



**SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL COMMITTEE
INQUIRY INTO THE
*COMMONWEALTH COMMISSIONER FOR
CHILDREN AND YOUNG PEOPLE BILL 2010***

FAMILIES AUSTRALIA

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Families Australia submission re:
Commonwealth Commissioner for Children and Young People
Bill 2010

Introduction

Families Australia welcomes the introduction of the *Commonwealth Commissioner for Children and Young People Bill 2010* and wishes to provide the Senate Legal and Constitutional Committee with 24 general and specific recommendations in relation to it (please see *Attachment A* for a summary).

Families Australia is a national, peak, independent, not-for-profit organisation which aims to promote the wellbeing of families and children. Since its inception in 2001, Families Australia has been a leading advocate for the introduction of a national strategy to tackle child abuse and neglect and to promote children's wellbeing. It played a major role in developing the National Framework for Protecting Australia's Children 2009-2020 (hereinafter called the 'National Framework'), which was endorsed by the Council of Australian Governments in May 2009.

For the past three years, Families Australia has been the coordinator of the Coalition of Organisations Committed to the Safety and Wellbeing of Australia's Children, a consortium of 100 major non-government community service organisations and prominent researchers from across Australia which is working closely with Federal, State and Territory Governments to implement the National Framework.

General comments

Families Australia strongly supports the introduction of the *Commonwealth Commissioner for Children and Young People Bill 2010*.

If the Commissioner is given appropriate powers and resourcing – see our specific comments below – he or she can potentially play a major role in improving the wellbeing and safety of Australia’s children and young people, as well as in helping to ensure that the rights of children and young people are protected and advanced in accordance with Australia’s obligations under the UN Convention on the Rights of the Child (hereinafter called the ‘UNCRC’), including in countries where Australia contributes to off-shore processing of asylum seekers and contributes to international agreements which may relate to the rights of children and young people.

The establishment of such an Office would be in line with Australia’s commitment in Article 4 of UNCRC, which states that “Governments must undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention.” It also would be an important advance in terms of promoting the centrality of children and young people in Australian society. As well as undertaking practical activities to protect and promote the rights of children and young people, the Office would be a important symbol of the nation’s intention to enhance its respect and care for children and young people.

The need for urgent national action to promote the rights and interests of children and young people is highlighted by facts which tell us that many of them need more help. While many children and young people in Australia enjoy their rights, many live in circumstances which increase their susceptibility to a violation of their rights, such as children living with mental illness or a disability¹.

In addition to reporting on those who live in circumstances of heightened vulnerability, official statistics indicate the high number of children who have already had their basic rights to safety and security violated². For example:

- in the five years to 2008-09, as a result mainly of child abuse or neglect, the number of children who were on care and protection orders increased by 47 percent to 34,409;
- in the five years to 2008-09, the number of children in out-of-home care rose by 44 percent to 34,069;
- in 2008-09, the number of children in Australia subject to a substantiation of a notification of child abuse or neglect increased by 1.7 percent to 32,641; and
- almost 50 percent of Australia's 100,000 homeless people are below the age of 25 years.

Aboriginal and Torres Strait Islander children are far more likely to be disadvantaged than non-Aboriginal and Torres Strait Islander children across a broad range of health and socio-economic indicators. They are two to three times as likely to die, be of low birth weight or have dental caries; five times as likely to be born to teenage mothers; eight to nine times as likely to be in the child protection system; and 24 times as likely to be in juvenile justice supervision³.

One of the more significant barriers to tackling these problems has been the poor coordination of policy planning and service delivery within, and across, various levels of government. In the area of protecting children, the Council of Australian Governments agreed (2009) that: "the investment by governments and the non-government sector into family support and child protection services is significant, yet our separate efforts still fail many children and young people. We need a unified approach that recognises that the protection of children is not simply a matter for the statutory child protection systems...Australia needs a shared agenda for change, with national leadership and a common goal"⁴.

