



THE LAW SOCIETY OF SOUTH AUSTRALIA

Submission to the Law Council of Australia on the examination of the *Commonwealth Commissioner for Children and Young People Bill 2010.*

**Children and the Law Committee of the
Law Society of South Australia**

Role of the Children and the Law Committee

As a Committee of the Law Society, the Children and the Law Committee of South Australia ("**the Committee**") provides comment and advice to the Society on pertinent issues, policies and legislation relating to children's access to and representation in the legal system and closely monitors legal issues relating to children and young people.

The Committee is unique to the Law Society in that its membership is multidisciplinary, drawing on the expertise of individual members. Current members practise in the areas of criminal and family law and in the child protection jurisdiction; are based within community legal centers, government and private practice, work within the youth welfare sector and in academia. The Committee thus provides a more holistic perspective and considered approach to matters impacting on the lives of children.

All members are committed to enhancing the human and legal rights of children and young people. All work of the Committee is undertaken within the framework of the United Nations Convention on the Rights of the Child. The Committee also takes a proactive and collaborative approach by networking relevant agencies,

individuals and initiating projects to further the legal rights of children and young people.

Introduction

The Committee welcomes the opportunity to provide comments and information to the Law Council Secretariat about work being done by the Committee relevant to the *Commonwealth Commissioner for Children and Young People Bill 2010*.

This submission will commence by setting out the current position in South Australia in relation to protection and promotion of the rights and interests of children in South Australia.

The Committee then considers the Bill with reference to the key characteristics identified by the United Nations Committee on the Rights of the Child¹ as being essential to the role of a Commissioner for Children.

The Committee then considers potential deficiencies in the Bill having specific regard to South Australia's current position.

Position of South Australia

South Australia now remains the only State in Australia without a State Commissioner whose role is to focus on the needs, interests and wellbeing of all children and young people².

¹ United Nations Committee on the Rights of the Child General Comment No. 2: *The role of independent national human rights institutions in the promotion and protection of the rights of the child* (2002) CRC/GC/2002/2.

² NT has a Commissioner whose mandate is to promote the wellbeing of protected and otherwise vulnerable children. With the exception of Victoria and the ACT, all of the Commissioner roles are independent of government.

The call for South Australia to create a position of State Commissioner for Children and Young People has been made for almost two decades, but it is a call that has long been ignored and dismissed by previous and current state governments.

The Children and the Law Committee has been advocating for the creation of a State Children's Commissioner since 1990. Today it remains a main platform of the Committee. Several high level Inquiries³ and like minded networks of health, education and medical professions⁴ have long advocated the need for a State Children's Commissioner.

The omission of such an authority is all the more concerning when considering that children are more affected by the actions and inaction of government than any other group in our community. Children are amongst the heaviest users of public services such as education and public health. They are individual citizens in their own right, yet they have no means of advocating for their needs or interests, or having their voices heard in decision making processes that affect their lives.

Whilst the Committee endorses the creation of a Commonwealth Commissioner for Children and Young People, it has reservations about the extent to which the respective roles of the Commonwealth Commissioner, State Commissioners and federal and state governments will interact under the proposed new legislative framework.

³ Such as the Wood Royal Commission into NSW Police Service (1996) ; Australian Law Reform Commission & Human Rights and Equal Opportunity Commission (1997), *Seen and heard: priority for children in the legal process*; Layton (2003), *Our Best Investment: A State Plan to Protect and Advance the Interests of Children*

⁴ Examples include SA Child Health Clinical Network and National Investment for the Early Years (SA Branch).

General Comments: compliance with the United Nations Convention on the Rights of the Child (“UNCRC”)

The key characteristics identified by the United Nations Committee on the Rights of the Child⁵ as being essential to the role of a Commissioner for Children are:

- Legislatively mandated, with a mandate incorporating the UNCRC;
- Independent of government;
- Accessibility of institution to children;
- Collaboration with other Children’s Commissioners and NGOs.

Legislative Mandate: Object and Principles underlying the Bill

The UN Committee on the Rights of the Child has identified four main UNCRC principles which must inform the analysis and implementation of all other rights⁶:

Article 2: 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): the best interests of the child as a primary consideration in all actions concerning children.

Article 6: the child’s inherent right to life and States parties’ obligation to ensure to the maximum extent possible the survival and development of the child.

⁵ Op.cit. note 1

⁶ United Nations Committee on the Rights of the Child: *General Comment on General measures of implementation of the Convention on the Rights of the Child* CRC/GC/2003/5

Article 12: the child's right to express his or her views freely in "all matters affecting the child", those views being given due weight.

