



Australian Government
Department of Immigration and Citizenship

4 February 2011

Ms Julie Dennett
Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

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

The Department of Immigration and Citizenship welcomes the opportunity to provide a submission to the above inquiry. We apologise for our delay in providing the submission, and appreciate the Committee granting us an extension of time in which to lodge it.

Please find attached a submission outlining some comments on the Bill. The Department is willing to respond to any questions the Committee may have arising from our submission, either through a supplementary submission or by attendance at hearing.

The contact officer for our submission to this inquiry is Jayne Christensen, A/g Director, Principal Advisor's Unit,

Yours sincerely

Kate Pope
Principal Advisor
Citizenship, Settlement and Multicultural Affairs Division

Department of Immigration and Citizenship

Submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010

Executive Summary

1. The Department of Immigration and Citizenship (DIAC) welcomes the opportunity to provide a submission to the inquiry into the Australian Greens' Commonwealth Commissioner for Children and Young People Bill 2010 (the Bill).
2. There are two functions of the proposed Commonwealth Commissioner which relate particularly to DIAC's areas of portfolio responsibility. These are the roles in protecting and promoting the rights of minors in immigration detention (proposed paragraph 9(1)(d)) and acting as guardian in appropriate cases for unaccompanied non-citizen minors (proposed paragraph 9(1)(e)).
3. DIAC's submission does not express a view about whether or not a Commonwealth Commissioner should be supported, which is a matter for consideration by the Commonwealth Government as a whole. The purpose of our submission is to provide some background about existing arrangements and processes relevant to the proposed guardianship and oversight roles of the Commonwealth Commissioner, and to highlight some key issues of concern to DIAC arising from those proposed roles.

Oversight of children and young people in immigration detention

4. Proposed paragraph 9(1)(d) provides that the functions of the Commonwealth Commissioner include promoting and protecting the rights of children and young people in immigration detention, or children whose parents or guardians are in immigration detention.
5. There is already a significant level of external oversight in relation to immigration detention, including by the Commonwealth and Immigration Ombudsman (Ombudsman), the Australian Human Rights Commission (AHRC) and the United Nations High Commissioner for Human Rights. While DIAC certainly supports the maintenance of strong external accountability mechanisms, DIAC queries the value of an additional layer of oversight in this area, which is likely to duplicate the role already performed by the Ombudsman and the Australian Human Rights Commission.
6. In 2009-10, 566 children were placed in immigration detention. No children were placed in an immigration detention centre. In accordance with section 4AA of the *Migration Act 1958* (Migration Act), and the Key Immigration Detention Values announced by the Australian Government in July 2008, children are only detained as a last resort and when they are detained they are not to be held in immigration detention centres. There will be occasions where children will be accommodated in low-security facilities within the immigration detention network, such as immigration residential housing, immigration transit accommodation and in Residence Determination under 197AB of the Migration Act.

7. On 18 October 2010, the Prime Minister and the Minister for Immigration and Citizenship announced that the Australian Government will begin moving significant numbers of unaccompanied minors and vulnerable family groups who are awaiting the outcome of their applications for asylum out of immigration detention facilities and into community-based accommodation.

8. Both the Ombudsman and the AHRC can investigate complaints made by individuals in relation to, respectively, administrative actions of Australian Government officials, and breaches of human rights. These bodies also provide DIAC with advice on the administration of immigration detention, as well as insights into our broader work and how it can be improved. During 2009-10, DIAC resolved 517 complaints to the Ombudsman, and 38 AHRC investigations.

9. DIAC prepares information and submissions in response to AHRC investigations, and engages in confidential conciliation processes with AHRC to address complaints where appropriate. If a complaint to the AHRC cannot be resolved through a confidential conciliation process, the President of the AHRC may report to the Attorney-General and make recommendations for action. While the AHRC cannot set aside a decision made in breach of relevant international treaties, finalised reports are tabled in Parliament. Once tabled, the AHRC reports are published on the AHRC website alongside DIAC's response.

10. DIAC also engages in ongoing cooperation with the Ombudsman to promote good public administration and improve decision-making, governance, transparency and accountability.

