

PROMOTING THE BEST INTERESTS OF THE CHILD:

*THE CASE FOR
A CHILDREN AND YOUNG PEOPLE'S COMMISSION
IN VICTORIA*

BY

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INTRODUCTION

I am very honoured to have been invited to speak at today's Law Institute Victoria and Pitcher Partners President's Luncheon on a topic that is dear to me. I would like to take this opportunity to express my appreciation to everyone concerned with the organisation of this event, and to thank each of you who has come to listen and think further about the benefits that Victorians would gain if this State were to establish a dedicated ongoing Children and Young People's Commission.

Many of you will know that I have advocated for the development of properly designed Commissions at the State, Territory and Federal level for many years, as have many significant organisations and individuals that are concerned with the rights and best interests of our young.¹ The close interconnection between rights and best interests has been described in many ways by such advocates, but I was particularly encouraged to see that the 1998 Joint Standing Committee on Treaties of the Commonwealth Parliament recognised that

*“children who are aware of their rights are more likely to articulate their concerns leading to early intervention in problems”.*²

There is common element in calls for States, Territories and the Commonwealth to establish Commissions. It is for a truly independent and influential voice for children and young people, an advocacy body with a formal mandate to galvanise attention to their situation and the power to take action to improve it.

Our children need a Commission which will champion their rights and ensure that their needs are considered by all levels and arms of government and every element of a society that too often leaves them out on a limb. Crucially the Commission must be independent, properly funded and at arms length from Government particularly as there will be times when the Commission will make recommendations for legislative changes that the government of the day will find unpalatable.

¹ See for example: Alston, P. and Brennan, G. (1991) *The UN Children's Convention and Australia*, Centre for International and Public Law The Australian National University, Canberra; Brewer, G. and Swain, P. (1993) *Where Rights are Wronged - A Critique of Australia's Compliance with the United Nations Convention on the Rights of the Child*, National Children's Bureau of Australia, Melbourne; Harvey, J. Dolgopoul, U. and Castell-McGregor, S. [Eds] (1993) *Implementing the U.N. Convention on the Rights of the Child in Australia*, South Australian Children's Interests Bureau, Adelaide; Boss, P., Edwards, S. and Pitman, S. (1995) *Profile of Young Australians - Facts, Figures and Issues*, Churchill Livingstone, Melbourne; Funder, K (Ed.) (1996) *Citizen Child - Australian Law and Children's Rights*, Australian Institute of Family Studies, Melbourne; Defence for Children International Australian Section (1996) *Australia's Promises to Children - The Alternative Report*, email - info@dcj-au.org; Burnside Social Justice and Research Program (1997) *A Proposal for a Commissioner for Children*, Sydney; Children's Interests Bureau Board of South Australia (1998) *A Commissioner for Children*, Adelaide; Defence for Children International Australian Section; (1998) *Towards Taking Australia's Children Seriously - A Commissioner for Children and Young People*, email - info@dcj-au.org; Castell-McGregor, S. "Do Children's Rights Really Matter? Have Commissioners for Children in Australia Lost a Human Rights Focus?" Children's Rights - National and International Perspectives Conference, University of Otago, Dunedin, 7-9 July 1999 (presented with Tina Dolgopoul); Rayner, M (2000) *Children's Rights Commissioners: Systemic Advocacy for Children in Australia, New Zealand and the UK*, Association of Lawyers for Children Conference, University of Warwick, 20-22 September 2000.

² Executive Summary at 5, available at: <http://www.aph.gov.au/house/committee/jsct/reports/report17/rept17contents.htm>. The Commonwealth Government has not responded to the Report.

Some people react negatively to the very suggestion of such a Commission. They claim that it would take away their rights as parents when in fact the opposite is true. This has been well demonstrated in countries such as Norway and New Zealand where similar bodies help to strengthen families and parents often make complaints on behalf of their children.

For the reasons I am pleased to outline today, I hope there will be further action that brings this State closer to having a Commission for Children and Young People.

