
Commonwealth Commissioner for Children and Young People Bill 2010 – Supplementary Submission

Senate Legal and Constitutional Affairs Committee

21 April 2011

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Introduction

1. On 29 March 2011 the Law Council of Australia appeared before the Senate Committee on Legal and Constitutional Affairs to give evidence at the Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010 (the Bill).
2. This appearance followed the making of a written submission to the Inquiry, dated 6 January 2011.
3. During the course of the oral hearing, the Law Council undertook to take on notice a question posed by the Hon Senator Guy Barnett. The following submission endeavours to respond to that question.

Question on Notice

Does the Law Council think there is a way of formalising meetings between State and Territory Children's Commissioners and the proposed Commonwealth Commissioner?

4. This question has been paraphrased from the transcript of the oral hearing.¹ It arose in the context of Senator Barnett's concerns about avoiding overlap and duplication between the functions of the existing State and Territory Children's Commissioners and the proposed Commonwealth Commissioner. Senator Barnett noted that State and Territory Children's Commissioners already meet twice a year and suggested that it would be useful for the Commonwealth Commissioner to participate in such meetings and to formalise such meetings.
5. A number of aspects of the Law Council's written submission dealt with the avoidance relationship between the functions of the Commonwealth and State and Territory Children's Commissioners. These aspects of the written submission are outlined below and provide important context for the consideration of the question on notice.
6. Various Commonwealth, State and Territory laws affect children. Some State and Territory Children's Commissioners and Guardians have a role in monitoring such State and Territory laws. The Law Council recommended that the Commonwealth Commissioner should have a particular focus on Commonwealth laws but not focus solely on such laws..
7. The division of powers between the Commonwealth and the States under the Constitution results in laws affecting children being made by the Commonwealth and the States and Territories with significant interaction between the laws, such as between Commonwealth family law and State and Territory child protection laws.² The Council of Australian Government's National Framework for Protecting Australia's Children 2009-2020 (the National Framework) recognises these

¹ See <http://www.apf.gov.au/hansard/senate/commtee/S13654.pdf> at p 19

² See Alistair Nicholson, 'Australia's Children: Does the Law Offer Them Sufficient Protection?', 2007 at http://www.ssps.unimelb.edu.au/data/assets/pdf_file/0006/93615/Lionel_Murphy_Memorial_Lecture_28_Nov_2007.pdf

significant interactions.³ The written submission suggested that the Commissioner should monitor these interactions as well.

8. The written submission also noted that there are Commonwealth, State and Territory policies, programs and funding arrangements relating to children and recommended that the Commonwealth Commissioner have a particular focus on Commonwealth policies, programs and funding and the interaction between Commonwealth, State and Territory policies, programs and funding.
9. The Law Council noted that clause 6 of the Bill provides that it is not intended to exclude or limit the operation of the law of a State or Territory that is capable of operating concurrently with the Bill when enacted. This clause is worded similarly to provisions in Commonwealth discrimination legislation which also overlaps with State and Territory laws in the field of discrimination.⁴
10. The written submission also noted that the Bill proposes that the Commonwealth Commissioner is obliged to consult with relevant State and Territory bodies in performing his or her functions (sub-clause 10(a)),
11. The Law Council also noted that sub-clause 10(g) of the Bill provides for referral of individual matters by the Commonwealth Commissioner to an appropriate authority. There are a range of authorities dealing with individual matters including State and Territory Children's Commissioners and Guardians.⁵ Such referrals imply the need for considerable contact between the Commonwealth and State and Territory Commissioners.
12. The written submission also noted that clause 12 of the Bill provides that the Commonwealth Commissioner must consult with State and Territory Governments to develop agreements concerning cooperation and interaction between the Commissioner and relevant State and Territory bodies.
13. The question on notice needs to be considered in the context of the desirability of the Commonwealth Commissioner focussing on Commonwealth laws, policies and programs and their interaction with relevant State and Territory laws, policies and programs and the Bill's proposed provisions which foster:
 - (a) Concurrent operation of the Bill with State and Territory laws;
 - (b) Consultation and contact between the Commonwealth Commissioner and relevant State and Territory bodies;
 - (c) Referral of individual matters by the Commonwealth Commissioner to State and Territory bodies; and
 - (d) The development of agreements concerning cooperation and interaction between the Commonwealth Commissioner and relevant State and Territory bodies.