The National Framework is predicated on a belief that 'business as usual' – of continuing with differing laws, policies, practices and standards across States and Territories – will not provide the major lift which is required to improve the lives of children and young people. Accordingly, the National Framework calls for

concerted national approaches on matters such as formal and informal out-of-home care, supporting the transition to independent living for young people leaving care and improved financial and non-financial support for carers.

The proposal for a Commonwealth Commissioner is another vitally important plank in achieving the required national-level lift in terms of policy, programs and resourcing for children and young people. It brings Australia into line with practice in many other countries, such as New Zealand, Norway, Sweden and England. It would also be in line with the recommendations of UN Committee on the Rights of the Child that all governments should create human rights institutions for children to assist in monitoring, promoting and protecting children's rights⁵.

We wish to make seven general comments and recommendations which aim to strengthen the Bill.

The first general comment relates to the national context in which the proposed Office of the Commissioner will be established. While the intention of promoting the wellbeing as well as the safety of children and young people is expressed in the Bill, it is important that the work of the Commissioner be situated squarely within a public health model under which, as stated in the National Framework:

priority is placed on having universal supports available for all families (for example, health and education). More intensive (secondary) prevention interventions are provided to those families that need additional assistance with a focus on early intervention. Tertiary child protection services are a last resort, and the least desirable option for families and governments.⁶

This model envisages a major shift in the way Australian governments and service delivery organisations conceptualise and respond to issues being faced by children and families. Under it, to again quote the National Framework, "a public health model offers a different approach with a greater emphasis on assisting families early enough to prevent abuse and neglect occurring"⁷. This approach is also consistent with the provisions of UNCRC.

We strongly recommend that the Bill explicitly reflect this broader approach to working with children, young people and their families. Specifically, the Commissioner ought to place strong emphasis on examining systemic issues impacting on children and young people and on promoting early intervention and prevention approaches based on a public health model. Without such a high-level reference point, there may be a tendency for the balance in the Commissioner's work to shift toward examination of specific cases, which would risk duplicating the work of the various State and Territory Commissioners or Children's Guardians (Recommendation 1).

The second general comment is that the Bill should provide a remit for the Commissioner to pay special attention to the needs and interests of groups of particularly vulnerable children and young people.

Aboriginal and Torres Strait Islander children and young people are over-represented in the child protection system, compared with non-Aboriginal and Torres Strait Islander children and young people. In 2008–09, the rate of Aboriginal and Torres Strait Islander children on care and protection orders was more than eight times the rate of non-Aboriginal and Torres Strait Islander children, and the rate of Aboriginal and Torres Strait Islander children in out-of-home care was just over nine times the rate of non-Aboriginal and Torres Strait Islander children. In the same year, Aboriginal and Torres Strait Islander children were 7.5 times as likely to be the subject of child abuse and neglect substantiations as non-Aboriginal and Torres Strait Islander children⁸.

According to the Australian Institute for Health and Welfare's *Child Protection Australia 2008-09* report, "the reasons for the over-representation of Aboriginal and Torres Strait Islander children in the child protection system are complex and include the legacy of past policies of the forced removal of some Aboriginal children from their families, the intergenerational effects of previous separations from family and culture, and poor socioeconomic status"⁹.

In view of these special and deeply compelling circumstances facing Aboriginal and Torres Strait Islander children and young people, families and communities, we urge positive consideration of ways in which the Commission should so structure itself as to ensure a particular focus on the needs of Aboriginal and Torres Strait Islander children and young people (Recommendation 2).

The Commissioner could, for example, be charged with monitoring compliance with the Aboriginal Child Placement Principle and should monitor and report on the impact of government policies on Aboriginal and Torres Strait Islander children and young people. The position would also augment the monitoring of existing COAG initiatives for children and young people, in particular, the National Framework and the National Quality Framework for Early Childhood Education and Care.

Other groups of children and young people who have heightened vulnerability include those who are in the out-of-home care system, in immigration detention and those living with a disability. In relation to children and young people living with disability, for example, the Commissioner should be tasked with advocating for minimum standards for quality of life to be met. To give effect to this point, an additional clause could be inserted at Part 2, Section 9 (Functions and powers of Commissioner) that “the Commissioner will pay particular regard to the rights, needs and interests of vulnerable children and young people” (Recommendation 3).

