For example by modelling the use of online tools to consult with young people in developing cyber safety and other programs.*

- *To consider and make recommendations about policies, legislation, reports, practices and services or any other matters affecting the wellbeing of children and young people;*
  - *For example by making submissions to Inquiries such as the impacts of the Henry Review of Taxation.*
- *To promote the participation of children and young people in community life and in particular in decisions that affect them, appropriate to their age and stage of development;*
  - *For example by working with the Health Preventative Taskforce in seeking children's views about health.*
- *To initiate, promote, coordinate, conduct and/or sponsor research, information, education, public awareness activities and other matters relating to the wellbeing of children and young people;*
  - *For example by sponsoring an analysis of the Longitudinal Study of Australia's Children data regarding play by children aged under 5 to help develop policy on the built environment;*
- *To promote a child and young person-centred approach to policy in all aspects and levels of government activity;*
  - *For example by working with the Department of Immigration to improve the policy and service response to unaccompanied minors*
- *To encourage coordinated and integrated approaches to service delivery for children and young people across all levels of government;*
  - *For example by membership of advisory groups on implementing policy frameworks of significance to children and young people such as the National Framework for Protecting Australia's Children.*
- *To monitor and report on Australia's obligations under the Convention on the Rights of the Child; and*
- *To provide information, referrals and advice to assist individual children and young people but not deal with a complaint made by, or on behalf of, an individual child or young person*
  - *For example by referring a parent concerned about the other parent's behaviour towards their children, to a Family Relationship centre.*

*We recommend that the Bill be redrafted so the Commissioner would have the following duties in undertaking these functions:*

- *To serve all children and young people in Australia, and give priority to, and have special regard to, the interests and needs of Aboriginal and Torres Strait Islander children and young people; and children and young people who are vulnerable or disadvantaged for any reason;*
- *To have regard to the UN Convention on the Rights of the Child;*
- *To seek the views of children and young people before making any significant recommendations or decisions;*
- *To refer a child or children, young person or young people, to the relevant authorities if they are at risk of significant harm;*
- *To collaborate with the state and territory Children's Commissioners and Guardians and the Australian Human Rights Commission including convening at least one annual meeting to discuss relevant priorities and issues, and consulting with them before reporting to the Parliament of Australia or the UN Committee on the Rights of the Child on the Convention on the Rights of the Child;*
- *To work in cooperation with, and consult with, other government agencies and non-government agencies; and*
- *To table an annual report to the Parliament of Australia detailing the Commission's activities.*

*We recommend that references to consulting with educators be removed.*

*We recommend that the Commissioner may consult with relevant Commonwealth state, territory bodies and other organisations rather than must consult with them.*

#### What the Commissioner should not do

There are also a number of roles that the Commissioner should not undertake which could usefully be clarified in the Bill. This includes those roles currently undertaken by existing institutions such as responding to individual's complaints which many state Commissioners, Ombudsman and the Australian Human rights Commission currently undertake. In any case formal complaints mechanisms are not child friendly nor do they fit with children's behaviour as evidenced by the very low number of complaints made directly by children.

Discrimination is currently dealt with by the Australian Human Rights Commission and should remain with them. Similarly there are existing groups capable of intervening on behalf of children in legal matters and that should remain outside the Commission. This not only reduces duplication but also avoids a conflict of interest for the Commissioner who may be both intervening in a legal matter and providing advice to Government on that same legal issue. Priority should be given to the proposed Commissioner's primary role of advocating at a systemic level not an individual level.

Further the Commissioner should act within the usual conventions regarding relationships between Commonwealth and state/territory officials in relation to the state/territory children's commissioners and guardians. Importantly the Commissioner should not be an additional layer of reporting for them.

