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Committee Secretary  
Senate Legal and Constitutional Committee  
Parliament House  
Canberra ACT 2600

### **Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010**

ChilOut – Children Out of Immigration Detention would like to provide this submission in support of the Bill to establish a Commonwealth Commissioner for Children and Young People.

We would like to note that calls for moving guardianship of unaccompanied minors have been made by many organisations for many years. ChilOut strongly supports replacing the Minister for Immigration with a more appropriate guardian for unaccompanied refugee and asylum seeking children, particularly those held in immigration detention.

Our board members have a wealth of experience working in the area of refugee and asylum-seeking children's rights and are located in Sydney and Canberra. We would be available to present evidence in person at any time.

Yours truly,

Kate Gauthier

Chair  
ChilOut – Children Out of Immigration Detention

## 1 Background

ChilOut is a not-for-profit community group of Australians who are concerned with the plight of children under 18 years held in immigration detention. ChilOut began its campaign in 2001, and quickly drew the support of many thousands of Australian parents and citizens who were against the detention of children.

Our campaign was put on hold after the 2005 changes made by the Howard Government to release children from secure detention facilities, with its amendment to the Migration Act to include the principle that children should only be detained “as a measure of last resort” in accordance with article 37(b) of the Convention on the Rights of the Child (CROC).

In recent years, although there has been no official change to policy, this practice has been reversed and the numbers of children being held in locked facilities has risen to alarming numbers, with conditions in those facilities worsening. ChilOut has resumed its campaign to ensure the rights of those children will be upheld.

This Bill is a vital step forward for the protection of children and young people in Australia. However, as ChilOut is concerned with children in immigration detention, this submission will focus on the rights and needs of those children.

## 2 Why Australia needs a Commissioner for Children and Young People

ChilOut strongly supports the Bill to establish a Commonwealth Commissioner for Children and Young People. We have provided some of our key reasons below:

### 2.1 A federal advocate for children’s needs and rights

There is currently no federal agency or organisation that is focused on the specific issue of children’s rights and needs. While the Australian Human Rights Commission has focused on children’s rights in past reports and investigations, it has neither the funding nor the powers to take on a Commissioner role expert.

Children in Australia deserve their own advocate who would oversee and monitor children’s rights under the CROC.

### 2.2 A national approach to children’s needs

A Children’s and Young People Commissioner (CYP Commissioner) would underpin the Australian Government’s National Framework for Protecting Australia’s Children 2009-2020. The Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin, has stated *‘We need national standards of care so children who cannot live with their families can grow up in a safe, secure environment. The implementation of national standards will provide a benchmark for the care of these children no matter where in Australia they live.’*<sup>1</sup>

This acknowledgement of the need to take a national approach towards out of home care should be applied to all children’s needs and rights. Specifically for children in immigration detention, a national framework would better inform the process to set up alternatives to detention currently being undertaken by the Department of Immigration. It is disturbing to view the difference in standards of care being documented in the national standards for out of home care compared to the environment provided to children detained in so-called Alternative Places of Detention (APODs.)

A national approach to the care of detained children may see an end to the discrimination that children in immigration detention face in the standards of care deemed appropriate.

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<sup>1</sup> [http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/nat\\_stds\\_children\\_in\\_care\\_21jan2010.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/nat_stds_children_in_care_21jan2010.aspx)

### 2.3 Meeting responsibilities under international law

The federal Government is signatory to the CROC and has responsibilities to meet obligations under the treaty. Yet state governments are responsible for delivery of many services to children as well as administering child protection laws, which impact on Australia's overall adherence to the CROC. A CYP Commissioner would assist in efforts to ensure all levels of Government adhere to our obligations towards children under the treaty.

The issue of breaches under the CROC for children in immigration detention is expanded upon below.

### 2.4 Lack of human rights statutory framework

Successive Australian governments have declined to introduce any legislated framework for human rights protection in Australia. As there is no mechanism to *enforce* children's rights, there is an increased need for national *advocacy* on children's human rights issues, particularly for at-risk children such as those in immigration detention. A Commissioner would not have any enforcement powers, but would be a valuable advocate to investigate and suggest remedies to a wide range of potential breaches of children's rights and needs in both public and private arenas.

### 2.5 General reform moves towards federalism

Child protection is not the only area where a national approach is being adopted. Across many professions, issues and areas of law, a state-based approach is being replaced by a national one. One example is the move towards a national curriculum for schools. Another example is the issue of professional bodies responsible for the registering and disciplining of medical professionals, where state agencies have been replaced with national agencies. This approach is being replicated across a wide range of policy areas. A CYP Commissioner would assist in the move to have child protection issues become nationally addressed rather than remain only a states' issue, in line with the general reform approach of the current federal government.

