
Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012

**Senate Legal and Constitutional Affairs
Committee**

1 June 2012

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Introduction

1. The Law Council is pleased to provide the Senate Legal and Constitutional Affairs Committee (the Committee) with this submission on the *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* (the Bill).
2. It is noted that the Bill is also currently the subject of an inquiry by the House of Representatives Social Policy and Legal Affairs Committee. The Law Council also hopes to make a submission to that inquiry.
3. The Law Council has previously made a number of submissions in support of the establishment of a National Children's Commissioner (the Commissioner). These include:
 - A submission to this Committee on the *Commonwealth Commissioner for Children and Young People Bill 2010* in January 2011;¹ and
 - A supplementary submission to this Committee on the *Commonwealth Commissioner for Children and Young People Bill 2010* in April 2011.²
4. The Law Council also appeared before this Committee on 29 March 2011 to give evidence at its Inquiry into the *Commonwealth Commissioner for Children and Young People Bill 2010*.
5. The establishment of the Commissioner is an important step towards addressing gaps in the implementation of Australia's international human rights obligations in relation to children.
6. The Law Council particularly welcomes the establishment of the Commissioner in the Australian Human Rights Commission (AHRC) as opposed to creating a separate independent statutory office, and considers that the Commissioner will complement the important functions carried out by the other Commissioners who are members of the AHRC well.
7. Having said this, the Law Council is disappointed about the inadequately short consultation period for contributions to this inquiry. While the Law Council acknowledges there is a need, on occasion, for short time frames for consultation on urgent matters, the Law Council does not consider that this is an example of a matter where the short time frame for consultation is justified due to any urgency associated with the proposed legislation. While the Law Council considers that the establishment of the Commissioner's position is long overdue, it is important that the legislation establishing the position is subject to proper public scrutiny and the Law Council considers that the practical arrangements to appoint the Commissioner should await proper public scrutiny of the legislation.

¹ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Commonwealth Commissioner for Children and Young People Bill 2010*, 6 January 2011. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5C22F15C-9E89-369E-BE52-93A40A939816&siteName=lca.

² Law Council of Australia, Supplementary submission to Senate Legal and Constitutional Affairs Committee, *Commonwealth Commissioner for Children and Young People Bill 2010*, 21 April 2011. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5C22F2B2-BF6E-4C8A-CF3F-90F0E8C0FE5E&siteName=lca.

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8. The Law Council only received notification of this inquiry on 24 May 2012. The Law Council has therefore only been provided with six (6) working days in which to prepare its comments on the Bill. The ability of the Law Council to provide considered feedback particularly in relation to draft legislation is limited by short timeframes like this.
 9. In light of the short timeframe for comments, this submission will focus on the location of the Commissioner within the AHRC, and how the Commissioner's functions will interact and operate with State and Territory Children's Commissioners and Guardians.

Key provisions of the Bill

Functions

10. The Bill seeks to amend the *Australian Human Rights Commission Act 1986* (Cth) (the Act). The functions of the Commissioner are outlined in proposed section 46MB(1), and include:
 - Providing a report to the Minister as soon as practicable after 30 June each year;³
 - Promoting discussion and awareness of matters relating to the human rights of children in Australia;⁴
 - Undertaking research, or educational or other programs, for the purpose of promoting respect for the human rights of children in Australia, and promoting the enjoyment of human rights by children in Australia;⁵ and
 - Examining existing and proposed Commonwealth enactments for the purpose of ascertaining whether they recognise and protect the human rights of children in Australia, and to report the results of such an examination to the Minister.⁶
11. The Bill's explanatory memorandum provides some additional details in relation to the objectives of establishing the Commissioner's position. These include to:
 - Improve advocacy at a national level for the rights of children under the age of 18 years;
 - Improve monitoring of Commonwealth laws and proposed laws that affect the rights and wellbeing of children and young people;
 - Promote cooperation between the Commonwealth, States and Territories to promote the rights, wellbeing and development of children and young people;
 - Encourage the active involvement of children and young people in decisions that affect them, particularly administrative decisions and development of Government policies, programs and legislation;

³ s.46MB(1)(a)

⁴ s.46MB(1)(b).

⁵ s.46MB(1)(c).

⁶ s.46MB(1)(d).