*We recommend that the Commissioner would not:*

- *Investigate, intervene in or attempt to ameliorate the circumstances of a particular child or young person;*
- *Handle complaints and matters of discrimination against children or young people;*
- *Be an additional layer of reporting for state and territory Commissioners; or*
- *Provide independent advice to assist courts in cases that involve human rights relating to children and young people.*

#### Independence

The Commissioner should be independent of other interests and should be solely focused on children and young people's wellbeing. There is currently no institution independent of other interests acting as a voice for Australia's children and young people.

Children and young people have many strengths and make many contributions; however, they are not often able to organise themselves into advocacy groups and are therefore mostly dependant on others to advocate for their interests.

Parents can be strong advocates for their own children however often find it difficult to organise on behalf of children or young people as a group. Other advocates represent children and young people but often do so from their own adult organisational or political point of view, and frequently without seeking children's or young people's views. These groups have important views and assist the development of public policy; however, they may not really represent the interests of children and young people.

We welcome the inclusion in the Bill of the requirement that the Commissioner to act independently. Essential to the exercising of this independence is the Commissioners control over their staff, budget and other resources. This aspect of independence should be put beyond doubt in the Bill through establishing it as an independent statutory agency.

However as the Commission will be funded from taxes, it is also important there be accountability for the use of those resources. The establishment of a Commissioner requires a sophisticated balancing of the independence of the role with the practical recognition of Government funding.

A Commissioner would report directly to the Parliament of Australia, and except as specifically provided for in the Act, not be subject to the direction of a Minister. They should be able to directly table reports to Parliament. They should however, provide the Minister with a draft of any report one month in advance of tabling, giving the Minister an opportunity to comment on the report. A Commissioner would be duty-bound to consider any comment provided by the Minister before tabling the final report.

As a statutory authority the Commissioner would be responsible for their own financial and administrative matters, receive a separate budget through the Ministers portfolio and employ its own staff. The staff required to assist the Commissioner in the performance of their functions would be engaged under the *Public Service Act 1999*.

Such an approach would enable the Commissioner to be an advocate free from political interference while ensuring good governance of public monies.

The Commissioner should be able to make the following reports:

- An Annual Report to the Parliament on the activities of the Commission in line with other statutory authorities and in the format required by the Government;
- An independent Report to the UN Committee on the Rights of the Child;
- A Report to the Parliament of Australia on Australia's progress against issues identified by the UN Committee on the Rights of the Child; and
- Other occasional reports on issues of significance and importance to children which are within the scope of the functions of the Commissioner.

In relation to the UN Committee on the Rights of the Child, the Attorney General would continue to submit Australia's Report on behalf of the Government. An Australian Commissioner would also submit a report as would the Non Government Organisations (the 'shadow report'). This is consistent with arrangements in the United Kingdom for example, where the Children's Commissioner submits a report to the UN Committee on the Rights of the Child instead of the national human rights institution.

The Commissioner should have the requisite powers to execute their role and fulfil their obligations. Section 9(2) gives the Commissioner a general power to do all things necessary for the performance of the functions. However generally these powers should be more specifically identified to avoid the misuse of powers and to afford those against whom the powers are being used, some protections and rights.

In carrying out their functions the Commissioner should have the following powers:

- To table reports directly in Parliament after forwarding the draft to the Minister and taking into account any comments they may make;
- To make public or other comments on children's and young people's well-being; and
- To require Government and non government agencies to provide them with relevant information, data and records to assist in monitoring and reporting on Australia's compliance with its obligations under the UN Committee on the Rights of the Child and other Government designated international treaties. Where information is disclosed in good faith, the organisation and individuals would be protected from liability.

To enable an Australian Commissioner to effectively carry out their role as an adviser, influencer, enabler and promoter, the two most important powers to have available to them would be the power to access information and the power to report directly to Parliament.

Neither power should be unfettered and should not override Cabinet-in-confidence, security classifications or crime commission classifications.

The ability to directly report to the Australian Parliament would give an Australian Commissioner the ability to raise concerns with the Parliament which in turn can more properly ask the Government to account for their policy decision/position. Requiring the Commissioner to provide a draft to the Minister and allowing four weeks for Ministerial comments provides the Government with the opportunity to seek further clarification, research or interviewing be undertaken by an Australian Commissioner before the tabling of a final report.

