Submission

on the

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

to the

Senate Legal and Constitutional Affairs Committee

Department of the Senate

Parliament House

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26 May 2012

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1. Introduction

On 23 May 2012 the Senate referred the *Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* to the Senate Legal and Constitutional Affairs Committee for inquiry and report.

The Bill would amend the *Australian Human Rights Commission Act 1986* to establish the office of National Children's Commissioner within the Australian Human Rights Commission.

Submissions from the public have been invited and should be received by 1 June 2012. The committee is due to report by 18 June 2012.

2. Children, the family and the Convention on the Rights of the Child

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.

2.1 Children welcome here

The Commissioner would be empowered under proposed new section 56MB (5) (a) to consult directly with children.

Many parents would find it odd, even disturbing, that a government body would be seeking to engage so directly with children and encouraging them, for example, to attend the Commissioner unaccompanied by their parents.

2.2 Convention on the Rights of the Child

Under proposed new section 56MB (6) (b) (v) the Commissioner would be required, among other things, to have regard to "the *Convention on the Rights of the Child* done at New York on 20 November 1989".

Indeed one of the objects of the Bill as stated in the Explanatory Memorandum would be to "assist Australia in meeting its international obligations by promoting and advancing the rights of the child, in particular as enshrined in the *Convention on the Rights of the Child*".[1]

Indeed, the Explanatory Memorandum cites the Committee on the Rights of the Child recommendation that national human rights institutions should include within its structure an identifiable commissioner specifically for children's rights as one of the aspects of human rights that the bill would advance.[2]

The Committee on the Rights of the Child 2005 "*Concluding observations: Australia*", among other findings, objected to the laws in various Australian States and territories that permit parents to use

corporal punishment for the purpose of "reasonable chastisement". The Committee formally called on Australia to "*take appropriate measures to prohibit corporal punishment at home*".

Many Australian families use reasonable physical discipline from time to time. There is a significant body of research confirming its utility in raising children well.[3]

It is one thing for there to be an internal domestic debate within each State and territory on the merits or otherwise of banning the use of corporal punishment within the home. It is quite another thing to have an international committee seeking to interfere in the laws of our states and territories on a matter such as this. Empowering a National Children's Commissioner as a local pusher of the views of this international committee would not be helpful and is unwarranted.

During the debate in 1990 on whether Australia should ratify the Convention on the Rights of the Child its proponents pilloried pro-family groups that asserted that the Convention undermined parental rights.

However, the official view was made clear in the 1995 "*Concluding Observations Concluding observations of the Committee on the Rights of the Child: Holy See*". The Committee took the Holy See to task over its formal reservation to Article 5 and Articles 12 through 16 of the Convention in which the Holy See states that it will interpret these articles in accordance with parents' inalienable rights and prerogatives. The Committee stated that it was "*concerned about [these] reservations ... in particular with respect to the full recognition of the child as a subject of rights ... <u>In this respect, it wishes to recall its view that the rights and prerogatives of parents may not undermine the rights of the child as recognized by the Convention, especially the right of the child to express his or her own views and that his or her own views be given due weight</u>*".[4] (Underlining added)

2.3 A charter for child autonomy?

Article 5 of the Convention states that:

> *States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*

This phrase effectively limits the obligations of States Parties to respect parental rights only when parents are considered by the State to be acting "*in a manner consistent with the evolving capacities of the child*".

By empowering a National Children's Commissioner to promote "*the enjoyment and exercise of human rights by children in Australia*", the Bill would potentially create a powerful government body that could act to undermine parental efforts to supervise the upbringing of their own children according to their best judgement.[5]

The autonomy model of children's rights is further expressed in Articles 12 through 16 of the Convention which require States Parties to recognize children's rights to:

- **have their views expressed and taken into account in all matters concerning them (Article 12).**

The weight to be given to these views is to be in accordance with the age and maturity of the child. While 12.2 deals with judicial and administrative proceedings, article 12.1 is unlimited in application. It could be held to require parents and educational authorities to give more weight to a child's views than they might otherwise do.

