



Australian
Human Rights
Commission
everyone, everywhere, everyday

2010

An Australian Children's Commissioner

.....
Discussion paper

October 2010

Introduction	2
1 What are children's rights and where do we find them?	2
2 What are some of the most pressing human rights issues facing children in Australia	3
3 Why does Australia need a national Children's Commissioner?	4
(a) <i>A national advocate</i>	<i>4</i>
(b) <i>Ensuring participation by children</i>	<i>4</i>
(c) <i>A coordinated approach to children's rights</i>	<i>5</i>
4 What could a national Children's Commissioner do?	5
(a) <i>Monitoring</i>	<i>5</i>
(b) <i>Education</i>	<i>6</i>
(c) <i>Participation</i>	<i>6</i>
(d) <i>Complaints</i>	<i>6</i>
(e) <i>Legal proceedings</i>	<i>7</i>
(f) <i>Inquiries and reporting</i>	<i>7</i>
5 What are the essential features of a national Children's Commissioner?	8
6 Are there Children's Commissioners in other places?	8
(a) <i>Commissioners for Children around the world</i>	<i>9</i>

Introduction

Establishing the office of a national Children's Commissioner would be an important step in making sure that all children in Australia can fully enjoy their human rights.

Late 2010 will mark the 20th anniversary of Australia's ratification of the United Nations [*Convention on the Rights of the Child*](#). While much has been achieved in the protection and promotion of children's rights since 1990, there are still many children in Australia who do not enjoy their human rights and no children in Australia have a national advocate promoting their interests.

In April 2010, the Australian Government announced the Australian Human Rights Framework. In that Framework, the Government re-affirmed a commitment to its human rights obligations under the seven core United Nations human rights treaties to which Australia is a party, including the *Convention on the Rights of the Child*.

In September 2010 Greens' Senator Sarah Hanson-Young introduced a bill to the Senate which called for the establishment of a Commonwealth Commissioner for Children and Young People to promote and protect the rights of children in Australia. The call for this office is not new. Over the last decade it has been supported by a number of child-rights focused groups, including the Australian Human Rights Commission (the Commission), UNICEF, Save the Children and the National Children's and Youth Law Centre.

These groups all recognise that an independent body with the power and the mandate to listen to, understand and advocate for children in Australia would make an important contribution to the protection and promotion of children's rights in Australia.

This paper explores the potential contribution that a national Children's Commissioner could make. It considers the following issues:

- What are children's rights and where do we find them?
- What are the most pressing human rights issues facing children in Australia?
- Why does Australia need a national Children's Commissioner?
- What could a national Children's Commissioner do?
- What are the essential features of a national Children's Commissioner?
- Are there Children's Commissioners in other places?

1 What are children's rights and where do we find them?

In November 1989, the United Nations General Assembly adopted the *Convention on the Rights of the Child* (CRC). In 1990 Australia ratified the CRC. This means that the Australian government has specific obligations to children under international law.

The CRC affirms that children are entitled to enjoy the same human rights as adults. The CRC sets out the full range of civil, political, economic, social and cultural rights

and reframes those rights as they apply to children. These rights can be broadly grouped as protection rights, participation rights and survival and development rights.¹ The CRC also sets the minimum standards that governments must meet in providing services and assistance to children.

The CRC recognises that children have particular needs and vulnerabilities which require special protection beyond the rights to which adults are entitled. Further, it establishes four principles to guide the interpretation of the Convention and assist countries in implementing their obligations.² The guiding principles are:

- non-discrimination
- the best interests of the child must be a primary consideration in all decisions concerning children
- the right to survival and development
- respect for the views of the child.

The Australian Government has obligations under the CRC to take all legislative, administrative and other measures to protect and ensure children's rights and to develop policies and take action in the best interests of the child.³ The Government has not yet met all of these obligations. Despite ratifying the CRC twenty years ago, the Australian Government has still not fully incorporated the CRC into domestic law.

One of the gaps in implementation is the absence of a national Children's Commissioner. The United Nations Committee on the Rights of the Child has raised two concerns in this regard in its concluding observations on Australia's efforts to protect the rights of children. First, the Committee has expressed concern that there is no national commissioner with a specific mandate for monitoring children's rights. Second, while acknowledging the valuable work of the Australian Human Rights Commission in the area of children's rights, the Committee has noted that there is no unit devoted to children's rights at the Commission.⁴

By establishing the office of a national Children's Commissioner, the Australian Government would take an important step towards meeting its international obligations to protect and promote the rights of children in Australia.