³ See the Council of Australian Governments National Framework for Protecting Australia's Children 2009-2020 at

[H\[http://www.fahcsia.gov.au/sa/families/progserv/Child_Abuse_Prevention/nfpac/Pages/gov_commitment.aspx\]\(http://www.fahcsia.gov.au/sa/families/progserv/Child_Abuse_Prevention/nfpac/Pages/gov_commitment.aspx\)](http://www.fahcsia.gov.au/sa/families/progserv/Child_Abuse_Prevention/nfpac/Pages/gov_commitment.aspx)

⁴ See *Age Discrimination Act 2004 (Cth)*, *Disability Discrimination Act 1992 (Cth)*, *Racial Discrimination Act 1975(Cth)*, *Sex Discrimination Act 1984 (Cth)*.

⁵ Other authorities dealing with individual matters include the Australian Human Rights Commission; Commonwealth, State and Territory Ombudsmen; Commonwealth and State and Territory Privacy Commissioners.

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14. In this context, the Law Council notes that some possible models or options for formalising meetings between the Commonwealth Commissioner and State and Territory Commissioners are:
- (a) The Australian Council of Human Rights Agencies;⁶
 - (b) The Australian Consumer Law Memorandum of Understanding between Commonwealth, State and Territory bodies;⁷
 - (c) Meetings convened by the Community and Disability Services Ministers' Advisory Committee or the National Framework Implementation Working Group;⁸ or
 - (d) A requirement for the Commonwealth Commissioner to report on meetings with State and Territory Commissioners in his or her annual report.

The Australian Council of Human Rights Agencies

15. The Australian Council of Human Rights Agencies (ACHRA) brings together all Commonwealth, State and Territory anti-discrimination and human rights bodies. It meets regularly to discuss discrimination issues across Australia. It prepares submissions on anti-discrimination and human rights issues.⁹ It appears to have a rotating chair in whose name such submissions are made and it appears to operate successfully without a specific statutory basis.
16. The Australian Human Rights Commission (AHRC) participates in meetings of ACHRA. The *Australian Human Rights Commission Act 1986* provides that the Commission may work with and consult appropriate persons, governmental organisations and non-governmental organisations (s 15). This general statutory provision, which appears similar to cl 10 of the Bill appears to be sufficient to facilitate the participation of the AHRC in ACHRA.

The Australian Consumer Law Memorandum of Understanding

17. Communication, co-operation and co-ordination between Commonwealth, State and Territory bodies in the area of consumer law are facilitated by the Australian Consumer Law Memorandum of Understanding (the MOU).¹⁰
18. The Australian Consumer Law was introduced by the *Competition and Consumer Act 2010 (Cth)*, which provides for the Australian Competition and Consumer Commission to be the Commonwealth regulator but also allows State and Territory Directors or Commissioners of Fair Trading or Consumer Affairs to continue to perform certain functions.
19. The MOU is underpinned by an Inter-Governmental Agreement but is not intended to create legally binding obligations on the parties. The parties are the Chairs of the

⁶ See <http://www.hrc.act.gov.au/content.php/content.view/id/233>

⁷ See http://www.consumerlaw.gov.au/content/the_acl/downloads/acl_mou.pdf

⁸ See http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf at p 35

⁹ [http://www.hrc.act.gov.au/res/civil%20marriage.pdf?PHPSESSID=3cb3df6ed6de64e3fd4be80ac851a01eH](http://www.hrc.act.gov.au/res/civil%20marriage.pdf?PHPSESSID=3cb3df6ed6de64e3fd4be80ac851a01eH;);
<http://www.eoc.sa.gov.au/eo-you/discrimination-laws/australian-charter-rights>

¹⁰ See http://www.consumerlaw.gov.au/content/the_acl/downloads/acl_mou.pdf. The MOU also facilitates co-operation with relevant New Zealand bodies.

relevant Commonwealth bodies and the Directors or Commissioners of the relevant State and Territory bodies.¹¹

20. The MOU provides for the parties to explore opportunities to communicate, co-operate and co-ordinate efforts within the context of the MOU. Such a provision appears to provide scope for meetings between Commonwealth, State and Territory bodies.
21. While the MOU exists within the context of a national legislative scheme and the Bill does not establish that type of scheme, the MOU could still be used as a model for formalising meetings between the Commonwealth Commissioner and State and Territory Commissioners.
22. A similar MOU could be developed pursuant to cl 12 of the Bill which provides for the Commonwealth Commissioner to consult State and Territory governments to develop agreements concerning co-operation and interaction between the Commissioner and State and Territory bodies.