Whilst the Committee notes that the Bill specifically refers to these Articles in Section 3 (3), the Object of the creation of the role of Commissioner under the Bill is stated to be "*as a measure to assist Australia in meeting its international obligations under the UNCRC, particularly as they relate to the following Articles...*"

The Committee considers that to ensure that the Bill achieves the expressed desire "*to cement Australia's international obligations under the UNCRC in legislation*" the principal object of the role of the Commissioner should be more clearly stated, with the UNCRC having the central and clearly expressed place in the role and remit of the Commissioner. For example, the object of the role should be clearly stated to be "*to safeguard and promote the rights and best interests of children and young persons*".

In determining whether and, if so, how to exercise his/her functions the Commissioner shall have regard to:

"any relevant provisions of the United Nations Convention on the Rights of the child".

By ensuring that the rights based mandate of the Commissioner is clearly enshrined in the legislation, the role of the Commissioner to advocate for the needs, views and rights of children and young people in Australia is clearly established, with the UNCRC as the touchstone principles to be applied by the Commissioner in exercising powers and performing duties under the Act.

Independence

The Committee endorses the independence of the role of Commissioner as established by the legislation. Independence from government is a key

component to enable a Children's Commissioner to operate effectively. While the office must have a close relationship with government to ensure it has the necessary credibility to work effectively, on the other hand, the government must not be able to determine the agenda and priorities of the role.

This means that the Commissioner should be able to set his/her own agenda, without direction from government. In addition, the Commissioner must have adequate funding and infrastructure, staff, premises and freedom from all forms of financial control that might affect their independence.⁷

Accessibility of institution to children and young people

The Committee endorses the requirement for the Commissioner to consult with, and encourage the participation of children and young people as part of his/her functions. In order to be effective, an institution established to protect and promote children's rights must be visible and accessible to children, and ultimately accountable to the children for whom it has been established. Children must know that the institution exists, what it does and how to approach it.

The role of the Children's Commissioner in engaging the participation rights of children is a key aspect of the role. Children's participation in decision-making can be described as a two-way process. If children are to be able to express a view, and that view is to be taken seriously, then they must be informed about relevant background facts, circumstances and options. The Commissioner's role therefore involves ensuring that children and young people are informed about their rights, and effectively ensuring that the views and opinions of children and young people are sought on what issues affect their lives.

However, the engagement of children's participation rights is a responsibility of government as well as the Children's Commissioner, and is by its nature a

⁷ Op. cit. note 1

resource intensive exercise. Thus, the federal and state governments must also take responsibility to take steps to raise awareness of the UNCRC, by producing accessible information about children's rights, ensuring that the UNCRC forms part of the school curriculum and ensuring that all those working with children and young people receive training in children's rights.⁸

Collaboration

The importance of collaboration of Children's Commissioners with other similar offices within their region, and with other bodies involved in the protection and promotion of human rights has been emphasised as a key characteristic of the role.⁹

It is noted that the concept of collaboration is emphasised throughout the Bill:

Section 10 "In performing the Commissioner's functions, the Commissioner must:

(f) *consult with relevant Commonwealth agencies, State and Territory bodies and other organisations;"*

Section 12(2)(2) "The Commissioner must consult with State and Territory Governments to develop agreements concerning cooperation and interaction between the Office of the Commissioner and relevant State and Territory bodies, including in connection with the provision of information or access to documents required by the Commissioner in relation to his or her functions".

It is noted that a function of the Commissioner is to "provide national leadership in monitoring and advocating for the wellbeing of Australian children and young

⁸ Similar to the United Kingdom experience, see *UK Children's Commissioners' Report to the UN Committee on the Rights of the Child* June 2008

⁹ Op. cit. note 1

people” (Section 9 (1)(a)) and in “co-ordinating policies, programs and funding which impact on children and young people, between federal, state, territory and local governments”;

The Committee considers that the respective roles and functions of the Federal and State governments, organisations and agencies should be more clearly defined. In particular, in order to ensure Australia’s compliance with its obligations under the UNCRC, where certain functions are not to be performed by the Commonwealth Commissioner, they should be performed by the State Commissioners.

Functions and Powers of the Commissioner-The role of the Commonwealth Commissioner and the State Commissioners

The key functions identified by the UN Committee on the Rights of the Child¹⁰ as being necessary to ensure that the role of a Children’s Commissioner is able to effectively fulfill its mandate of ensuring compliance with Australia’s obligations under the UNCRC are:

1. Functioning as a **watchdog for children's rights** by scrutinising new legislation and policy to ensure that children's rights are respected and ensuring that existing legislation, policy and practice abides by children's rights.
2. Undertaking **research** and **reporting** on any aspect of policy or practice affecting children.
3. Actively **promoting awareness** of children's human rights.
4. Implementing **youth participation** by encouraging government and the public to give proper respect to children's views, and ensuring the

¹⁰ Op. cit. note 1

Commissioner's work is directly informed by the views of children to reflect their priorities and perspectives.

