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

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Law and Bills Digest Section

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

Date introduced: 23 May 2012

House: House of Representatives

Portfolio: Attorney-General

Commencement: The formal provisions commence on Royal Assent, while the operative provisions commence either on Royal Assent or on 1 July 2012 (whichever is the later).

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

To establish a National Children’s Commissioner (NCC) and to specify that Commissioner’s functions within the Australian Human Rights Commission (AHRC).

Background

The proposal for a NCC has been put over a lengthy period by a wide range of people. The current Attorney-General, while acting as the Shadow Attorney-General, made the proposal to Parliament in 2003, while the UN’s Committee on the Rights of the Child (CROC), having nominated the need for an office-holder such as the NCC in its General Comment of 2002, took up the issue in response to the Australian reports under the Convention in 2005:

Independent monitoring

15. The Committee welcomes the establishment of the post of Commissioner for Children in the States of New South Wales, Queensland and Tasmania, as well as the existence, at Federal level, of the Human Rights and Equality Opportunity Commission (HREOC). While acknowledging the very valuable work of HREOC in the area of children’s rights, the Committee is concerned that there is no commissioner within HREOC devoted specifically to child rights and that substantial cuts in its funding over the past 10 years have severely affected its workforce and its ability to handle effectively individual complaints, public inquiries and policy work.


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16. The Committee recommends that the State party ensure that HREOC can undertake independent and effective monitoring of the implementation of children’s rights, in accordance with the Committee’s general comment No. 2 (2002) on the role of independent national human rights institutions, by providing it with adequate human and financial resources to do so. In addition, the State party could create specialized sections within the offices of the various state and territory ombudsmen to deal with issues relating to children.3

Many submissions to the parliamentary committee inquiries into the Bill (referred to below) also make the point that their advocacy for a position such as the NCC has been consistent over a lengthy period, many looking back over the time since the UN Convention on the Rights of the Child (CROC) was ratified by Australia in 1990.4


Committee consideration

The Bill was referred to both the Senate Legal and Constitutional Affairs Legislation Committee, which reported on 18 June 2012; and the House Standing Committee on Social Policy and Legal Affairs, which reported on 21 June 2012. Details of the two inquiries can be found (respectively) at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/national_childrens_commissioner/index.htm (the Senate Report) and http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%20childrens%20commission/report.htm (the House of Representatives Report).

While the majority on both Committees recommended unamended passage of the Bill (the House of Representatives majority also recommended that the question of adequate funding be revisited), the dissenting contributions of the Coalition members of each Committee were different. The Senate Coalition members made ‘additional comments’ which gave conditional support to the Bill, while

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also issuing a caution about the need for the NCC to ensure the position ‘complements and supports the work of state and territory children’s commissioners’.6

In contrast, the Coalition members of the House of Representatives Committee made a dissenting report in which they recommended opposition to the Bill, concluding ‘that the AHRC, in cooperation with the relevant state and territory commissioners and guardians, already adequately perform the functions envisaged for the new Commissioner.’7

In the Senate Report the Australian Greens, through Senator Hanson-Young, recommended passage of the Bill but also proposed three specific amendments, which were to extend the referencing to include three additional relevant treaties; to require the NCC to report on Australia’s compliance with CROC; and to include specific references to certain marginalised groups of children.8

**Position of major interest groups**

Both the Senate and House of Representatives Committee reports refer to the overwhelming support for the establishment of the NCC in the submissions received.9 There remain, however, critics of the proposal. The Centre for Independent Studies has issued publications which oppose the establishment of the NCC, with the Centre’s Jeremy Sammut expressing the view that the Commissioner would be likely to favour ‘parental rights’ and that this would be a negative outcome in the face of ‘the child protection crisis in Australia’. Sammut also believes that the Commissioner will be ineffective in achieving the roles stipulated tasks.10

The wide ranging submissions to the Committee inquiries which welcomed the introduction of the NCC included, for example, the Society of St Vincent de Paul, which comment that:

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...the creation of a statutory advocate for “the needs, rights and views of people below the age of eighteen” is a significant step in highlighting the structural marginalisation of children in Australia, and recognition that children’s rights are human rights.\textsuperscript{11}

The Human Rights Law Centre, simply notes that:

The establishment of a National Children’s Commissioner will help to promote and protect the human rights of children and young people and ensure that the best interests of children are taken into account in the development and review of national law and policy.\textsuperscript{12}

Finally Grandparents Australia/Victoria observe that:

Grandparents are in the frontline in the battle to prevent child abuse and to restore children to being happy and hopeful.

The appointment of a National Children’s Commissioner is a crucial manoeuvre in this battle and will improve the possibility of winning – making short, medium and long term improvements in the lives of Australia’s children.\textsuperscript{13}

All of these submissions also express various concerns, either regarding the adequacy of funding or specific amendments they would like to see made to the Bill, such as the need to reference a broader field of international treaties, or to give the Commissioner greater powers. Nevertheless, in spite of these desires for improvement, the widespread belief that the Bill represents a positive step is apparent.

Financial implications

The Explanatory Memorandum states that ‘[t]he establishment of the Children’s Commissioner will cost $3.5m over four years from 2012-13, when the position is to be established.’\textsuperscript{14}


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Several submissions, and both the Senate and House of Representatives majority reports, express concern at the levels of funding.\textsuperscript{15} As mentioned above, the House of Representatives majority report makes specific recommendation on this issue\textsuperscript{16}, while the Senate Report also makes definite suggestions about the need to review the situation.\textsuperscript{17} Finally, the AHRC President has expressed concern that the funding `would not by itself meet the real cost of creating this position.'\textsuperscript{18}

\section*{Main issues}

The differences between the parliamentary parties’ attitude to the Bill has been noted above. The crucial element in these differences would seem to be the pre-existing role of state and territory commissioners or guardians. The Government clearly believes that the NCC and its state and territory counterparts would be covering different fields and would be able to complement and contribute to each other’s work. The Coalition is clearly concerned that the risk of duplication and waste is significant.

One of the suggestions for amendment that was put by a variety of bodies was that the Bill should include a reference to the state/territory commissioners. In particular it might be suitable to specify the NCC’s state and territory counterparts in the list of bodies or people that the NCC may consult with in \textit{proposed subsection 46MB(5)} \textit{Proposed section 46MB} commences with a setting out of the functions of the NCC, and provides:

\begin{quote}
\begin{enumerate}
\item[(5)] In performing functions under this section, the National Children’s Commissioner may consult any of the following:
\begin{enumerate}
\item children;
\item Departments and authorities of the Commonwealth, and of the States and Territories;
\item non-governmental organisations;
\item international organisations and agencies;
\item such other organisations, agencies or persons as the Commissioner considers appropriate.
\end{enumerate}
\end{enumerate}
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item Senate Report, op. cit., p. 18, ‘the committee believes it would be worthwhile to revisit the question of funding for the new role once the office is operational and its optimal operating budget can be more accurately judged.’
\item Australian Human Rights Commission, Submission no. 36, p. 6, quoted in the House of Representatives Report, op. cit., p. 4.
\end{enumerate}
\end{footnotesize}
The suggestions are clearly not mandatory – simply listing people/entities that the NCC might want to consult. The provision also includes proposed subparagraph (e), which allows the NCC to consult with anyone. Thus the current legislative form would not preclude the NCC from consulting fellow commissioners. Nevertheless, if there are to be nominated bodies, it would not seem inappropriate to cite the state and territory counterparts, thereby giving them formal legislative recognition at a Federal level. Neither major parliamentary party has, however, pursued this amendment, despite the concerns of the Coalition regarding the relationship between the national and state/territory children’s commissioners.