DESIGN AND DEMAND

In a few moments I will say more about some of the key functions and responsibilities that the Commission should perform and why there needs to be a specific body such as a Commission. However at the outset, it is necessary to stress that an impotent, under-resourced or politically compromised Commission is doomed to disappoint children, their families and their advocates. This point was well made at a seminar held nearly 10 years ago by the South Australian Children's Interests Bureau with the benefit of distinguished and experienced speakers such as Maalfrid Flekkoy, Norway's first Ombudsman for Children, and Ian Hassall, New Zealand's first Commissioner for Children.³ These and other evaluations over the years make it clear that the proposed Commission's capacity to properly perform its functions will depend upon essential design features such as the following:

- The Commission must have a mandate that takes the United Nations Convention on the Rights of the Child as its frame of reference.⁴ As all of you would well appreciate, Australia's ratification in December 1991 after consultation with the States and Territories,⁵ imposed Convention obligations on all levels of government.⁶ It is, in my view, the most appropriate foundation for the Commission and logically, the Commission should be the lead body monitoring how Victoria meets Convention obligations. Importantly for the title of my presentation today, the Convention rightly locates the fulfilment of best interests as one of the rights that children are entitled to have met - that children's rights must be viewed holistically and comprehensively.
- The Commission must of necessity be an independent office with its own permanent statutory powers. To this end, the Commission should be accountable to Parliament rather than to the government of the day.

³ Harvey, J. Dolgopol, U. and Castell-McGregor, S. [Eds] (1993) *Implementing the U.N. Convention on the Rights of the Child in Australia*, South Australian Children's Interests Bureau, Adelaide.

⁴ The lack of such a reference has been a particular criticism of how Commissions have been established in New South Wales and Queensland: see for example Castell-McGregor, S (1998) 'NSW on the way to being the second State to establish a Children's Commissioner' Vol 6 No 2 *Rights Now*, 14; Queensland, Department of Families Youth and Community Care (1999) *Review of the Queensland Children's Commissioner and Children's Services Tribunals Act 1996: Report and Recommendations* at 15, Rayner, M. 'Children's Rights Commissioners – Systemic advocacy for children in Australia, New Zealand and the UK', Association of Lawyers for Children Conference, University of Warwick, 20-22 September 2000

⁵ The Parliament of Australia's Joint Standing Committee on Treaties report on the Convention in August 1998 commented that an "*area of concern was the lack of consultations with the community prior to ratification although adequate consultations appeared to have occurred with State and Territory governments*" (emphasis added), Executive Summary at 2, available at:

<http://www.aph.gov.au/house/committee/jsct/reports/report17/rept17contents.htm>

⁶ The Convention was adopted by the United Nations General Assembly on 20 November 1989 and came into force from 2 September 1990. It was ratified signed on behalf of Australia on 22 August 1990 by the Commonwealth Executive on, ratified on 17 December 1990 and entered into force for Australia on 16 January 1991. On 22 December 1992, the Attorney-General declared the Convention to be an instrument relating to human rights and freedoms made pursuant to s47(1) of the Human Rights and Equal Opportunities Act 1986 (Cth): Commonwealth of Australia *Gazette* GN 1, 13 January 1993, p. 85.

- In the words of the Association of Children's Welfare Agencies,⁷ the Commission must have "a recognised place and responsibility in the government bureaucracy".
- The Commission has to be adequately resourced, not just financially but also in terms of its access to information, including the statistical data so important for proactive work and also information from people of all ages "on the ground".
- The Commission must be focussed upon and accessible to its young constituents.
- The breadth of the Commission's remit must take into account all levels of government, non-government and commercial organisations which impact upon children and young people. A properly designed Commission must not have a sole focus on child protection. It is concerned with advancing and promoting respect for the rights, interests and well-being of **all** children and young people in the State. By doing so, a Commission invariably is a force for the prevention of abuse and neglect.
- Its senior officer and public face would need to be a Commissioner with a high profile, as she or he would be called upon to undertake a number of proactive and highly visible leadership tasks.
- Further, the Commissioner should have the same independence of the Executive as does a judge. I consider that this independence is essential because it does not always suit government policy to be child focused. With the best will in the world, the responsible Minister may not be in a position to direct public attention to a particular problem because of the principle of cabinet solidarity. Similar considerations apply in respect of a Commissioner who holds a Public Service type appointment.

