# YOUTH AFFAIRS

## A Children's Commissioner for Queensland
### The cutting edge proves blunt

On 13 November 1996 the Queensland Government passed the *Children's Commissioner and Children's Services Appeals Tribunal Bill.* The objectives, as described in the Explanatory Notes, are to 'establish and provide for the operation of a Children's Commission, consisting of the Children's Commissioner and the staff of the Commission, and to consolidate mechanisms for appeal of administrative decisions made under children's services legislation'.

Many people around Australia have been looking to Queensland with interest with regard to this Bill. First, because this would be the first office of its kind in the country. Second, because the general proposal seemed to sit incongruously with other recent pieces of Queensland legislation. The *Juvenile Justice Legislation Amendment Act 1996* significantly increased sentencing penalties and allowed such things as the fingerprinting of young people under 17 *after* the conclusion of their recent court case. The *Education (General Provisions) Amendment Bill 1996*, passed on 28 November 1996, gives principals unfettered powers in relation to exclusion and suspension from schools and reduces even further the appeal processes open to students.

In his second reading speech, the Minister for Families, Youth and Community Care admitted that children remain powerless in the political process and that acknowledgment of children being individual human beings with basic needs and rights shared by all humankind has been slow in coming. He quoted Robert Ludbrook, former Director of the National Children's & Youth Law Centre (NC&YLC):

> Australia's enthusiasm for children's rights in the abstract is not matched by any noticeable change in policies and priorities whether at commonwealth, state or territory level. Life for Australian children goes on very much as usual. They remain at the bottom of the social heap.

The Minister went on to state that:

> Queensland is at the cutting edge in advancing children's issues to the forefront of public consciousness through the setting up of the Children's Commission. With this legislation we have recognised the need for a children's voice, or a children's advocate, that will be beneficial to children in this State.

It was hoped that, at long last, there would be a significant move to progress the United Nations Convention on the Rights of the Child in Australia and children's rights in general. Sadly, the reality has not matched the rhetoric: advances in children's rights have proved somewhat 'blunt' and narrow.

## The legislation

It is important to be aware that the legislation is the result of a resolution of the Queensland Parliament of 1 May 1996, which called on the Government to establish immediately an independent authority to fully investigate accusations of paedophilia in Queensland. This gives some reason for the actual thrust of the Bill, which, in fact, only responds in a limited way to the needs of Queensland children. It focuses on children in, or with potential to be involved in the child protection systems. Children who are subject to the juvenile justice or education systems, for example, have no recourse under this legislation.

The Bill covers three main areas:

- Children's Commission and Children's Commissioner,
- Official Visitors to residential facilities,
- Children's Services Appeals Tribunal.

### *Children's Commission*

The Commission is to consist of a Commissioner and staff (cl.5). The Commissioner controls the commission (cl.6) and is to be independent (cl.7). His/her functions may be summarised as follows:

- monitoring and reviewing the provision of children's services and relevant complaints procedures; receiving complaints about the delivery of children's services; receiving complaints about alleged offences involving children and monitoring procedures for handling such cases;
- promoting the principle that parents or legal guardians have the primary responsibility for the upbringing of children;
- advising the Minister about standards for child care and foster homes and inquiring into any other children's service matters as the Minister requests;
- 'co-operating' with bodies such as the Queensland Police Service and the Australian Bureau of Criminal Intelligence with respect to specific cases of child sexual abuse, child pornography and child sex tourism and general endeavours to eradicate such problems;
- establishing a program of official visitors to residential facilities and tribunals to hear appeals of reviewable decisions; and
- conducting research and inquiring into matters relevant to the above functions.

A person will be able to make a complaint to the Commissioner about an alleged offence *involving a child* or the delivery of *children's services* (cl.19). *Children's services* is defined in the Dictionary in Schedule 1 as 'a service provided under or in relation to children's services legislation'. *Children's services legislation* is defined as:

(a) the *Adoption of Children Act 1964*
(b) the *Child Care Act 1991*
(c) the *Children's Services Act 1965* (essentially care and protection and care and control matters).
(d) the *Family Services Act 1987*

The Dictionary also states that an *'offence involving a child* does not include an offence involving the child if the child is the alleged offender'.

### *Official visitors*

The Commissioner can appoint any public servant who is considered to have 'the necessary expertise, experience or training' to be an official visitor (cl.29). S/he must ensure that official visitors are adequately trained to carry out their functions (cl.34). These functions are (cl.35):

(a) inspecting residential facilities to find out whether the facilities provide an appropriate standard of care for the residents; and
(b) suggesting to the Commissioner ways of improving the effectiveness and quality of care provided in residential facilities.

An official visitor has the power to enter and inspect a residential facility and any documents relating to its op-

eration, to speak to a resident or staff member privately and to provide reports and advice to the Commissioner (cl.36).

***Children's Services Appeals Tribunal***

The Minister for Families, Youth and Community Care may appoint people to be on a panel of members for the Tribunal. The Commissioner establishes a tribunal to hear an appeal of a reviewable decision. A tribunal has three members, one of whom may be the Commissioner.