Our third general comment pertains to the extent of the powers of the Commissioner. Part 1, Section 3(2) states that the Commissioner “will advocate at the national level for the needs, views and rights of people below the age of 18”.

We recommend that the Bill recognise that the Commissioner ought not to ignore the needs and interest of people above the age of 18. We have in mind two

specific examples where the Commissioner should take a particular interest in the situation facing people over the age of 18 years because of their experiences as children.

It is widely acknowledged, based on research, that young people who transit from out-of-home care to independent living have relatively poor outcomes in terms of employment, education, homelessness, health and other indicators when compared with the wider cohort of young people who do not have an out-of-home care experience. Research commissioned by the CREATE Foundation shows that practice varies considerably across States and Territories in respect of the age at which government assistance ceases for young people transitioning from the out-of-home care system to independent living¹⁰. One State supports young people until 25 years, while others terminate assistance between 19 and 21 years. It would seem unreasonable, therefore, for the Commissioner to be unduly restricted in terms of the extent of coverage of his or her role.

The other instance we cite relates to the situation of the Stolen Generation, Forgotten Australians and former Child Migrants. As a nation, we have only relatively recently acknowledged, and started to provide support for, people from these backgrounds. We contend that Australia has in no way adequately understood or compensated these people for injustices they experienced as children. It is therefore important that the Commissioner be empowered to play a role in relation to past abuses perpetrated on children. This may, for example, take the form of providing evidence to official inquiries or advising on policy matters where past practice is of relevance (Recommendation 4).

Our fourth general comment concerns the reporting by the Commissioner to fulfil formal UNCRC requirements. Part 4 of the Bill requires the Commissioner to prepare reports on behalf of the Australian Government to UNCRC under the terms of the Convention.

As a States Party to UNCRC, the Australian Government alone has the responsibility for preparing its report on the nation's performance under UNCRC. If the Commissioner is to remain independent, and to be seen to be independent, that Office must not be put in a position of potentially having to balance the official views of the Australian Government with those which the Commissioner might have formed through independent analysis and consultation. Rather, it is the proper role of the Commissioner to prepare his or her own report about Australia's performance under UNCRC without fear or favour, and it is appropriate for this report to be made public (Recommendation 5).

Our fifth general comment also relates to the linkage between the Bill and UNCRC. We strongly support the Principles contained in Part 1, Section 4, which are drawn from UNCRC. However, in addition, we suggest that points be inserted which elaborate upon UNCRC, emphasising the Australian context. Specifically, another clause could be inserted in Part 1, Section 4 which refers to children's wellbeing and rights, and which draws upon the principles which were agreed in 2009 by all Australian Governments in the National Framework¹¹ (Recommendation 6). For example:

- (2) The Parliament intends that the Commissioner will:
 - (a) promote the wellbeing of children and young people as a national priority;
 - (b) promote, in particular, the wellbeing of Aboriginal and Torres Strait Islander children, young people and families;
 - (c) work to promote children's rights' being upheld by systems and institutions in Australia.

The sixth general comment concerns the relationship between the Bill and State and Territory practices. At present, the Children's Commissioners or Guardians who operate in States and Territories have differing powers as set out in their relevant legislation. In some jurisdictions, the Commissioner is mandated to take a broader children's wellbeing perspective, while other Commissioners tend to focus their attention on specific cases.

We argue that, for public clarity and to avoid duplication of effort, the roles and responsibility of the national and State/Territory Children's Commissioners, and their inter-relationships, should be more clearly defined. In effect, we suggest that there be a cascading national system which defines the powers, roles and functions which are appropriate to a Commonwealth Commissioner and those which should properly be handled at a State and Territory level. This would be a longer-term goal and not part of the initial Act, although we do recommend that the Bill encourage the longer-term development of common approaches across jurisdictions in matters such as performance reporting and monitoring (Recommendation 7).