There is a strong local demand for such a Victorian Commission. It was demonstrated at a large forum last year held at Melbourne Town Hall with the assistance of a grant from the Victoria Law Foundation.⁸ Participants from a wide range of disciplines and perspectives called for more strategies to advance the rights, interests and well-being of young Victorians. One key recommendation was the establishment of a truly independent and dedicated Commission for Children and Young People that enjoys authority and fearlessness akin to the office of the Auditor-General.

The momentum for a State body was advanced in June 2001 by the Youth Affairs Council of Victoria when it released a discussion paper titled *Are You Listening To Us? – The Case For A Victorian Children and Young People's Commission*.⁹ I had the privilege of speaking at the launch and I commend the paper to you. My comments today draw heavily on its contents. In essence:

“The vision is of a unique resource and an expert independent ‘champion’ for children and young people that is strongly informed by the participation of children and young people. The focus of the Commission would be upon assisting and influencing all Victorians to better understand, respect and give effect to children and young people’s rights, interests and well being. In addition to enhancing the effectiveness of existing remedies for children and young people, it would be a proactive force in identifying constructive and systemic ways to advance the status of young Victorians.”¹⁰

⁷ *Towards a Children’s Commissioner*, Issues Paper No. 7.

⁸ The Project was titled: The United Nations Convention on the Rights of the Child - what does it mean in Victoria? Children and Youth Issues Working Group: Federation of Community Legal Centres

⁹ Available at: <http://www.yacvic.org.au/pages/policy/cypc/contents.htm>

¹⁰ (2001) *Are You Listening To Us? – The Case For A Victorian Children and Young People's Commission* at 9, available at: <http://www.yacvic.org.au/pages/policy/cypc/contents.htm>

THE CONCRETE PROPOSAL FOR VICTORIA

Are You Listening to Us? unfolds the compelling argument for a Victorian Commission paying detailed attention to models that have been established elsewhere and to the existing landscape of service, accountability and advocacy agencies in our State. It carefully assesses what the limitations are seen to be and explains why the proposal meets these concerns. For the first time to my knowledge, the discussion paper provides a concrete proposal that aims to be tailor-made for Victoria.

The Youth Affairs Council continues to invite comment on its proposal and I was pleased to hear that representatives of the Law Institute have held discussions with the Council about the suggested model. As always, the views of the Institute will be an influential determinant of whether and how the proposal progresses. I am not aware that the establishment of a Commission is currently part of the policy platform of either the State Government or State Opposition. I hope this will change.

Calling for the establishment of a Commission is not about attacking Government but about the Government itself sending a very clear signal that it cares about children and young people. The recognition that children and young people require and deserve special advocacy by means of a Commission should, and I believe can, transcend party-politics and enjoy bipartisan support.

In this regard, it is positive that the Youth Affairs Council of Victoria has met with both State Government and Opposition parliamentarians over the proposal and I am particularly pleased that the Minister for Youth Affairs, the Hon. Monica Gould MLC is seeking advice on the proposal.

FUNCTIONS AND RESPONSIBILITIES

I turn now to what I see as the work that the Commission should perform. In doing so, I have had to be selective due to my allotted time today and I have sought to underline and discuss a few of the features that I think would hold the most relevance for a predominantly legal audience such as this. A fuller exposition is to be found in the Youth Affairs Council discussion paper.

❖ The Commission should, on an ongoing basis, review and report on proposed and existing laws, practices and policies which relate to children and young people.

