



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: HumanRightsCommittee:VK

14 December 2010

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

Dear Committee Secretary,

Re: Commonwealth Commissioner for Children and Young People Bill 2010

The Human Rights Committee (the "Committee") of the Law Society of New South Wales has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society Council on any proposed changes.

The Committee thanks you for the opportunity to comment on the *Commonwealth Commissioner for Children and Young People Bill 2010* (the "Bill"). The Committee is generally supportive of the Bill, including the extension of the Commissioner's powers to children and young people in Australia and Australian external territory regardless of their citizenship or residency status. In addition, the Committee wishes to make several observations and suggestions in relation to the Bill that it believes would aid the Commissioner in his/her general objective of protecting and promoting the rights, interests and well-being of children and young people.

1. **Enforceability:**

The Committee is concerned that the Bill in its current form may not properly empower the Commissioner to protect the rights of children and young people. For example, while the Commissioner is empowered to intervene in legal cases involving the rights of children and young people (clause 9(1)(h) of the Bill), the Commissioner is not able to initiate proceedings on his/her own accord.

Furthermore, although clause 9(2) empowers the Commissioner to do all things necessary to be done in order that he/she can perform his/her functions, it is not clear if the Commissioner is able to compulsorily require the production of information in performing his/her functions.

The Committee's view is that the Commissioner should be able to:

- a. initiate proceedings on his/her own accord; and
- b. compulsorily require the production of information from individuals, Commonwealth agencies, State and Territory bodies and other organisations in the performance of its functions.

2. **Accountability and processes:**

The Committee cautions against wholly or partially duplicating an organisation such as the NSW Department of Community Services (DoCS). Public perception of DoCS or of

its equivalent in other states, fairly or unfairly, is that it is not sufficiently accountable to the public or to other agencies working in child protection.¹ Further, there is a perception that while DoCS seeks to undertake child protection action, it has been known to either fail to intervene,² or to intervene in a disproportionate and/or inappropriate way.³ In making this observation in respect of the proposed Commissioner, the Committee notes the NSW Ombudsman's conclusion in its report on DoCS:

*It is not enough that DoCS officers are committed and well-intentioned. Without the right systems, records and support, appropriate child protection interventions become as much a matter of good luck as good management.*⁴

That Ombudsman's report concluded that there was a clear link between poor internal processes (record keeping, communication, inadequate computer system and lack of administrative support) and ineffective interventions on the ground.

The Committee supports clause 11 of the Bill which provides that the Commissioner is to act independently. However, the Committee's view is that in addition to acting independently, the Bill should articulate that the Commissioner is accountable to the public. The Committee's view is that including accountability provisions in the Bill may assist the Commissioner to avoid the pitfalls that affect DoCS. For example, the Bill might expressly provide that the Commissioner is subject to freedom of information requirements. The Bill might also make clear that, in carrying out his/her functions, the Commissioner keep adequate records and make regular reports.

3. "Rights, interests and well-being":

The Committee notes that the Commissioner is required to act in a way that promotes and protects the rights, interests and well-being of children and young people (clause 11(1)(a) of the Bill). The Committee's view is that an assessment of what constitutes the best interests of the child should be undertaken on a considered case-by-case basis. In the Committee's view, the Bill should include a non-exhaustive list of factors affecting the "rights, interests and well-being of children and young people". For example, the child's socio-economic background, age and life experience of the child and his/her parents' circumstances will affect what is considered to be in his/her best interests.

The Committee thanks you again for the opportunity to comment.

Yours sincerely,

Mary Macken
President

¹ See for example Caroline Overington, "Couple awarded \$50K to sue DOCS" *The Australian*, 20 April 2009 available online from here: <http://www.theaustralian.com.au/news/couple-awarded-50k-to-sue-docs/story-e6frg6no-1225700241031> (last accessed 8 December 2010)

² See for example Caroline Overington, "150 NSW children who died were DOCS cases: Ombudsman" *The Australian*, 23 April 2009, available online from here: <http://www.theaustralian.com.au/news/children-who-died-were-docs-cases/story-e6frg6no-1225702273083> (last accessed 8 December 2010) and NSW Ombudsman, *Report of Reviewable Deaths in 2001 – Child Deaths*, April 2009 available online from <http://www.ombo.nsw.gov.au/publication/PDF/annualreport/Report%20of%20Reviewable%20Deaths%202007%20-%20Child%20Deaths.pdf> (last accessed 8 December 2009)

³ See note 1.

⁴ NSW Ombudsman, *DoCS: Critical Issues – Concerns arising from investigations into the Department of Community Services*, April 2002 at p 18, available online from: <http://www.ombo.nsw.gov.au/publication/PDF/specialreport/DOCS-CRITICAL%20ISSUES.pdf> (last accessed 8 December 2010)