## 3 Children in immigration detention

### 3.1 Protection of children held under Commonwealth jurisdiction

Currently, there is no agency or commission with the responsibility to protect and advocate for the rights of children being held under Commonwealth jurisdiction, specifically children held in immigration detention centres. As there are no Commonwealth child protection laws, this results in children in immigration detention being denied the basic protections of state child abuse laws, or even codified minimum standards of conditions for their detention. This has resulted in refugee and asylum seeking children having fewer protections and remedies for the conditions under which they are held than convicted criminals, who have basic protections of their rights enshrined in state laws.

A well-known case of children detained in Baxter Detention Centre illustrates this point. The children's lawyers made an application for release to the Family Court, arguing that the conditions of detention were a breach of South Australian child protection laws. The Family Court agreed and ordered the release of the children<sup>2</sup>. The Department of Immigration transferred the children into community detention, but at the same time appealed this matter to the High Court, not on the grounds that there was no abuse of the children, but on the grounds that the Family Court had no jurisdiction in Commonwealth matters of immigration detention. This argument was upheld<sup>3</sup>, creating the legal precedent

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<sup>2</sup> <http://www.austlii.edu.au/au/cases/cth/FamCA/2003/451.html>

<sup>3</sup> <http://www.austlii.edu.au/au/cases/cth/HCA/2004/20.html>

that the Commonwealth Government can engage in child abuse. This is a matter that any decent society should take action to rectify.

### 3.2 Breaches of Convention on the Rights of the Child (CROC)

According to the *Convention on the Rights of the Child*, children must be detained as a *measure of last resort* and for the *shortest appropriate period of time*; and any detention of children must be a *proportionate response* to achieving a legitimate aim.

CROC contains the following provisions:

- the best interests of the child shall be a primary consideration. (Article 3(1));
- detention must be as a measure of last resort and for the shortest appropriate period of time. (Article 37(b));
- children in detention have right to be treated with humanity and respect (Art.37(a), (c));
- children have the right to enjoy, to maximum extent possible, development and recovery from last trauma (Art.6(2) and (39));
- asylum-seeking and refugee children are entitled to appropriate protection and assistance (Art. 22(1)).

*A Last Resort?*, the 2004 report of the (2002-3) HREOC inquiry into children in immigration detention, found that the Department's failure to implement the repeated recommendations to release children on mental health grounds amounted to cruel and inhumane treatment under article 37(a) of *the Convention on the Rights of the Child*. A CYP Commissioner would be specifically mandated to follow up such breaches.

### 3.3 Current conditions for children in immigration detention

There has been a significant build-up of the numbers of children being held in immigration detention facilities. According to Department statistics, as at 22 October 2010, there were 772 children being detained.<sup>4</sup>

Of the 772 children, 654 were being held in "alternative temporary detention in the community" otherwise known as APODs – Alternative Places of Detention. *Alternative temporary detention in the community* is not 'temporary' as children have been in Leonora for seven months and for far longer on Christmas Island. It is not really 'in the community' as children are held behind fences, and the few lucky enough to go outside to school<sup>5</sup> do so under guard and are brought right back afterwards.

There are 297 kids held in this form of detention on Christmas Island. Most of them are unaccompanied Afghan children - effectively war orphans. There can be no argument that they are being held because they are a security risk.

Many children have not left their place of detention in months. While it was laudable that the ALP policy was to remove children from main Immigration Detention Centres (IDCs), the result has been that kids are now held for long periods in places that do not have anything close to adequate facilities. At least the IDCs were purpose built to house people for long periods and have recreational and educational facilities. Places such as the Darwin Asti Motel are cramped, with only a cement carpark for children to play in. 150 Afghan boys held in the Darwin Lodge have not been outside since April 2010.

The move to house children in APODs has not been taken in the best interests of the children, but as a political fix for the embarrassing situation of detaining hundreds of children, a policy the current government strongly criticised the previous government for. Under the APOD policy, the Minister for Immigration, Chris Bowen, would have you

<sup>4</sup> [http://www.immi.gov.au/managing-australias-borders/detention/\\_pdf/immigration-detention-statistics-20101022.pdf](http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20101022.pdf)

<sup>5</sup> <http://www.crikey.com.au/2010/09/13/next-stop-the-darwin-airport-motel-home-to-150-asylum-seeker-teens/>

believe that these children are not really being detained, recently claiming "There's no children in detention centres as such, so there's no children behind the razor wire."<sup>6</sup> As though the absence of razor wire alone can make detention humane or acceptable. Yet Dr Louise Newman, a child psychiatrist and an adviser to Government on immigration detention issues, has stated that in some cases, detention centres are actually better than the alternatives currently being used for children.<sup>7</sup>

In the absence of CYP Commissioner, there is no single agency mandated to draw together such advice and to advocate in a sustained fashion for the rights and needs children in immigration detention.