2 What are some of the most pressing human rights issues facing children in Australia?

Many children in Australia are able to enjoy their rights. However, the rights of some children are vulnerable. For example, these include children experiencing homelessness, children experiencing violence, bullying or harassment and children who live with a disability, including those living with mental illness.

There are also certain groups of at-risk children who are less likely to be able to enjoy their full range of rights. These groups include Aboriginal and Torres Strait Islander children; children in out of home care; children in detention, including those in immigration detention; and children living in rural and remote areas of Australia.

Human rights provide a clear framework for promoting, and for ensuring accountability in respect of, child wellbeing. Human rights outline the minimum

standards necessary to ensure the wellbeing of children – including the right to an adequate standard of living, the right to health care, the right to education, the right to family life, the right to protection from violence, and the right to participate in one's culture.

The Commission believes that, through monitoring and advocacy, a national Children's Commissioner could make an important contribution to increasing the opportunities for at-risk children to enjoy their human rights.

3 Why does Australia need a national Children's Commissioner?

A national Children's Commissioner could play an important role in promoting and protecting the rights of all children in Australia, particularly of those who are most at-risk. This could improve their opportunities to grow and develop and to make a positive contribution to society. In particular, a national Children's Commissioner could:

- operate as a national advocate for children's rights, ensuring that government decision making processes and outcomes are consistent with the best interests of children
- develop mechanisms to secure the participation of children in decisions that affect them
- provide a coordinated national approach to children's rights.

(a) A national advocate

A national Children's Commissioner could operate as a national advocate for children's rights.

There may be times when children are not able, or are not invited, to participate directly in decision-making processes. At these times, it is critical that there is someone with the mandate to speak on behalf of children and to represent their interests to government and policy makers.

A national Children's Commissioner could fill that role, ensuring that government and policy makers always consider and respect the guiding principles of the CRC, including the obligation to act in the best interests of children.

(b) Ensuring participation by children

Children do not have an official or defined role to play in mainstream politics and policy making. It is easy, therefore, for decision makers to overlook including children in these processes. And, if children are invited to 'sit at the table' their voices are rarely truly heard.

A national Children's Commissioner could work to ensure that children's views are heard on issues that affect their lives and that those opinions are respected by those involved in official decision-making processes.

(c) *A coordinated national approach to children's rights*

Because Australia is a federation, there are particular challenges in ensuring a coordinated national approach to government decision-making on issues that affect children.

The federal government is responsible for ensuring that Australia meets its obligations under the CRC. Children's rights and interests are impacted by policies and services that fall within the Commonwealth's powers, for example income support and family law. However, states and territories have responsibility for the provision of many other services that affect children, including health and education.

Because the responsibility for policies and services that affect children is spread across the different levels of government, the protection of children's rights in Australia requires a coordinated national approach.

A national Children's Commissioner could play that coordination role. This is discussed further in section 5 below.

4 What could a national Children's Commissioner do?

The United Nations Committee on the Rights of the Child has observed that an independent Children's Commission should:

- **monitor** the observation of children's rights under the CRC
- receive **complaints** of breaches of children's rights under the CRC
- provide a **voice** for children, ensuring that their opinions are expressed and heard
- be able to **support** children taking cases in court and **intervene** in relevant matters before a court
- promote **public understanding** of children's rights among government, public agencies and the general public.⁵

(a) *Monitoring*

A primary function of a national Children's Commissioner could be to monitor, investigate and report on the implementation of children's rights under the CRC.⁶

This monitoring role might include:

- reviewing proposed and existing laws, policies and resource allocations, and practices relating to children and young people
- making recommendations to relevant Ministers about laws which should be made or amended to ensure that the rights of children and young people are considered and protected
- conducting inquiries and reporting to Parliament about children's rights issues

- establishing ongoing dialogue with providers of public services to families, children and youth to ensure that services are delivered in a way that protects the rights of children
- advocating for effective data collection on children's health, wellbeing, development and participation in order to measure the impact of laws, policies and programs upon children and accurately monitor progress towards implementation of children's rights.

The national Children's Commissioner could also assist governments by analysing key policies to ensure they are consistent with Australia's international obligations.

(b) Education

Building community understanding about children's rights could be an important function of a national Children's Commissioner.⁷ The Commissioner's role could include:

- conducting research around children's rights issues and developing appropriate public education programs
- promoting understanding of children's rights among children, young people and the broader community, and in government and public agencies
- collaborating and coordinating with the community and business sectors and existing state and territory children's commissioners and children's guardians to develop and strengthen community understanding of children's rights.

(c) Participation

The international and Australian communities recognise that children have a right to participate in decisions that affect them.⁸ A national Children's Commissioner could enhance the capacity of children to exercise their right to participate.