It is also interesting to note that no reference to ‘parents’ is made in this collection of individuals and bodies that the NCC is directed towards. Policy considerations may have led to the drafting which gives specific mention of a range of individuals and groups the NCC may consult, but does not mention the traditional legal and moral guardians of children. A significant majority of these individuals are traditionally presumed to have a keen interest in promoting the interests of children, however there are also various dilemmas that may arise between the interests of the child and the interests of the parent. It is clearly open to the Commissioner to consult such individuals by reference to proposed paragraphs (c), (d) or (e), in so far as everyone is covered by that final, very broad discretion.

There have traditionally been certain tensions in this field of relationships, particularly in the history of the UN’s CROC. There have been schools of thought which are deeply concerned that such an instrument may serve to undermine the appropriate authority of parents.19

A submission to the inquiries from FamilyVoice Australia says:

The Bill makes no reference to children as part of families or to the role of parents as the primary carers and advocates for their children.

For example, the Bill would make no provision for the proposed National Children’s Commissioner, in performing his or her functions, to consult with parents.

This failure would be likely to reinforce the approach taken in the Convention on the Rights of the Child, of treating children as autonomous individuals detached from the families in which they live.20

19. An account of this history is offered by the Western Australian Committee of the Council for the National Interest in a 1997 Submission to the Joint Standing Committee on Treaties:
...at about the time the United Nations Convention on the Rights of the Child (the Convention) was signed by the Australian Government there was widespread community concern about a number of its Articles which were seen by individual parent, parent and family organisations and others as a threat to parents’ rights and responsibilities and likely to drive a wedge between parents and their children leading to fragmentation of families.
As a consequence of this concern many thousands of petitions were made to both the House of Representatives and the Senate urging that the Convention not be ratified or that ratification be delayed or that certain rights and responsibilities of parents be reserved (Council for the National Interest, West Australian Committee, Submission, Joint Standing Committee on Treaties, 1997, http://www.cniwa.com.au/docs/Rights%20of%20a%20child.pdf)
As mentioned above, the Centre for Independent Studies demonstrates a concern about the role of parents, but from another angle. Jeremy Sammut, a researcher for the Centre, is concerned that the parental rights lobby may be too effective and may serve to overwhelm the interests of children caught up in the national child protection crisis by inappropriately emphasising the ‘rights’ of a parent to maintain contact with their child/ren.

Clearly the appropriate role of parents is contentious. The consultation provision at proposed subsection 46MB(5) as currently worded does not preclude consultation with parents, and there is no parliamentary support for their specific mention. Nevertheless, it may be seen as significant by sections of the community that no explicit reference is made to parents as individuals of interest or significance to the NCC. The differing perspectives on the appropriate balance reflect a fundamental tension between two different but related duties. On the one hand there are requirements and responsibilities for the State to protect children from inappropriate behaviour by parents, but on the other hand there are also requirements and responsibilities on parents to protect children from inappropriate behaviour by the State or its instrumentalities. Arriving at a constructive resolution of these responsibilities will be one of the challenges faced by the NCC.

Proposed subsection 46MB(6) requires the NCC to ‘have regard to’ seven of the more significant treaties. After nominating these seven specific treaties the subsection concludes that the NCC must, as appropriate, have regard to:

(c) such other instruments relating to human rights as the Commissioner considers relevant.

Once again a contentious question has arisen as to whether or not additional inclusions should be made with respect to this provision. Many submissions to the inquiries argued that there should be explicit recognition of a broader range of treaties. Once again the provision makes the point that the NCC should consider other treaties as appropriate, but it remains an issue for interested parties as to whether there should be a wider range of treaties mentioned. The Government explains that the provision is drafted to reflect the treaties given particular recognition by the AHRC Act, however this is not accepted as a sufficient justification by many submitters.