A reviewable decision is a decision or assessment mentioned in s.15D(1) *Adoption of Children Act 1964* or s.41(1) *Child Care Act 1991* or a reviewable decision under the *Children's Services Act 1965* (Schedule 1, Dictionary). What constitutes a decision in the last category is contained in a new schedule to be inserted into the *Children's Services Act 1965*. The existing separate appeal mechanisms under the adoption and child care Acts will be abolished. Appeals from the tribunal on a question of law may be made to the District Court.

It can be seen that the focus of the Commissioner's work is issues of abuse and some problems which children experience as a result of being placed in the care of the State — probably as a result of abuse. There has been a total avoidance of the concept of children's rights as such. There has not been a recognition of the very broad range of issues and areas in which children are disadvantaged and disempowered. It also implies a policy and political agenda in relation to children which is judgemental and draws a distinction between the 'deserving' and the 'undeserving'. This explains the punitive thrust of the *Juvenile Justice Legislation Amendment Act 1996* and the *Education (General Provisions) Amendment Bill 1996* and the protection focus of the Children's Commissioner legislation. Such thinking fails to recognise the overlap between those who offend, experience problems in the school system, and those in need of care and protection.

## Can this legislation be effective within its limited scope?

There is reason to be concerned that the person employed as the Children's Commissioner may not be particularly suitable. The Bill sets out the required qualification to be (cl.10(2)(a)):

> knowledge of, and experience in, child protection, community services, child welfare, education, law, medicine, psychology or social work.

It would seem more appropriate to stipulate that qualifications in law, medicine, social sciences and so on should also relate to children. Further, the criteria should be much more child oriented, including a demonstrated commitment to young people and an ability to communicate and work with them effectively.

It is also of concern that while cl.7 maintains that the Commissioner is independent, cl.6(2) allows for the commission to be 'attached' to 'a department for ensuring the commission is given administrative support services for carrying out the Commissioner's functions effectively and efficiently'.

The ability of the Commissioner to do anything really effective is also doubtful. If a complaint is made about an offence involving a child, it *must* be referred immediately to the Police Commissioner and possibly other 'entities', presumably such as the Department of Families, Youth and Community Care. If the complaint is about service delivery, then the Children's Commissioner assesses the complaint to see if it warrants investigation by the police or 'another entity' (cl.20(1)).

Having referred the matter to the police or other entity, the Children's Commissioner must assess the complaint if it is then referred back to him or her by the Police Commissioner or other entity to assess whether the complaint warrants further investigation (cl.20(2)).

One cannot help but wonder if another inaccessible bureaucracy is being set up. Clause 20 simply encourages matters to be passed around in circles. In addition, it has always been possible for people in Queensland to report abuse matters to the police or the Department for prosecution, care applications and so on. There is little reason to believe that a Commissioner is needed to bring these matters to light, especially if there is no real power to advance them in any way through the office. It is simply another avenue for mandatory reporting. In this way, the Commissioner may do more harm than good to a young person. It is assumed that the only answers are prosecution and care applications and that this is always appropriate. In the rush to bring paedophiles to justice, the rights of the victims are simply trampled upon. Many young people who experience abuse do not want this full-scale intervention with the associated issues of family disruption and possibly their removal from the family. It has been the experience of NY&CLC that many young people express the wish that they just want the abuse to stop. It should be remembered that most child abuse is, in fact, perpetrated *within the family circle*. The result is that the young person may become a victim thrice over: once through the abuse, twice because of the nature of the court process and thrice by being blamed by other family members for distress, the splitting up of the family, and so on.

If the Commissioner assesses a complaint about service delivery as requiring investigation, then she/he will undertake that investigation and send a report to the Minister. If the service provider fails to take action, the Commissioner can recommend to the Minister that a report be tabled in Parliament.

Since 'the Minister' is the Minister for Families, Youth and Community Care, there could well be cases where the Minister would not be eager to follow this recommendation. For example, it could relate to dereliction of duty on the part of the Minister's own staff and indicate that he is unable to keep his Department in order.

In any event, the Commissioner's independence is again undermined because the ultimate sanction, tabling of a report in Parliament, relies on the Minister.

The Bill provides for official visitors to be appointed from the ranks of general employees under the *Public Service Act 1996*. Again there is no requirement that there be a commitment to children and their rights. It is questionable what effect their role will have. Having provided a report, they have no ability or obligation to ensure any suggestions are actually acted upon.

An 'official visitor' may 'confer alone with a resident'. There is no right of a resident articulated in the Bill to have access to an official visitor, or for residents to be notified of the presence of an official visitor so that they may raise issues with the visitor.

Those eligible to be members of the panel for the Appeals Tribunal need the same qualifications as the Commissioner — the same questions arise as to suitability.

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interests which could attach to a parcel of land, leaving no room for any native title.