Laws, practices and policies have a history of appearing incrementally rather than in any comprehensive or cohesive manner. They are frequently grafted on to their predecessors without any understanding of their overall effects. The ongoing responsibility for assessment would respond to the equivalent concern expressed by the Joint Standing Committee on Treaties in respect of all Australian jurisdictions,¹¹ and would place the Commission in a well-informed position to recommend changes and initiatives, including those which would enhance consistency with other legal systems in Australia where this would be beneficial. In

¹¹ Recommendation 21 states: “*The Joint Standing Committee on Treaties recommends that the Government request the Standing Committee of Attorneys-General to review existing legislation, policies and practices at Federal, State and Territory levels for compliance with the Convention on the Rights of the Child*”, Executive Summary at 23, available at <http://www.apf.gov.au/house/committee/jsct/reports/report17/rept17contents.htm>

this regard, it is pertinent that the expert monitoring committee on the Convention had this to say in its 1997 Concluding Observations on New Zealand's initial report on compliance:

"4. The Committee notes with interest the recently established procedure of the State party to have an evaluation of the impact on children of all legislation affecting children that is submitted to the Cabinet. It welcomes such a child impact analysis as part of the legislative process." (emphasis added).¹²

My own experience suggests that when amendments are made or proposed to Commonwealth legislation such as the Family Law Act 1975 or child support legislation, the focus is all too often on the rights and concerns of adults rather than children. This is not surprising because of the nature of the articulate pressure groups that abound in this area. The same is true for matters that are State responsibility such as, for example, police powers, the regulation of public spaces, and planning issues.¹³

❖ **The Commission should promote public education programs about the Convention.**

It is self-evident that the exercise and enjoyment of rights depends upon knowing you have them and having a community that takes rights seriously. The relevant Convention obligation is Article 42 by which governments are to *"make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike."*

The paucity of knowledge in Australia was one of the matters identified as a "principal subject of concern" to the Committee on the Rights of the Child in its 1997 Concluding Observations on Australia's first report on implementation of the Convention.¹⁴ The Committee remarked:

"10. The Committee notes that the Convention and its principles are not generally known to the public, although the notion of rights is. The Committee regrets that there seems to be a lack of adequate understanding in some quarters of the [Australian] community of the principles of the Convention, as well as its holistic and interrelated approach, and the importance that the Convention places on the role of the family."

The Joint Standing Committee's 1998 report displayed the same concerns and in particular, appreciated the scope for lack of understanding of the Convention to give rise to scaremongering about children's rights. Both Committees emphasised the need for systematic community education and awareness raising and I do not think anyone would seriously suggest that Victoria is somehow exempt. Importantly, in the absence of a comprehensive program, the media tends to take a negative lead. For example, while Victoria has been spared the madness of the push for mandatory sentencing, we did see the serious suggestion that the age of criminal responsibility should be lowered.

¹² Available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/dee3759cb02513328025644b005b6320?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/dee3759cb02513328025644b005b6320?Opendocument)

¹³ Australian Law Reform Commission & Human Rights and Equal Opportunity Commission (1997) *Seen and Heard: priority for children in the legal process*, Report No 84, ALRC, Sydney.

¹⁴ Available at:

<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/3d744477ea59fdaf8025653200508bb8?Opendocument>

❖ **The Commission should conduct inquiries in response to a reference or at its own instigation and have the capacity to exercise powers related to the production of evidence and the protection of witnesses.**

Too often when this function is identified, the immediate reaction is to assume that it will be in the domain of child protection. While those systemic issues should certainly not be excluded from the subject matter of inquiries, it is not the *raison detre* of the proposed model. As I have mentioned, the proposed Commission is designed to have a broader holistic purview, one that aims to enhance the enjoyment of all Convention rights. There will always be significant issues concerning children and young people that relate to critical matters such as health, education, safety and culture which an expert body like the Commission will be most suited to investigate in the public interest.

Again, I would highlight that the proposed model does not, however, envisage that inquiries should merely be a reaction to high profile cases where systems have been found wanting. While such a scenario may prompt a referral to the Commission where no existing scrutiny mechanism would be appropriate, the inquiry function offers a mechanism for identifying how Victoria can proactively better our respect for children's rights and best interests.

It is all too easy to focus on building new roads and at the same time forget that children and young people don't drive and can be left isolated from their friends because the local bus service doesn't run on a Sunday. It is also easy to make clucking noises about how children and young people have eating disorders or alcohol and drug problems as we look at a television screen on which advertisers are pushing alcohol, drugs, fatty foods and high speed cars.