The Commissioner could promote meaningful dialogue between children and government by developing mechanisms for direct consultation.

The Commissioner could also have a responsibility to speak on behalf of children if there were insufficient mechanisms for children to represent their own interests at the national level.

(d) Complaints

According to the United Nations Committee on the Rights of the Child, it is important for an independent Children's Commissioner to have the power to receive and investigate complaints from children who feel that their rights have been breached.⁹

In Australia, children and young people can make a complaint about some human rights breaches. For example, children can make a complaint to the Australian Human Rights Commission if they feel they have been discriminated against on the grounds of age, race, sex or disability. The Australian Human Rights Commission has a more limited mandate to investigate complaints where an action by the

Commonwealth is alleged to have breach or infringed a right contained in the CRC.¹⁰ More information about the complaints handling function of the Australian Human Rights Commission is available [here](#).

Currently, parents or advocates often make complaints on behalf of children. An effective and meaningful complaints mechanism should be specifically designed for children and designed in consultation with children. A national Children's Commissioner could ensure that complaints processes appropriately engage children, potentially including online engagement.¹¹

(e) Legal proceedings

A national Children's Commissioner could assist courts as amicus curiae by providing expert advice on human rights issues in important cases impacting on the rights of children and young people.

The Commissioner could also intervene in legal cases brought by individuals alleging a breach of their Convention rights as well as in legal cases with implications for the enjoyment of the rights of children and young people at the systemic level.

(f) Inquiries and reporting

A national Children's Commissioner could play an important role in investigating and reporting publicly on particular issues relating to children and young people. It could also support community sector advocacy, both in engaging the community sector in inquiry processes and through providing ongoing support to community sector organisations that are often not adequately funded or trained for effective advocacy.

The Commission has conducted a number of inquiries which directly consider the impact of government policies on the rights of children, raise awareness of children's rights in Australia and recommend ways to better protect and promote the human rights of children. The impact of these inquiries and the resulting reports has been enhanced by their use as advocacy tools by the community sector. The reports of these inquiries include:

- *A last resort?*, the report of the National Inquiry into Children in Immigration Detention (2004)
- National Inquiry into Rural and Remote Education (2000)
- *Age Matters*, a report on age discrimination (2000) examines a number of age distinctions made in Australian law and policy, many of which adversely affect children and young people
- Mandatory detention of juvenile offenders in WA and NT (2000)
- *Seen and heard*, the report of the National Inquiry into Children in the Legal Process (1997).

A national Children's Commissioner could conduct comparable inquiries with a specific focus on the rights on children in Australia.

A national Children's Commissioner could initiate of its own motion inquiries and reports in addition to those requested by the Australian Government or by

Parliament. A national Children's Commissioner could have responsibility for preparing a report to the United Nations Committee on the Rights of the Child in accordance with Australia's obligations under the Convention. This report would be presented to the Committee alongside the government report and the non-government report.

5 What are the essential features of a national Children's Commissioner?

The following features of a national Children's Commissioner are essential to ensure the role is effective and meaningful:

- independence from government
- statutory authority and power, including security of tenure
- adequate resourcing
- accessibility to children, including establishment of a child-appropriate complaints process
- exclusive focus on children under 18 years of age
- ability to act proactively and reactively and to direct its own agenda.

6 Are there Children's Commissioners in other places?

The Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia all have a Commissioner or Guardian for children and young people living in that state or territory. The state and territory Commissioners do important work advocating for children. However, there is still a need for a national Children's Commissioner.

The responsibilities of state and territory Commissioners vary considerably. For example, some offices, such as the Queensland Commission for Children and Young People and Child Guardian and the South Australian Office of the Guardian for Children and Young People, focus on certain groups of disadvantaged children, including children in government care or children with no one to act on their behalf.¹² The ACT Commission, in contrast, has a much broader mandate to promote and protect the rights of all children and young people in the ACT.¹³

As discussed in section 3 above, our federal system of government means that all levels of government have a role in protecting the rights of children. State and territory governments are responsible for many essential services, such as public transport, education, health services and other community services.

But there are some policy areas for which responsibility rests with the Commonwealth and which have a direct impact on the lives of children, including immigration, social security and family law.¹⁴ In addition, many of the issues facing Australia's children, such as homelessness, violence and bullying, mental illness and access to justice affect all children across Australia. These are national issues and need to be understood, analysed and responded to from a national perspective. A

national Children's Commissioner could focus particularly on these issues raising questions of children's rights throughout Australia.