The Australian Greens recommend that

1.9 Section 46MB(6)(b) of the Bill should be amended to explicitly include:

(a) the Convention Against Torture and Cruel, Inhumane or Degrading Treatment or Punishment and the Optional Protocol to this Convention;


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(b) the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; and


The Convention Against Torture and Cruel, Inhumane or Degrading Treatment or Punishment and its Optional Protocol are particularly relevant to the situation of children because together they seek to regulate and monitor conditions of detention and other situations where the individual is held in confinement. Thus these instruments deal with appropriate detention facilities for young offenders, for instance, or with immigration detention facilities holding children or involuntary mental health treatment.

The relevance of CROC’s optional protocols speaks for itself, however, after acknowledging its relevance the majority of the Committee also recognised the need for consistency with the AHRC Act’s provisions and concluded:

After careful consideration, the committee has decided to defer judgement on the possible inclusion of a list of specific instruments in the Bill until the consolidation of anti-discrimination laws has been delivered. The committee will monitor the process of consolidation, and possibly revisit the question of the inclusion of specific instruments in the legislation in the future.22

Similar debates and outcomes were recently conducted around the passage of the Human Rights (Parliamentary Scrutiny) Act 2011. Oddly enough the set of seven treaties to be considered by the Parliamentary Human Rights Committee (as agreed under the National Human Rights Framework) differs from those nominated by this Bill for the NCC. The Parliamentary committee is to consider the Convention Against Torture and Cruel, Inhumane or Degrading Treatment or Punishment but, unlike the NCC, is not required to consider the Universal Declaration of Human Rights.

The Parliamentary Human Rights Committee is scheduled for review in 2013-14.

Finally there is another issue where questions regarding the comprehensiveness of coverage have also been raised. The Bill proposes to specify in subsection 46MB(4) that

In performing functions under this section, the National Children’s Commissioner may give particular attention to children who are at risk or vulnerable.

There was a view from a number of submissions that the various categories of ‘at risk’ or ‘vulnerable’ children should be spelt out in the Bill. Children in detention and aboriginal children were particularly mentioned as being appropriate to recognise. The Australian Greens adopted this recommendation in the text of their Dissenting Report. Once again, however, the existing text is designed to cover these categories, albeit not explicitly. The majority Senate Committee report decided against spelling it out on the grounds that

the committee notes that the Bill makes explicit reference to the *Convention on the Rights of the Child*, which lists Indigenous children and children in detention. That being the case, the committee considers that it would be unnecessary and cumbersome to separately list these individual groups of vulnerable children. Indeed, to do so could potentially be exclusionary, and as such, highly undesirable. The committee is satisfied that the new commissioner will have ample discretion to look at and promote the interests of any and all groups of vulnerable and at risk children.\(^{23}\)

**Key provisions**

The contentious provisions have been examined above, so this section will simply look more closely at the structure of the Bill.

**Division 1—Establishment and functions**

After clarifying a few definitional matters (most importantly the definition of child is given as being people under the age of 18 (item 1)), the Bill inserts a **new Part II A** into the *Australian Human Rights Commission Act 1986* (AHRC Act) by item 5 of Schedule 1. It is this new Part which establishes the new National Children’s Commissioner (NCC) (proposed section 46MA) and sets out the functions of the NCC (proposed section 46MB).

The functions are:

- submit a yearly report to the Minister (who is required to table the report before each House within 15 sitting days (proposed section 46MN))
- promote awareness and discussion of human rights of children in Australia
- research and educate to promote human rights of children in Australia, and
- examine Commonwealth laws (current and prospective) as to whether they comply with the human rights of children (and to report on this examination).

It is noted that these functions are different to some other Commissioners in so far as some Commissioners may also have responsibility for complaint handling designed to redress discrimination. These responsibilities may be established under different legislation (for example the *Sex Discrimination Act 1984*) or under the AHRC Act itself. Similarly the NCC’s state and territory counterparts may also have complaint handling responsibilities in this field. These distinctions reflect both difference in function (for example state and territory office holders may have practical welfare responsibilities that the Commonwealth NCC does not) and in the legislative structures governing the roles. The NCC is designed to operate more at a policy level than an individual level.