Examples such as these illustrate why the Commission's remit must encompass the private sector where the rights and interests of children and young people may be subjugated to commercial considerations.

Vital to improvement is real systemic input by the children and young people whose rights and interests are to be advanced. To this end, the Commission has a fourth critical function that I would hope a legal gathering such as this will also see as essential.

❖ **The Commission should promote models of children and young people's participation in decision making, not only about their individual circumstances but also about laws, policies and practices that affect them.**

A number of important considerations guide this essential function which the proposed Commission should have a leading role in advancing both as a community resource and as a leading example.

An overarching one is Article 12 of the Convention, the participation principle, which requires due weight to be given to the views of children and young people. That expectation has applied not just in Victoria but indeed throughout Australia since our nation's ratification of the Convention. In this State particularly, the promotion of children and young people's participation accords with the Government's stated commitment to placing young Victorians at the centre of government policy, and its identification of the need for:

*"innovative policy development and coordination mechanisms to provide forward-looking policy responses that cut across economic, social and environmental barriers."*¹⁵

I would be surprised if any of us considered that Article 12 can be said to be given proper effect for the individual circumstances of children and young people, let alone in then having a voice in the structures which determine the reality of lived lives.

Notwithstanding our efforts, Moira Rayner's comment on this subject needs to be remembered:

*"[Children] are a large uninfluential section of the community. They do not have access to the means of exerting power, or protecting their own vulnerability. They are restricted in the extent they can make decisions about their own lives. They do not play any part in the processes which determine the policies which affect them. They, unlike other subjects of discrimination, are peculiarly unable to organise themselves politically. But there is something more at work. Even the concerns of those adults who advocate for children have a low political priority."*¹⁶

Her assessment, with which I agree, falls squarely as an area calling for a response from the Victorian Government and in my view, the proposed Commission is ideally suited to leadership in "walking the talk" of effective participation as well as advocating for best practice.

COMPLAINTS

The role of the proposed Commission in respect of complaints is the final matter of function I would like to address today. The model proposed by the Youth Affairs Council of Victoria does not envisage the Commission handling individual complaints as a matter of course. It would not aim to duplicate existing complaints systems but to make them more user friendly for children and young people. The Norwegian Ombudsman considers the broader implications of an individual complaint across Norwegian society. This works well because it ensures that he isn't swamped by individual complaints and that issues aren't considered on a piecemeal basis.

The discussion paper reflects this design approach in the following way:

"As a starting point for discussion as to what the narrow criteria for the Commission accepting a complaint might be, [the Council] proposes the following:

- *the complaint raises issues of public interest or systemic significance; or*
- *the rights, interests or well-being of a particular child or young person, or groups of children or young people will be seriously affected if no action is taken and no other avenue of complaint, redress or source of assistance is reasonably or practically available."*¹⁷

¹⁵ "Youth at the Centre: Governing with Young Victorians", *Ministerial Statement* April 2000 by the Hon. Justin Madden, the previous Minister for Youth Affairs

¹⁶ "The Right to be Heard" in Alston, P. and Brennan, G. (1991) *The UN Children's Convention and Australia*, Centre for International and Public Law The Australian National University, Canberra

¹⁷ (2001) *Are You Listening To Us? – The Case For A Victorian Children and Young People's Commission* at 19, available at: <http://www.yacvic.org.au/pages/policy/cypc/contents.htm>

These criteria are also the suggested basis for the Commission exercising a capacity to apply for standing to intervene or act as *amicus curiae* in proceedings.¹⁸

Feedback to the Youth Affairs Council on the discussion paper has also stressed the importance of the Commission in identifying gaps in existing complaint systems and advocating for these to be corrected.