(a) *Commissioners for children around the world*

Many countries around the world have recognised the importance of having an independent office or agency with responsibility for protecting and promoting children's rights.

For example, Norway appointed an Ombudsman for Children in 1981.¹⁵ The Ombudsman is independent and investigates complaints from individual children, monitors and analyses legislation and policy and undertakes a range of public education activities. The Norwegian Ombudsman for Children is currently focusing on the incorporation of the CRC into all areas of society, strengthening the security net for vulnerable children and increasing the quantity and quality of children's participation as active citizens.¹⁶

There are also Children's Commissioners in New Zealand and England.¹⁷ In both countries, the Children's Commissioner promotes awareness and understanding of the views and interests of children. They also conduct research and inquiries into matters relating to children and can investigate decision or acts taken in respect of an individual child.

These Commissioners undertake a range of important tasks and achieved a number developments in the realisation of children's rights. For example, the Children's Commissioner in New Zealand organises a Young People's Reference Group (YPRG), comprising young people between 12 and 18, to provide it with advice. The YPRG assists the Children's Commissioner in a number of ways, including by having input into the development of its strategic direction and by building regional networks to consult with and support children and youth throughout the country. The YPRG also advises other government agencies on policies and services being developed for children and young people.¹⁸

Specialist Children's Commissioners are making important advances for children's rights around the world. Children in Australia deserve the same.

A national Children's Commissioner would be an important step towards an Australian society that better protects and promotes the right of its children.

¹ UNICEF, Rights under the Convention on the Rights of the Child, available at http://www.unicef.org/crc/index_30177.html.

² UNICEF, Fact Sheet No.10, The Rights of the Child, available at <http://www.ohchr.org/Documents/Publications/FactSheet10Rev.1en.pdf>.

³ United Nations, Convention on the Rights of the Child (CRC), <http://www.unicef.org/crc/>.

⁴ The Committee on the Rights of the Child, 40th Session, *Concluding Observations: Australia*, 20 October 2005; The Committee on the Rights of the Child, 16th Session, *Concluding Observations: Australia*, 21 October 1997.

⁵ The Committee on the Rights of the Child, *The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child: General Comment No. 2*, CRC/GC/2002/2, 15 November 2002.

⁶ The Committee on the Rights of the Child, *The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child: General Comment No. 2*, CRC/GC/2002/2, 15 November 2002.

⁷ The Committee on the Rights of the Child, *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para.6): General Comment No 5*, CRC/GC/2003/5, 27 November 2003.

⁸ See for example the Australian Law Reform Commission Report 84, *Seen and Heard: priority for children in the legal process*, 1997, chapter 3, para 5.25.

⁹ The Committee on the Rights of the Child, *The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child: General Comment No. 2*, CRC/GC/2002/2, 15 November 2002.

¹⁰ Under the *Australian Human Rights Commission Act 1986*.

¹¹ As noted in Australian Law Reform Commission Report 84, *Seen and Heard: priority for children in the legal process*, 1997, chapter 4, para 4.16-4.19 in particular. children generally do not use adult-controlled mechanisms to make complaints.

¹² For further information see Commissioner for Children and Young People, Western Australia, <http://www.cyp.wa.gov.au>; Office of the Child Safety Commissioner, Victoria <http://www.ocsc.vic.gov.au>; Office of the Guardian for Children and Young People, South Australia, <http://www.gcyp.sa.gov.au>; Commission for Children and Young People and Child Guardian, QLD, <http://www.cypcg.qld.gov.au/about/our-services.html>; Office of The Children's Commissioner, Northern Territory, <http://childrenscommissioner.nt.gov.au/aboutus.html>; NSW Commission for Children & Young People, <http://kids.nsw.gov.au/kids/about.cfm>; ACT Human Rights Commission, Children & Young People Commissioner, <http://www.hrc.act.gov.au/childrenyoungpeople/>.

¹³ ACT Human Rights Commission, Children & Young People Commissioner, <http://www.hrc.act.gov.au/childrenyoungpeople/>.

¹⁴ Human Rights Law Resource Centre, *Special Children's Rights Edition Bulletin*, April 2010.

¹⁵ The Ombudsman for Children, Norway, available at http://www.barneombudet.no/english/about_the_/.

¹⁶ The Ombudsman for Children, Norway, Focus Areas, available at <http://www.barneombudet.no/english/objectives/>.

¹⁷ Office of the Children's Commission, New Zealand, <http://www.occ.org.nz>.

¹⁸ Office of the Children's Commission, New Zealand, Young Person's Reference Group, available at <http://www.occ.org.nz/yprg>.