- Support Government agencies to develop mechanisms which enhance the involvement of children and young people; and
- Assist Australia to meet its international obligations with respect to children – particularly those enshrined in the *Convention on the Rights of the Child* (CROC).⁷

12. The Law Council supports these objectives and the functions of the Commissioner, but is concerned about the terminology used in section 46MB of the Bill. In particular, that the functions of the Commissioner only refer to the ‘human rights of children in Australia’.⁸ Such an expression may lead to uncertainty about whether the Commissioner’s functions extend to children and young people in immigration detention in areas excised from Australia’s migration zone such as Christmas Island.

13. Given that one of the objectives of the Commissioner’s role is to assist Australia to meet its international obligations with respect to children, particularly those enshrined in the CROC,⁹ the Law Council submits that proposed section 46MB explicitly state that the Commissioner’s functions extend to every child to whom Australia has international human rights obligations. Accordingly, the Law Council recommends that the Committee consider recommending the amendment of proposed section 46MB by referring to ‘children in Australia or towards whom Australia has international obligations’.

At risk or vulnerable children

14. The Law Council is pleased that the Bill provides the Commissioner with discretion to focus on particular groups of children who are at risk or vulnerable.¹⁰ Whilst the Bill does not specify the groups of children that may be considered ‘at risk or vulnerable’, the Bill’s explanatory memorandum provides some guidance in this regard. In particular, the explanatory memorandum refers to children with a disability; Aboriginal and Torres Strait Islander children; homeless children; and those who are witnessing or subjected to violence¹¹ as falling under this category.

15. The Law Council notes that neither the Bill nor its explanatory memorandum mention children in immigration detention as being considered ‘at risk or vulnerable’. To ensure that their rights are not overlooked, the Law Council suggests that the Committee recommend that the explanatory memorandum be redrafted to refer to ‘children seeking asylum in Australia, or in immigration detention or whose parents or guardians are seeking asylum in Australia or are in immigration detention’, to the groups of children who may be considered ‘at risk or vulnerable’.

International instruments

16. Proposed section 46MB(6) outlines the international instruments that the Commissioner must, as appropriate, take into consideration when performing his or her functions. These include, the Universal Declaration of Human Rights; the International Convention on the Elimination of all Forms of Racial Discrimination; the

⁷ Explanatory Memorandum to *Australian Human Rights Commission Amendment (National Children’s Commissioner) Bill 2012.*, p.2. Available from <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F4812%22>.

⁸ See for example s.46MB(1)(b), (c) and (d)

⁹ Op cit., Explanatory Memorandum, p.2..

¹⁰ s.46MB(4)

¹¹ Op cit., Explanatory Memorandum, p.8.

International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the CROC; the Convention on the Rights of Persons with Disabilities; and any other instruments 'relating to human rights as the Commissioner considers relevant'.

17. It is noted that the Bill's explanatory memorandum states that 'other instruments relating to human rights' may include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.¹²
18. In its submission on the *Commonwealth Commissioner for Children and Young People Bill 2010*, the Law Council recommended that that Bill refer to the Optional Protocols to CROC and other relevant instruments.¹³ The Law Council similarly recommends that the Committee recommend that proposed section 46MB(6)(b) be amended so that the 'other instruments relating to human rights' that are currently outlined in the Bill's explanatory memorandum, are specifically included in the text of the Bill. Including these instruments in the text of the Bill will ensure that the Commissioner takes them into consideration in carrying out his or her functions.

Locating Commissioner in AHRC

19. The Law Council welcomes the fact that the Commissioner will be located in the AHRC. Indeed, there are a number of advantages to the comprehensive approach to human rights protection fostered by the AHRC Act and the use of the framework provided by that Act for the work of the other Commonwealth Commissioners.
20. The Law Council notes that the AHRC currently has a role in relation to protecting children's rights. For instance, it may consider complaints of breaches of rights arising from CROC or other international instruments; conciliate claims of discrimination involving children and young people on grounds relating to age, disability, race and sex and refer claims that are unable to be conciliated to court.
21. Locating the Commissioner within the AHRC also means that the more specific functions outlined in the AHRC Act, which apply to all members of the AHRC, will apply to the Commissioner. Some of these functions are referred to in proposed section 46MB, and include examining laws for consistency with Australia's international obligations; promoting public awareness of human rights; undertaking research or public inquiries into human rights; participating in processes relating to reporting to the United Nations about Australia's compliance with CROC and other conventions; and intervening in legal proceedings. Indeed, the Law Council is pleased that the Bill proposes to amend the AHRC Act to enable the Commissioner to assist the Federal Court and Federal Magistrates Court as *amicus curiae* in certain proceedings under Division 2 of the AHRC Act.¹⁴

¹² Ibid.