The Community and Disability Minister's Advisory Committee and the National Framework Implementation Working Group

23. As noted above, the National Framework for Protecting Australia's Children recognises significant interactions between Commonwealth, State and Territory laws, policies and programs affecting children. It contains a specific action to explore the potential role for a National Children's Commissioner, including the relationship with State and Territory Children's Commissioners. This action is identified as an initial 3 year action with advice to be provided to the Commonwealth Government in late 2009.¹²
24. The Law Council notes that Senator Barnett questioned officers of the Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA) and the Attorney-General's Department at the Committee's hearing into the Bill on 30 March 2011 about whether this advice had been provided.¹³ The officers noted that the advice had been provided to the government in 2010 and that there had subsequently been consideration of the issue but that they did not have a view on the appropriate model to avoid duplication and overlap in the roles of the Federal, State and Territory Commissioners. The officers took a question on notice in relation to the model.¹⁴
25. The Law Council also notes that the National Framework includes governance arrangements which provide that the Community and Disability Services Ministers' Conference (the Conference) is responsible for its implementation. The conference is supported by an officials' forum, the Community and Disability Service Ministers' Advisory Committee (CDSMAC) to manage the National Framework. CDSMAC members are Chief Executives, Directors and Secretaries of relevant government departments. CDSMAC members are likely to have existing relationships with the State and Territory Children's Commissioners and may be able to convene meetings between them and the Commonwealth Commissioner as part of CDSMAC's function in managing the National Framework.

¹¹ Ibid. Other parties are relevant New Zealand bodies.

¹² See note 2 at p 16

¹³ See <http://www.aph.gov.au/hansard/senate/committee/S13655.pdf> at p 30

¹⁴ Ibid at p 31

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26. The National Framework Implementation Plan 2009-2012 (the Implementation Plan) identifies the exploration of the potential role for a national Commissioner for Children as a priority action.¹⁵ The Implementation Plan refers to partnerships such as CDSMAC and the National Framework Implementation Working Group which will meet quarterly and have a hands on role in implementation and delivery of the Framework. Commonwealth, State and Territory representatives, as well as community representatives will make up the Working Group, which will consult with stakeholders such as State and Territory Children's Commissioners. This Working Group may also be able to facilitate meetings between the Commonwealth, State and Territory Commissioners.

A Reporting Requirement

27. The *Australian Human Rights Commission Act 1986* contains a requirement for the Aboriginal and Torres Strait Islander Social Justice Commissioner to submit an annual report to the Minister regarding the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islanders and recommendations for action to ensure the enjoyment of those rights (s 46C(1)).
28. Cl 26 of the Bill provides for the Commonwealth Commissioner to submit an annual report to the Minister without specifying any particular matters to be contained in the report. The holding of meetings with State and Territory Commissioners could be included as a specific matter to be addressed in the report in a similar way to the specific matters required to be included in the Aboriginal and Torres Strait Islander Social Justice Commissioner's annual report.
29. While such a requirement would place an obligation on the Commonwealth Commissioner to facilitate such meetings, it would not place an obligation on the State and Territory Commissioners to participate. As the Law Council noted at the hearing on 29 March 2011, there may be a need for complementary legislation within the States and Territories to create such obligations if this is considered necessary. However, as noted above there are a number of models and options, which could be used to facilitate such meetings even in the absence of specific State and Territory legislation.

Conclusion

30. The Law Council thanks the Committee for providing it with an opportunity to provide further information in response to the question on notice. The Law Council trusts that this information is of assistance to the Committee.

¹⁵ See

http://www.fahcsia.gov.au/sa/families/pubs/Protecting_children/Documents/nation_framework_protecting_children.pdf

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- 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 of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.