The final general comment relates to the role of the Commissioner in respect of children and young people seeking asylum. The intention of Part 1, Section 7 and Part 2, Sections 9(1)(d) and 9(3)(c) is clearly to ensure that the children of people seeking asylum in Australia will be protected by this Office. We support this intention and would further recommend that the Commissioner have jurisdiction relating to children in any off-shore processing centre who are, or whose families are, seeking asylum in Australia and where Australia can exercise rights and influence by virtue, for example, of the provision of funding (Recommendation 8). This should be added specifically in Section 9(3) as:

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

Specific comments

Re: Bill Part 1

Preliminary

We support the Objects of the Bill, in particular, that the Office of the Commissioner ought to be independent, be bound by statute, and be clearly linked to meeting Australia's international obligations under the UNCRC (Section 3(3)).

However, we consider that the main role of the Commissioner should be more clearly stated, with proactive language demonstrating better links to key provisions of UNCRC. Article 2 of UNCRC refers to the “obligation of States to respect and ensure the rights set forth in the Convention for each child within their jurisdiction without discrimination of any kind”. Article 3(1) refers to the “best interest of the child as a primary consideration in all actions concerning children”.

At present, Section 3(2)(a) of the Bill states, *inter alia*, that “The Commissioner will: (a) advocate at the national level for the needs views and rights of people below the age of 18”. In light of UNCRC and the need to develop in Australia a more widely shared understanding of the application of the “best interests principle”, however, we suggest that this Object statement be reworded as follows: “The Commissioner will: (a) safeguard and promote the rights and best interests of children and young people at the national level” (Recommendation 9).

Similarly, we suggest that a new Object be inserted in Section 3(2) as follows:

(e) monitor the development and application of States'/Territories' laws and instruments, policies and procedures to ensure that the 'best interests of the child' are upheld.

In relation to Section 4 – Principles – we suggest that a reference be added to UNCRC Articles 9.1 and 9.3 regarding the separation of children and young people from their parents and continuing contact with parents. Section 4 might be amended to read (Recommendation 10):

4(f) every child is entitled to continuing contact with one or more parents and with family; and
(g) separation of a child from his or her parents should only occur where it is demonstrably in the best interests of the child.

Because the term 'best interests' has particular meaning under UNCRC, we suggest that an additional definition be inserted in Section 5 as follows (Recommendation 11):

the **best interests of the child** are consistent with UNCRC Articles 3.1, 9.1, 9.3, 18.1 and 21.

Re: Bill Part 2

Office of the Commonwealth Commissioner for Children and Young People

Division 1 – Establishment

We support the creation of the Office as a statutory body and for the Commissioner to hold an Office equivalent to that of a Secretary of a Department. The statutory basis of the Office is vitally important in terms of maintaining the independence and integrity of the position. However, we note with concern that some statutory bodies have been dismantled in Australia in recent years (for example, the Australian Heritage Commission) and express the strongest wish that the Commonwealth Commissioner role be enduring.

Division 2 – Functions and powers of Commissioner

We strongly support many of the proposed functions and powers contained in Section 9, especially those which seek to protect and promote the status, rights and wellbeing of children and young people. However, we consider that Section 9 can be strengthened. In addition to involving children and young people in decisions that affect them (Section 9 (1)(g)), the Commissioner should specifically be required to engage with children and young people on a continuous basis. This will not only ensure that the Commissioner's work is well-informed, but will also provide a way in which children and young people can be further empowered to express their viewpoints (Recommendation 12).

Additional suggestions relating to Section 9 are as follows:

- Section 9(1)(c) needs to make clear that the Commissioner can initiate any reviews, inquiries or research. Presently, the Bill does not seem to indicate clearly who can or should initiate such activities (Recommendation 13).
- Section 9(i)(c): we suggest that the word 'Indigenous' be replaced with 'Aboriginal and Torres Strait Islander' as elsewhere in the Bill (Recommendation 14).