11. The Ombudsman has a particular function in reviewing the circumstances of people who have been in immigration detention for more than six months, and reports to the Minister for Immigration and Citizenship and Parliament. The Ombudsman can recommend anything he or she considers appropriate including alternative forms of detention arrangements, the grant of a visa and general recommendations relating to DIACs handling of its detainee caseload. The Ombudsman is also responsible for:

- monitoring and inspecting immigration compliance and removal activities;
- monitoring and inspecting the administration of immigration detention facilities to assess compliance with published immigration detention standards; and
- investigating and reporting on systemic issues in immigration administration.

12. Most complaints to the Ombudsman about DIAC are resolved without the need for a formal report. The Ombudsman can, however, conclude an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. DIAC prepares responses to reports by the Ombudsman and also provides regular updates to the Ombudsman regarding progress in implementing Ombudsman recommendations. The Ombudsman's office reports on DIAC's activities once every six months.

13. As noted above, DIAC queries the value of an additional layer of oversight in this area, which is likely to duplicate the role already performed by the Ombudsman and the Australian Human Rights Commission.

Guardianship of unaccompanied minors

14. Proposed subparagraph 9(1)(e) provides that the functions of the Commonwealth Commissioner would 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’.

15. As at 30 June 2010, there were 744 unaccompanied minors who had been granted a protection visa who were in the Unaccompanied Humanitarian Program. During 2009-10, 218 unaccompanied minors arrived as irregular maritime arrivals.

16. The *Immigration (Guardianship of Children) Act 1946* (IGOC Act) provides that the Minister for Immigration and Citizenship is the guardian of unaccompanied non-citizen minors who arrive in Australia with the intention of becoming permanent residents.

17. Currently, the Minister’s guardianship responsibilities are delegated to officers within State and Territory child welfare agencies and certain DIAC officers. The IGOC Act also permits a guardian to appoint a custodian to provide for the day-to-day care of a minor. DIAC has engaged Life Without Barriers, a not-for-profit, community-based agency providing services to children and young people, to act as a carer for a number of unaccompanied minors.

18. For unaccompanied minors who have been found to be refugees (known as unaccompanied humanitarian minors), DIAC, working with State and Territory governments or service providers, organises suitable accommodation and appropriate care arrangements. Services provided to unaccompanied humanitarian minors include: monitoring of care arrangements by a case worker and assistance with clothing, food, housing and educational requirements. Services for unaccompanied humanitarian minors are provided by the relevant State or Territory child welfare agency or, where this is not possible, by a not-for-profit service provider.

19. DIAC is aware that the Minister’s guardianship responsibilities under the IGOC Act potentially give rise to a perception of a conflict of interest given the Minister is also responsible for making decisions about the same minors under the Migration Act. DIAC has been exploring alternative ways in which the IGOC Act could better meet the objective of providing for the care and welfare of unaccompanied minors.

20. In a separate Bill also introduced by the Australian Greens, the Migration Amendment (Detention of Minors) Bill (the Detention of Minors Bill), the Greens propose that the Minister for Immigration and Citizenship must determine that a minor be placed at a specified place within the community rather than being held in detention. That Bill also proposes that a guardian be appointed to advocate for the best interests of a minor subject to a residence determination.

21. DIAC is concerned that as the proposals in the Commissioner for Children and Young People Bill and in the Detention of Minors Bill do not propose to repeal the IGOC Act or indicate how the proposed guardianship arrangements would tie in with the IGOC Act, the proposal appears to set up a dual guardianship regime. That is, it would seem possible under this Bill that the Minister could be the guardian of a minor under the IGOC Act and the Commonwealth Commissioner could be the guardian under this legislation. DIAC considers that this would be unworkable in practice.

22. DIAC also notes that the Commissioner for Children and Young People Bill proposes that the Commonwealth Commissioner would be the guardian in 'appropriate cases'. There is a lack of clarity in the bill as to which cases it would be 'appropriate' for the Commonwealth Commissioner to act as legal guardian, and DIAC queries what criteria would be used to establish which cases are 'appropriate', and what arrangements would apply to cases which are not found to be appropriate for the proposed Commonwealth Commissioner to act as guardian.

23. Further, DIAC queries how the proposed Commonwealth Commissioner could have the capacity to provide the day-to-day care that is required of a guardian, given that the Minister is currently the guardian of several hundred minors under the IGOC Act. Neither the Commissioner for Children and Young People Bill nor its explanatory memorandum outline whether there would be arrangements in place to allow the guardianship to be delegated.