¹³ Op cit., Law Council Submission on *Commonwealth Commissioner for Children and Young People Bill 2010*, p.16.

¹⁴ s.46PV(3)

22. Notwithstanding the advantages of the Commissioner being a member of the AHRC, there are also some disadvantages to this arrangement. Central to these are the limited resources of the AHRC.

23. In the 2012-2013 Federal Budget, \$3.5 million was allocated to the establishment of the Commissioner within the AHRC.¹⁵ When questioned about this funding allocation in a Senate Estimates hearing in May 2012, President of the AHRC, Catherine Branson QC stated that:

“... the funding of itself is not adequate if we choose to give those staff, which we regard as essentially the minimum with which a commissioner can effectively work, adequate resources for what we would expect to be a rise in complaints made under the Convention on the Rights of the Child. It will also not have the capacity to support the additional demands on support services of the commission, such as the legal office if demands are referred to the legal office. It will not enable us to provide further lawyers and there will be further demands on our finance and human resources people. It is not adequate to provide additional funding there either.”¹⁶

24. Without adequate funding, the Commissioner may not be able to carry out his or her roles effectively. Whilst it is acknowledged that the Government is currently operating in a tight fiscal environment, it is vital that the AHRC is sufficiently funded to enable the Commissioner to perform their important role properly. The Committee may want to bring this funding inadequacy to the attention of the Government in their report on the Bill.

Interaction with State and Territory Children’s Commissioners

25. The Law Council considers that interaction between the Commissioner and State and Territory children’s commissioners and guardians will be crucial to the Commissioner fulfilling his or her functions. The Law Council also believes that interaction with relevant Commonwealth agencies will also be important.

26. The Law Council has previously discussed how a Commonwealth Commissioner could interact with State and Territory children’s commissioners and guardians in its submissions on the *Commonwealth Commissioner for Children and Young People Bill 2010*.¹⁷

27. A number of Commonwealth, State and Territory laws affect children. This is due to the division of powers between the Commonwealth and States under the Constitution. There is significant interaction between these laws, as demonstrated by the interaction

¹⁵ See http://www.budget.gov.au/2012-13/content/bp2/html/bp2_expense-03.htm

¹⁶ Senate Estimates Hansard, 23 May 2012, p.23. Available from http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/c8cd5559-756e-4765-af45-3eb75cd89f92/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2012_05_23_1059.pdf;fileType=application%2Fpdf#search=%22committees/estimate/c8cd5559-756e-4765-af45-3eb75cd89f92/0000%22

¹⁷ Op cit., Law Council of Australia Submission on *Commonwealth Commissioner for Children and Young People Bill 2010*; and Law Council of Australia Supplementary Submission on *Commonwealth Commissioner for Children and Young People Bill 2010*.

between Commonwealth family law and State and Territory child protection laws.¹⁸ The Council of Australian Government's National Framework for Protecting Australia's Children 2009-2020 recognises these interactions.¹⁹

28. The Law Council supports the concurrent operation of State and Territory laws relating to children's commissioners and guardians and relating to the rights of children generally, given the division of Constitutional responsibilities in this regard. The Law Council notes that given the Commissioner will be located in the AHRC, the provisions relating to concurrent operation of State and Territory laws in section 4 of the AHRC Act will apply.
29. The Law Council has previously indicated that it will be important for the Commissioner to focus on the interactions between Commonwealth, State and Territory laws and policies and avoid duplicating functions of State and Territory children's commissioners and guardians in relation to relevant State and Territory laws and policies.²⁰ The Law Council is pleased that the Commissioner will work closely and collaboratively with State and Territory counterparts to identify national or cross-jurisdictional matters that would benefit from national leadership,²¹ and that it is not intended that the Commissioner will duplicate the work of State and Territory children's commissioners and guardians, or Commonwealth bodies like Ombudsmen.²²
30. In its previous submissions, the Law Council recommended that the Commissioner should have a particular focus on Commonwealth laws, but not focus solely on these laws. Whilst the Commissioner's work will largely be Commonwealth oriented, the Bill recognises the need for the Commissioner to work with the existing State and Territory children's commissioners and guardians in the performance of his or her functions.²³
31. The Law Council considers that the Commissioner's functions will complement the functions of State and Territory children's commissioners and guardians. Apart from the South Australian Guardian, whose role is limited to child protection matters only, the other State and Territory children's commissioners have a range of functions. These include monitoring child protection systems; investigating or reviewing deaths of children in the child protection system; screening for people working with children; monitoring laws affecting children; investigating or monitoring individual complaints about services to children; advocating for juvenile detainees and general advocacy for children and young people.
32. The Law Council considers that consultation with relevant Commonwealth agencies, State and Territory bodies and other organisations will be particularly important given that one of the objectives of the Commissioner's role is to promote cooperation between the Commonwealth, States and Territories to promote the rights, wellbeing