- A new function should be added after (but not replacing) Section 9(1)(d) which would read (Recommendation 15):

(e) promoting a consistent approach and actions to the best interests of the child that are consistent with UNCRC Articles 3.1, 4, 9.1, 9.3 and 18.1

(i) to not separate children from their parents except where necessary

(ii) maintain relationships with parents except where contrary to the child's best interests

(iii) parents or legal guardians share common responsibilities for the upbringing and development of the child.

- Section 9(1)(e) calls for the Commissioner to act as the legal guardian of unaccompanied minors. We recommend that this provision be amended. Such a role would potentially conflict with the overall independence of the Commissioner, as his/her actions could well be compromised by prevailing Government policy and resources. Furthermore, the role would be at odds with the Commissioner's overall duty independently to assess and monitor the rights of children and young people and, as the need arises, to raise matters of concern. Instead, we argue that the Commissioner ought to pay special regard in his/her independent assessment and monitoring role to the situation of unaccompanied minors as well as to the level and quality of care which is to be provided by the relevant Minister under the *Immigration (Guardianship of Children) Act 1946* (Recommendation 16).
- Section 9(1)(i) should be reconsidered. While it is important that the Commissioner should carefully consider and express views about the coordination and impact of policies, programs and funding, it seems far beyond the normal remit of a statutory Office actively to coordinate such activities, which are properly the responsibility of line government agencies. Such a direct role in coordination might compromise the independence of the Office and should be avoided (Recommendation 17).
- Section 9 should reflect the role of the Commissioner in monitoring Australia's compliance with the UNCRC (Recommendation 18).

- Section 9 ought to define clearly the lines of demarcation between the proposed Commonwealth Commissioner and the various State and Territory Children’s Commissioners and Guardians. This will be important especially in relation to the handling of complaints and advocacy about specific, individual cases.

In that vein, Section 9(h) should clarify the nature and extent of the Commissioner’s potential involvement in legal cases involving the rights of children and young people. In situations where State and Territory laws apply in individual cases, it may appear to be anomalous for the Commonwealth Commissioner to become involved, except perhaps in providing advice to the parties or in relation to complaints of breaches of children’s rights under the UNCRC. There is a danger, also, that the Commonwealth Commissioner role could become over-burdened with individual cases which cannot be resolved at State or Territory level, thus in effect duplicating, and perhaps complicating, those jurisdictional processes.

On the other hand, we note that there is a disparity in the terms of reference and mandates of the various State and Territory Children’s Commissioners or Guardians across Australia. While such disparities exist, it may be argued that the Commonwealth Commissioner should operate in this area – having a role akin to that of an Ombudsman – in order to provide national consistency of treatment of complaints made by, or on behalf of, children and young people.

It may be that an appropriate role for the Commonwealth Commissioner in this area is the provision of assistance to children and young people in taking a particular matter to the appropriate authority. If, however, the matter is of a more general nature or is not covered by State or Territory processes, a more active role for the Commissioner may be considered.

We suggest, therefore, that this clause be subject to further careful consideration (Recommendation 19).

It is also recommended that an additional function of the Commissioner be to monitor the National Framework and its successor national plans (Recommendation 20).

In relation to Section 10(f), we recommend that the Commissioner be explicitly required to consult with non-government community service organisations, researchers/academics and other relevant parties. This recommendation is based on the major role which is being played by the non-government and academic sectors in the promotion of the safety and wellbeing of Australia's children through research and analysis, advocacy, policy advising and service delivery roles (Recommendation 21).

Re: Bill Part 3

Appointments and staffing of the Office of the Commissioner

Section 20(2) states that a person must not act in the position of Commissioner for more than 12 months. While the intention of this clause is clear, that is, that permanent appointments be expedited, the effect could be to terminate a temporary appointment because of government delays, resulting in a lack of continuity and potential unfairness to the temporary occupant, who may well be the best person to continue in the position pending a permanent appointment. We recommend a re-consideration of this clause (Recommendation 22).