## 4 Amendments to the Bill

### 4.1 Guardianship of unaccompanied children in immigration detention

ChilOut strongly agrees with the need to remove powers of guardianship for unaccompanied minors from the Minister for Immigration. However, we disagree that the most appropriate guardian would be the CYP Commissioner.

Successive Immigration Ministers have failed to give unaccompanied children the special protection that they needed. This directly relates to the fact that the Minister for Immigration is both the guardian and jailer of unaccompanied children, as well as the ultimate decider of visa grants.

A properly independent advocate is better able hold the best interests of the child as a primary consideration, both for the child's migration issues as well as their social-service and accommodation needs. For example, under current Migration regulation 2.20<sup>8</sup>, protection visa applicant children (asylum seekers) can be released from detention under a Bridging Visa if a child welfare authority of a State or Territory has certified that release from detention is in the best interests of the non-citizen and there is someone to care for the child in the community. Yet the Minister for Immigration has not referred a single case to any state welfare authority to determine if a child could be released, despite it being quite obviously in a child's best interest not to be detained for long periods, particularly in the case of the hundreds of unaccompanied minors being detained. This is because under excision laws, those child asylum seekers are barred from applying for a protection visa under the usual arrangements and are given a non-statutory application process. A CYP Commissioner would be in a position to advocate that this discriminatory situation be rectified for children.

It is crucial the Commission be able to operate independently. ChilOut believes that s11(1)(b)<sup>9</sup> of the Bill is incompatible with s9(1)(e)<sup>10</sup>. Under these two sections, the Commission would be responsible both for guardianship of unaccompanied children, as well as responsible for monitoring the appropriateness of guardianship and investigating complaints.

Guardianship of unaccompanied minors should not rest with an independent Commissioner for Children and Young People. Rather it should be transferred from the Minister for Immigration to a Minister for Children and Young People, ideally, but in the absence of such a position, the Minister for Families, Housing, Community Services and Indigenous Affairs. The Minister would then engage FaHCSIA in the care of

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<sup>6</sup> <http://www.abc.net.au/tv/qanda/txt/s3010595.htm>

<sup>7</sup> <http://www.abc.net.au/am/content/2010/s3015469.htm>

<sup>8</sup> [http://www.austlii.edu.au/au/legis/cth/consol\\_reg/mr1994227/s2.20.html](http://www.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/s2.20.html)

<sup>9</sup> "In performing his or her functions, the Commissioner is not under the control or direction of the Minister."

<sup>10</sup> "[The Commissioner's powers include] 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."

unaccompanied children. Direct responsibility would then be delegated to members of a panel of advisers funded by FaHCSIA, but staffed by a community organisation.<sup>11</sup>

**Recommendation:** If there is agreement to transfer guardianship arrangements out of the hands of the Immigration Minister into a more appropriate body, ChilOut recommends removing s9(1)(e) from the Bill.

#### 4.2 Reporting to Parliament

ChilOut believes that text of section 12 should be made more specific.

S11(1)(b) states the Commissioner is not under the control or direction of the Minister, and s11(2) allows the Commissioner to report to the Parliament. In order to fully grant the independence implied under s11(1)(b), the Bill should be amended to specifically allow for the Commissioner to report *directly* to Parliament.

**Recommendation:** Change bill to read

s11(2)The Commissioner may report directly to the Parliament on any matter related to his or her functions.

#### 4.3 Complaints mechanism

ChilOut would like to see the function of the Commission expanded to include developing a mechanism to investigate complaints by or on behalf of children concerning breaches of their human rights.

**Recommendation:** Add s9(1)(k)

s9(1)(k) receiving, investigating and acting on complaints brought by or on behalf of children concerning breaches of their human rights.

#### 4.4 Ensure that all Australian activities towards children are covered.

ChilOut endorses the view of the Families Australia submission in respect to ensuring that the Commission has jurisdiction on all offshore processing centres within Australian territory or where Australia provides funding and may exercise rights and influence. This will be of particular importance if an offshore processing centre is set up in East Timor.

**Recommendation:** Include the change to the Bill as drafted by Families Australia

S9(3)(d) all children and young people seeking asylum in Australia, including those held in off-shore processing facilities which fall under Australia's jurisdiction or to which Australia contributes resources.

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<sup>11</sup> See Australian Human Rights Commission, *A Last Resort?*, "Recommendation 3: An independent guardian should be appointed for unaccompanied children", available at [http://www.hreoc.gov.au/human\\_rights/children\\_detention\\_report/report/chap17.htm#17\\_4](http://www.hreoc.gov.au/human_rights/children_detention_report/report/chap17.htm#17_4)