The NCC is, however, to be given a capacity comparable to other Commissioners who may seek leave to appear as amicus curiae in suitable court cases (proposed subsection 46PV(3)).

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\(^{23}\) Ibid., p. 15.
Divisions 2 and 3—Appointment, Terms and conditions

As the Explanatory Memorandum points out, proposed Divisions 2 (Appointment) and 3 (Terms and conditions) of proposed Part IIAA of the AHRC Act are effectively ‘standard’ and ‘largely mirror the administrative provisions for the Aboriginal and Torres Strait Islander Social Justice Commissioner [(ATSISJC)]’: Any differences between these provisions and the Aboriginal and Torres Strait Islander Social Justice Commissioner are to reflect updated drafting practices since the position was created in 1992.

These changed drafting practices do, however, lead to a non-uniform Act as the end result. The proposal to review the AHRC and its associated legislative arrangements will presumably allow the non-uniform nature of these provisions to be addressed.

**Proposed Division 2** has provisions for the appointment of the NCC by the Governor-General for a maximum of seven years (reappointments may be made). Acting arrangements may also be put in place.

**Proposed Division 3 covers terms and conditions of appointment.** Remuneration and allowances are to be determined by the Remuneration Tribunal or by regulation. Outside employment is by permission of the Minister only and resignation takes effect on receipt of letter by the Governor-General or on a later date nominated in the letter. Termination is for ‘misbehaviour’ or if unable to perform duties for some incapacity; various financial difficulties, such as bankruptcy; or if the Commissioner is absent without leave beyond specified periods.

**Division 4—Miscellaneous**

The provisions in **proposed Division 4—Miscellaneous** are again almost identical to those governing the ATSISJC, however they raise some interestingly different issues.

**Proposed section 46ML** covers information held by government agencies which the NCC wishes to access. In standard form it is required that if a Commonwealth agency is to provide information which reveals the identity of a particular individual then the permission of that individual must be sought before disclosure is permissible. The Explanatory Memorandum points to the importance of these provisions in the case of children. It confirms that the information provided by a Government agency cannot reveal the identity of an individual without that individual’s consent. The Explanatory Memorandum does not, however, explore the precise nature of the arrangements to be made to establish that consent in the case of legally incompetent individuals. As every school is well aware, there are continuous legal and/or social requirements for permission forms to be signed by parents/legal guardians responsible for children. This arrangement will presumably continue in place in so far as the NCC is concerned and the parent’s/guardian’s permission will need to be sought rather than, or maybe as well as, the individual whose personal privacy is directly concerned. This interplay of parental and child rights and responsibilities highlights the drafting decisions elsewhere in the Bill.

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A final apparent incongruity is to be found in proposed section 46MN, the section requiring reports to be tabled in the Parliament. This section is, in a sense, as the Explanatory Memorandum says, consistent with other tabling requirements in the Act, in so far as tabling is concerned. However, in a unique departure from the mirroring arrangements that have governed these Divisions, the relevant sections are not alike. When the ATSISJC’s reports are tabled there is a legislative requirement that they are then sent to the Minister’s state and territory counterparts (section 46M of the AHRC Act). There is no corresponding provision in the arrangements governing the NCC, who is not required to send on copies of the reports to his or her state/territory counterparts. This discrepancy may be the result of historical considerations now regarded as no longer relevant, however, given the crucial nature of the relationship between the NCC and the NCC’s state and territory counterparts it is noteworthy that these particular provisions have not been replicated. This decision means there is no legislative assurance that the appropriate transmission of information will occur between the Commonwealth and state and territory counterparts.

Concluding comments

The Bill’s provisions clearly have significant support. In a sense this only serves to highlight the parliamentary reluctance to make amendments.

From the commencement and funding arrangement there is a certain sense of urgency governing passage of the Bill, although the commencement dates are arranged in such a manner that caters for a date later than 30 June 2012.