5. Ensuring that children have effective means of redress when their rights are violated or disregarded by investigating **individual complaints**.
6. Conducting **systemic advocacy** by reviewing children's access to and the effectiveness of, all forms of advocacy, including children's access to the courts and existing, localised complaints mechanisms.
7. Having **investigative** functions to conduct inquiries or reviews, bring, intervene or assist in legal proceedings relating to a child/children, compel and question witnesses, access relevant documentary evidence and places of detention.

The Functions and Powers of the Commissioner as listed under Section 9 of the Bill include some but not all of these functions. For example, the Commissioner does not have powers to investigate individual complaints or to conduct systemic advocacy.

Section 6 of the Bill specifically states:

“ This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act. ”

Thus, it appears that the intention is that the roles of the individual State and Territory Commissioners are to be preserved, with the Commonwealth Commissioner assuming a role of overarching national leadership and coordination of policies, programs and funding.

In order to ensure compliance with Article 12 of the Convention, the functions of the Commissioner should include ensuring that children have effective means of

redress when their rights are violated or disregarded. Even where the role does not have the jurisdiction to respond to individual complaints, it should play a part in ensuring that mechanisms exist to challenge individual violations of children's rights. This includes reviewing children's access to, and the effectiveness of, all forms of advocacy including children's access to the courts, and existing, localised complaints mechanisms.

It is submitted that it is appropriate for the State Commissioners to retain more state-specific roles such as systemic advocacy of localised complaints mechanisms and investigation of individual complaints. Whilst the Federal Commissioner can assume a broader, national role, there are numerous local issues that the Federal Commissioner will be unable to cover, particularly as so many areas of children's lives fall within the jurisdiction of the State. These include education, youth offending, health and child welfare.

The Committee is concerned by the fact that there is a significant deficiency in coverage of these state-specific areas in South Australia, in the absence of a South Australian Commissioner. In particular, there is no dedicated body to comment on policy and legislation to ensure that children's rights are being considered and upheld. While various pieces of legislation may make provision for children's interests to be considered, there is no monitoring body or advocate to ensure this outcome is achieved. Nor is there a body for providers of non-government funded youth services to report when social injustices or gaps in service provision occurs for children who are not in alternative or state care.

There are no child-friendly mechanisms for addressing the concerns of children and young people in South Australia. For example, young people do not have an avenue to complain about the services they receive or are denied from an employment, education or housing provider. Adolescents who are experiencing homelessness but who are not currently involved in the care and protection system have no advocate to investigate why their circumstances do not result in support being provided by Families SA. While young people unfairly dismissed

from employment may contact the Fair Work Ombudsman to seek information and support, it is a mechanism designed for adults. The Young Workers Legal Service provides an invaluable service, but is limited in scope¹¹.

Conclusion

In summary, the points raised by the Committee in response to the Bill are as follows:

- To ensure that the Bill achieves the expressed desire “*to cement Australia’s international obligations under the UNCRC in legislation*”, the principal object of the role of the Commissioner should be more clearly stated, with the UNCRC having the central and clearly expressed place in the role and remit of the Commissioner.
- The Committee endorses the independence of the role of Commissioner as established by the legislation. Independence from government is a key component to enable a Children’s Commissioner to operate effectively. This means that the Commissioner must have adequate funding and infrastructure, staff, premises and freedom from all forms of financial control that might affect his/her independence.
- The Committee endorses the requirement for the Commissioner to consult with, and encourage the participation of, children and young people as part of his/her functions. However, the Committee notes that the federal and state governments must also take responsibility to take steps to raise

¹¹ YWLS provides workers under the age of 30 with free, confidential advice about work-related matters, and encourages membership of the relevant trade union. It is staffed by volunteer advisors in their final or penultimate year of law, under the guidance and supervision of trained Industrial Officers. The YWLS is a once-off service. That is, once a young person has been a client of the YWLS s/he is no longer eligible to obtain advice/information about an unrelated matter.

awareness of the UNCRC, by producing accessible information about children's rights, ensuring that the UNCRC forms part of the school curriculum and ensuring that all those working with children and young people receive training in children's rights.

- In order to ensure Australia's compliance with its obligations under the UNCRC, the division of functions between Commonwealth and State Commissioners for Children requires further clarification.
- It is submitted that it is appropriate for the State Commissioners to retain more state-specific roles such as systemic advocacy of localised complaints mechanisms and investigation of individual complaints.
- The Committee wishes to record its particular concern that there is a significant deficiency in coverage of these state-specific areas in South Australia, in the absence of a South Australian Commissioner for Children and Young People.

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18 June 2010