The Commissioner would also need the power to be able to speak publicly on behalf of children, without fear of interference.

*We recommend that the Bill establish a statutory authority called The Australian Commission for Children and Young People, responsible for its own financial and administrative matters, receive a separate budget through the Ministers portfolio and employ its own staff. This includes a requirement to table an annual report in Parliament detailing the Commissioner's activities for the previous year. The staff required to assist an Australian Commissioner in the performance of their functions should be engaged under the Public Service Act 1999.*

*We recommend that the Commissioner report directly to the Parliament of Australia, and except as specifically provided for in the Act for example in relation to financial accountability, not be subject to the direction of a Minister. They should however, provide the Minister with a draft of any report one month in advance of tabling, giving the Minister an opportunity to comment on the report. A Commissioner would be duty-bound to consider any comment provided by the Minister before tabling the final report.*

*We recommend the retention of the sections that refer to the Commissioner acting independently.*

*We recommend that specific reference be included in the Bill to give the Commissioner the following powers:*

- *To table reports directly in Parliament after forwarding the draft to the Minister and taking into account any comments they may make;*
- *To make public or other comments on children's and young people's well-being; and*
- *To require Government and non government agencies to provide them with relevant information, data and records to assist in monitoring and reporting on Australia's compliance with its obligations under the UN Committee on the Rights of the Child and other Government designated international treaties. Where information is disclosed in good faith, the organisation and individuals would be protected from liability.*

### Constituents

We support the definition of young person as someone under the age of 18 years as it creates consistency at a policy and legislative level.

The Commissioner should serve all children and young people in Australia; yet within this total population the Commissioner should be required to give priority to, and have special regard to, the

interests and needs of Aboriginal and Torres Strait Islander children and young people; and children and young people who are vulnerable or disadvantaged for any reason such as children who are refugee unaccompanied minors.

This approach recognises that whilst a Commissioner should advocate for and promote the interests and wellbeing of all children and young people in Australia, that a voice or an advocate is often needed most for those who are marginalised or left behind within our society.

The term 'young people' is deliberately used as those from the early teenage years onwards have previously indicated they prefer to be described as 'young people' rather than 'children'.

#### Name

The proposed Commissioner has a significant role in reporting on Australia's performance against the UN Convention on the Rights of the Child which gives them an international role. In any case the Commissioner should play an active role in advocating within the region and internationally. Australia is an important middle power that has had a positive influence on the world affairs: the Commissioner should similarly take a proactive and positive role and ensure that children's interests are represented at international forums.

Given the Commissioners international role, then it should be renamed the Australian Commissioner to distinguish them from other Children's Commissioners within the region, internationally and from other Commonwealth countries.

*We recommend the Commissioner be called the Australian Commissioner for Children and Young People.*

#### Statutory Review period

Reviewing the Act after two years is premature. The Commissioner's time will initially be absorbed with establishing an office, employing staff and setting up communication with children and young people (Thomas et al 2010). Additionally there will not have been a reporting period to the UN Committee on the Rights of the Child. The statutory review period should be extended to allow for a complete cycle in which the Commissioners functions are tested.

*We recommend that the Bill be reviewed five years after commencement.*

#### Consulting with children and young people on the Bill

The NSW (2007) and WA Commissioners for Children and Young People (2010) consultation and research on wellbeing also demonstrates that children and young people are clearly capable of forming opinions on the various public instruments that impact on them.

Therefore the establishment of a Commission for them must be influenced also by them. Failure to specifically seek their views will undermine the integrity of the Parliaments actions.

There is a precedent for Parliament to undertake such consultations with children. The NSW Parliamentary Committee on Children and Young People (2009) took evidence directly from children when they were conducting their Inquiry into 9-14 year olds.

*We recommend the Committee directly consult with a range of children on the redrafted Bill before it is returned to the Senate for further debate.*

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