Section 24 states that the Commissioner may, on behalf of the Commonwealth, engage consultants to assist in the performance of the functions of the Commissioner. We would like to be sure that this phrase, "on behalf of the Commonwealth", represents a common legal terminology reflecting the authority of the Commissioner and the Commonwealth's obligation to pay for decisions made lawfully by the Commissioner. On the basis that the Commissioner is to be an independent entity and will not undertake activities on behalf of the

Commonwealth (see other comments about reporting and coordination), we would be concerned if this phrasing implied any obligation by the Commissioner to have prior approval for engaging consultants or to have restricted decision-making powers with respect to their work or their reports (Recommendation 23).

Re: Bill Part 4

Other matters

We have already commented, above, on Section 25 concerning the role of the Commissioner in preparing reports on behalf of the Commonwealth of Australia to the UNCRC.

We support Section 26(1) relating to the production of an Annual Report to Parliament. However, we consider that the Section ought to encourage the Commissioner to go beyond “a report on the operations of the Office of the Commissioner”. We would like the annual report to be an analysis and assessment of the situation for children and young people, and of gaps in policy and programs, and to contain recommendations that address systemic failures for children and young people and their families (Recommendation 24).

Concluding comments

Families Australia believes strongly that the establishment of a Commonwealth Commissioner for Children and Young People who is equipped with strong powers and adequate resources would represent a major advance in the nation’s recognition and appreciation of the rights of children and young people, especially the most vulnerable. It is vital that the Office be independent and approach its business in a frank and fearless manner, with the best interests of children and young people at heart. Families Australia would welcome the opportunity to assist the Senate Committee further in its deliberations.

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Attachment A: Summary of recommendations

Recn.	Summary
1	Bill to explicitly reflect the public health model
2	Commissioner should ensure a particular focus on Aboriginal and Torres Strait Islander children and young people
3	Commissioner should pay special regard to the rights, needs and interests of vulnerable children and young people
4	Commissioner should not be restricted to considering only the situation of children and young people under the age of 18
5	Commissioner should prepare his/her own independent report to the UN Committee on the Rights of the Child
6	Add reference to the Australian context, in particular, the principles underpinning the National Framework for Protecting Australia's Children 2009-2020
7	Longer-term development of common approaches across jurisdictions in matters such as performance reporting and monitoring
8	Commissioner to have a role in off-shore processing centres
9	Section 3(2)(a): add best interests provision
10	Section 4: add UNCRC Articles reference regarding separation of children and young people
11	Section 5: add definition of 'best interests'
12	Section 9: add reference to continuous engagement with children and young people
13	Section 9(1)(c): clarify power to initiate inquiries
14	Section 9 (1)(c): refer to Aboriginal and Torres Strait Islander children and young people
15	Section 9(1)(d): refer to separation of children and young people from families
16	Section 9(1)(e) Commissioner to pay special regard to the situation of unaccompanied minors rather than act as legal guardian
17	Section 9(1)(i) remove coordination role
18	Section 9: add reference to monitoring role
19	Section 9: demarcate clearly the lines of responsibility with State and Territory Commissioners
20	Section 9: additional function of monitoring the National Framework for Protecting Australia's Children 2009-2020
21	Section 10(f): explicitly require consultation with non-government organisations and researchers/academics
22	Section 20(2): reconsider acting Commissioner 12-month restriction
23	Section 24: clarify clause about engagement of consultants
24	Section 26(1): provide additional guidance about the annual report

References

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- ³ Australian Institute for Health and Welfare, *A picture of Australia's children*, Canberra, 2009: viii
- ⁴ Council of Australian Governments, *National Framework for Protecting Australia's Children 2009-2020*: 6, 9, accessed at http://www.fahcsia.gov.au/sa/families/pubs/framework_protecting_children/Documents/child_protection_framework.pdf (November 2010)
- ⁵ UN Committee on the Rights of the Child, *General guidelines regarding the form and content of periodic reports* CRC/C/58, para 18
- ⁶ Council of Australian Governments, *National Framework for Protecting Australia's Children 2009-2020*: 7, accessed at http://www.fahcsia.gov.au/sa/families/pubs/framework_protecting_children/Documents/child_protection_framework.pdf (November 2010)
- ⁷ *Ibid.*: 8
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