¹⁸ Alistair Nicholson, 'Australia's Children: Does the Law Offer then Sufficient Protection?', 2007 at http://www.ssps.unimelb.edu.au/data/assets/pdf_file/0006/93615/Lionel_Murphy_Memorial_Lecture_28_Nov_2007.pdf, cited in Law Council of Australia, Supplementary submission to Senate Legal and Constitutional Affairs Committee, *Commonwealth Commissioner for Children and Young People Bill 2010*, 21 April 2011, p.3. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=5C22F2B2-BF6E-4C8A-CF3F-90F0E8C0FE5E&siteName=lca

¹⁹ Council of Australian Government's National Framework for Protecting Australia's Children 2009-2020. Available from

http://www.fahcsia.gov.au/sa/families/progserv/Child_Abuse_Prevention/nfpac/Pages/gov_commitment.aspx

²⁰ Op cit., Law Council of Australia Submission on *Commonwealth Commissioner for Children and Young People Bill 2010*.

²¹ Op cit., Explanatory Memorandum, p.7..

²² Ibid.

²³ For example see s.46MB(5)(b).

and development of children and young people.²⁴ It will also be important in ensuring that Australia complies with its obligations under CROC and other international instruments. The Law Council notes that many of the matters covered in Australia's reports regarding its compliance with CROC and in the Concluding Observations of the Committee on the Rights of the Child relate to State and Territory matters.²⁵

33. The Law Council is therefore pleased that proposed section 46MB(5)(b) provides that the Commissioner may consult Departments and authorities of the Commonwealth, and of the States and Territories in performing his or her functions. Authorities of the Commonwealth, States and Territories include State and Territory commissioners and guardians for children.²⁶
34. It is noted that the Bill provides the Commissioner with the power to obtain information from Commonwealth government agencies.²⁷ A Commonwealth government agency is defined as a Department or authority of the Commonwealth;²⁸ or a person who performs the functions of, or performs functions within, a Department or authority of the Commonwealth.²⁹
35. The Bill contains a number of provisions in an effort to protect the privacy of individuals who may be mentioned in the information that the Commissioner seeks to obtain. For instance, the Commonwealth agency must not provide information in a way that would reveal the identity of a particular individual, or produce a document that reveals the identity of a particular individual, without the consent of the individual in question.³⁰ According to the Bill's explanatory memorandum, these provisions have been included in order to ensure that a child's right to privacy is respected.³¹ The Law Council supports the inclusion of such safeguards in the Bill.

Conclusion

36. The Law Council considers the Bill to be an important step towards the implementation of Australia's international human rights obligations in relation to Australian children, and is pleased that the Commissioner will be tasked with ensuring that the rights, wellbeing and development of Australian children will be taken into account in the development of future legislation, policy and programs.
37. The Law Council is also pleased that the Commissioner will be located within the AHRC, but notes that it is vital that the AHRC is sufficiently funded to enable the Commissioner to perform their important role properly. The Law Council also reiterates the importance of the Commissioner interacting with State and Territory children's commissioners and guardians in order to effectively carry out his or her functions.
38. The Law Council encourages the Committee to recommend that this Bill be passed subject to the suggested amendments to the Bill and/or the Explanatory Memorandum and thanks the Committee for the opportunity to comment on this important legislation.

²⁴ Op cit., Explanatory Memorandum, p.1.

²⁵ See Concluding Observations of the Committee on the Rights of the Child, Australia. Available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?OpenDocument)

²⁶ Op cit., Explanatory Memorandum, p.7.

²⁷ s.46ML

²⁸ s.46ML(6)(a).

²⁹ s.46ML(6)(b).

³⁰ s.46ML(4).

³¹ Op cit., Explanatory Memorandum, p9.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.