Based on a review of the literature, the Council identifies two principal reasons for its adopted position as to complaints. First, it is feared that an individual complaints-handling function would consume the resources and dominate the work of the Commission, thus preventing work on more public interest and advocacy issues. The second main concern is that:

“In other areas, the individual complaint-based focus has been criticised as being unable to address more systematic and institutionalised forms of discrimination, and as having a limited capacity to educate the wider community about human rights and discrimination.”¹⁹

Those two reasons are advanced in the context of the numerous complaint handling mechanisms which, with inherent limitations, already exist in Victoria, avenues such as: internal review by departments with final resort to the Victorian Civil and Administrative Tribunal, the systems of professional bodies, the Ombudsman’s Office, the Health Services Commission, and the Equal Opportunity Commission of Victoria.

Instead of duplication, the proposed Commission would complement the mechanisms that are in place through the following main functions:

- by providing assistance and referral to the correct complaint handling body using the Commission’s specialist expertise in children and young people’s matters.
- by providing support to people with a grievance as they negotiate existing complaint systems.
- by evaluating the extent to which existing mechanisms are accessible and meaningful for children and young people and guiding their improvement.
- by collating and analysing the nature of complaints by or concerning children across the existing systems in order to identify trends and issues that require a systematic response.

CONCLUSION

I would like to finish by briefly addressing three specific objections to the establishment of Commissions for Children and Young People that I have heard over the years.

The first is that the same outcomes for children and young people can be achieved by way of non-government organisations, an office within government, a designated Minister, or a committee comprising Ministers or public servants. This view fails to appreciate the critical importance of the independence of the Commission and I do not think I need to labour the point with this audience.

¹⁸ (2001) *Are You Listening To Us? – The Case For A Victorian Children and Young People’s Commission* at 18, available at: <http://www.yacvic.org.au/pages/policy/cypc/contents.htm>

¹⁹ (2001) *Are You Listening To Us? – The Case For A Victorian Children and Young People’s Commission* at 18, available at: <http://www.yacvic.org.au/pages/policy/cypc/contents.htm>

The second argument asks why the youngest segment of community should have a dedicated Commission and not, for example, our senior citizens. The answer to this is plain - the establishment of a Commission for Children and Young People does not preclude equivalent bodies for other segments. More importantly perhaps, remembering my quote from Moira Rayner, children and young people are uniquely disenfranchised in our democratic community and lack both power and a high political profile.

The third objection is premised on the notion that a Commission would undermine the role of parents and the family. The discussion paper *Are You Listening To Us?* soundly rebuts this argument saying:

“...a Commission that espouses the principles of CROC places a high value on the importance of the family. The Convention on the Rights of the Child calls on governments to ‘respect the responsibilities, rights and duties of parents’ (article 5) and to recognise that ‘parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child’ (article 18.1). In this way:

taking individual rights seriously inevitably implies support for family and community life... (children’s) survival and their present and future participation in the community are largely dependent on the strength of the family environment.

In Norway the Children’s Ombudsman has found that rather than undermining parents, the Office has developed a strong partnership with them and often complaints come from parents on behalf of their children.

This is reflected in Australian statistics about complaints received by State Ombudsman concerning issues affecting children and young people. For example, the Victorian Ombudsman noted that in relation to complaints about issues such as statutory care, protection and education ‘most if not all were from parents or groups representing parents’. Similarly, in Queensland, the Ombudsman found that ‘typical’ complaints relating to children and young people were from parents or foster carers on behalf of children. Similar patterns have been found in all Australian states. This clearly demonstrates that statutory bodies do not take over the role of parents but rather work with families.”²⁰ (footnotes omitted)

Similarly, Ian Hassell, a former New Zealand Commissioner, pertinently observed that:

“The first and usually most fierce and persistent advocates for children are their parents and families, and they can be relied upon to act on their children’s behalf and to fight for them.”²¹

I hope that you too will take up the cudgels for children’s rights and best interests by supporting the development of a Commission for Children and Young People in Victoria.

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²⁰ (2001) *Are You Listening To Us? – The Case For A Victorian Children and Young People’s Commission* at 19, available at: <http://www.yacvic.org.au/pages/policy/cypc/contents.htm>

²¹ “A Children’s Commissioner” in Alston, P. and Brennan, G. (1991) *The UN Children’s Convention and Australia*, Centre for International and Public Law The Australian National University, Canberra