Brennan CJ rejected the appellants' argument that the Crown's power of alienation under the *Land Act* was conditioned by a fiduciary duty owed by the Crown to the indigenous inhabitants. Neither the Crown's power to extinguish native title, nor the position occupied for many years by the indigenous inhabitants *vis-a-vis* the Government was sufficient to base a 'free-standing fiduciary duty'.

## Subsidiary questions

There was a subsidiary question in the case about the ability of the Wik and Thayorre Peoples to maintain an action for damages in respect of the State Government's entry into Agreements for the granting of Special Bauxite Mining Leases for breach of procedural fairness or breach of fiduciary duty where the Agreements had later been given the force of law by legislation (the Comalco and Aurukun Acts). Kirby J explained the reasons of the majority rejecting the applicant's claims. In the Court's view, the legislation clearly authorised both the execution of the Agreements and the granting of the mining leases and to maintain such an action would be to undermine the clear intention of the legislature to prevent any impugning of the Agreements.

## Where to now?

The reaction to the judgment from all sides of the native title debate has been immediate. Despite the postscript of the majority to the effect that their decision was 'in no way destructive of the title' of the pastoralists, there has been concern expressed about the remaining uncertainty relating to grants under other legislation and the ongoing need to determine the extinguishment/co-existence question on a case-by-case basis. Predictably responses from the industry sector and State Governments have varied with some calling for the extinguishment of all native title over pastoral leases, others wanting legislative confirmation of the validity of all pastoral leases (especially those issued post 1994), and many questioning the best way to advance negotiations to manage the dual interests. The Commonwealth Government, whose legislation was in part based on an 'extinguishment view' of pastoral leases has yet to formulate its position, though the issue seems certain to generate much ongoing debate.

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### References

1. The Wik Peoples subsequently lodged an application under the NTA and the common law action was put 'on hold'. However, the preliminary questions of law were set down under the common law action.
2. The argument of those supporting extinguishment was based on Brennan J's reasoning in *Mabo (No. 2)* (1992) 175 CLR 1 at 68 that once the Crown granted the leasehold interest, it gained the 'reversionary' interest (the future right of possession upon the expiry of the lease), and that upon the expiry of the lease, the Crown had the total legal and beneficial interest in the land, the plenum dominium. Toohey J concluded that 'reversionary' interests only arose where the holder of an estate in fee simple (ie a holder of an interest from the Crown) issues a lesser interest, not where the Crown itself is granting an interest.
3. The term 'radical title' was used by the court in *Mabo (No. 2)* to describe the Sovereign Crown's interest before it gained the full beneficial interest in the land through an appropriate exercise of sovereign power. See Rogers, 'The Emerging Concept of "Radical Title in Australia"', (1995) 12 *Environmental and Planning Law Journal* 183 at 185-6.

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The process before the tribunal remains an adult forum which is unlikely to be user-friendly to children. In addition, cl.45 requires a fee to be lodged with an appeal, the fee to be fixed under regulation. It is unclear whether this can be waived if a child is an applicant.

The main area where children can bring an appeal is the new provisions in relation to *The Children's Services Act*. This is to be welcomed in that children in care are a particularly vulnerable group. However, in view of the comments just made and the fact that a child may well not be supported by their Family Services Officer or parents/foster parents in making an appeal, it is unclear how accessible the system will be to these children. This indeed, is the fundamental flaw. There remains no-one who is 'there' for children. Only someone who judges them and their complaint. There is no-one to assist them to bring a complaint and advocate for them and support them during it.

## Conclusion

The whole point has been missed — a Children's Commissioner should be a true *advocate* for children, that is, someone who listens to them and speaks up for and with them wherever children themselves identify issues of concern to them. Nowhere does this legislation ever mention 'the best interests of the child' or articulate any of the 'rights' as opposed to 'protection' based Articles of the Convention on the Rights of the Child. Nowhere is the 'Gillick' principle as stated by the House of Lords in 1985 and accepted into Australian law in *Marion's* case in 1992 considered. (See (1992) 106 ALR 385.)

Thus, while the politicians congratulate themselves on dealing with the issue of paedophilia, they have failed to see that children are human beings and citizens *who should be heard on all matters affecting them*, not simply on issues where adults feel 'safe' in allowing them to be heard. The 'cutting edge' needs much sharpening before Queensland can really be said to have done anything significant for its children.

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[**Co-editor's note:** Since this item was written a Children's Commissioner, Normal Alford, has been appointed. He has already attracted some attention. According to the *Courier Mail* of 18 January 1997, the new Commissioner has been accused of being 'authoritarian' and 'out of touch' with children's issues. Apparently the new Commissioner expressed approval for laws in Singapore in relation to graffiti and similar social order laws, where a tough approach was adopted to offenders, extending even to public canings.

According to the *Courier Mail*, the Commissioner did not advocate similar laws in Australia but representatives of youth groups expressed concern about how 'in touch' the new Commissioner was with youth culture. The new Commissioner said his office had been 'inundated' with complaints against the Department of Family, Youth and Community Care in its opening weeks. Norman has made an interesting start. [PW]]