- **freedom of expression, including seeking and receiving information through any media (Article 13).**

The only limitation is by the laws usually considered necessary to place limits on freedom of expression. This Article could be applied to prevent parents from effectively controlling information available to their children.

- **freedom of thought, conscience and religion (Article 14).**

Under this article parental supervisory rights must only be respected by the State when exercised in a manner consistent with the evolving capacities of the child. In other words, children have a right to freedom of thought, conscience and religion to be exercised independently of their parents' direction with the full legal protection of the State whenever the child is judged to have the capacity to do so.

- **freedom of association and peaceful assembly (Article 15).**

This freedom is only to be limited by the usual limits permitted to restrict these rights for adults (eg protection of public order). This Article could also be cited to prevent parents from effectively supervising their children's relationships with others.

- **freedom from arbitrary interference with privacy (Article 16).**

Privacy rights are used to ground alleged rights to sexual activity, access to contraception and abortion. This Article could be held to endorse children's rights to such things without parental knowledge or supervision whenever the child is judged to have the capacity to exercise these "rights" independently.

In each of these Articles children are said to possess autonomous rights. Either through Article 5 or through explicit statements in these Articles, parental supervisory rights are to be exercised only in a manner consistent with the evolving capacity of the child.

This represents a decisive move away from age-based criteria for minority status to capacity-based criteria. The obvious difficulty with this is that once it is held to be an obligation under international law (as opposed to simply being expressed as a suggestion for how parents ought to fulfil their supervisory responsibilities) is that someone must make judgements as to:

- the current capacity of the child to exercise a particular right independent from parental supervision;
- the extent to which parental action infringes the child's valid, autonomous exercise of a right; and
- any remedy necessary to enforce or uphold the child's rights and to restrain the parents from infringing those rights.

The Bill would empower the proposed National Children's Commissioner to make recommendations *"as to the action that should be taken to ensure the enjoyment and exercise of human rights by children in Australia."*[6]

If the National Children's Commissioner follows the general line taken by the Committee on the Rights of the Child these recommendations are likely to include measures that would undermine parental rights by treating children as autonomous. This would not be a helpful development.

The government ought to be supporting parents not undermining them in pursuit of fulfilling so-called international obligations.

Recommendation 1:

The Bill would further entrench the Convention on the Rights of the Child in Australian law and public policy by creating a National Children's Commissioner empowered:

- ***to consult children without reference to their parents;***
- ***to have regard to the Convention and***
- ***to make recommendations to "ensure the enjoyment and exercise of human rights" - as understood by the Committee on the Rights of the Child – "by children in Australia".***

These developments could lead to a significant undermining of parental rights and responsibilities.

The Bill should therefore be opposed.

3. "Children and young people"

Although the Bill only refers to children – and would define "*children*" as "*people under the age of 18 years*"[7] - both the Explanatory Memorandum, on nine occasions, and the Minister's second reading speech on 13 occasions refer to the Bill and the proposed National Children's Commissioner as advancing the enjoyment of human rights by children and young people.

The term "children and young people" could be understood to include some people who are not below the age of 18 years. This is potentially misleading and should be clarified.

Recommendation 2:

The Minister should be asked to clarify the references to "young people" in the Explanatory Memorandum and in her second reading speech.

4. Endnotes

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1. Explanatory Memorandum, p 2.

2. Ibid., p 3.

3. Larzelere, R E & Kuhn, B R, (2005), "Comparing child outcomes of physical punishment and alternative disciplinary tactics: A meta-analysis", *Clinical Child and Family Psychology Review*, 8 (1), 1-37: http://www.springerlink.com/content/k0x4468k255187qg/ ; and

4. *Concluding observations of the Committee on the Rights of the Child: Holy See*, 27 Nov 1995, paras 7 and 13: http://www.unhcr.org/refworld/pdfid/3ae6aec910.pdf

5. Schedule 1, item 5 inserting new section 46MB (1) (c).

6. Schedule 1, item 5 inserting new section 46MB (3) (b).

7 Schedule 1 item 1