



**Submission to the
Senate Community Affairs Committee Inquiry into the
Commonwealth Commissioner for Children and Young People Bill 2010**

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1. INTRODUCTION

Novita Children's Services commends the introduction of the Commonwealth Commissioner for Children and Young People Bill 2010 ('the Bill') and appreciates the opportunity to comment on its provisions.

Novita Children's Services is a South Australian non-government, non-profit organisation established in 1939 as The Crippled Children's Association of South Australia to care for children diagnosed with polio. Today, Novita provides state-wide services for children and young people living with disabilities and their families.

Novita's range of services include therapy, equipment, rehabilitation and family support services to more than 1,300 children and young people with disabilities and acquired brain injuries; in addition, Novita provides a variety of services to approximately 400 children with special needs and social disadvantage, and to their families across South Australia. Novita's specialist services are delivered by multi-disciplinary teams that include occupational therapists, speech pathologists, psychologists, physiotherapists, social workers, educators and support workers. Through its work with families and communities, Novita has a direct impact on more than 12,000 South Australians, helping to give our next generation the best start to life.

2. SUMMARY

Novita considers that the establishment of an independent office of a Commonwealth Commissioner for Children and Young People is a necessary and urgent measure to ensure that the Australian Government enacts its obligations to:

- Australian children and young people pursuant to the United Nation's Conventions on the Rights of the Child (UNCRC);
- Australian children and young people living with disabilities pursuant to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

In several Articles within the two Conventions, there are overlapping responsibilities that the Australian Government must meet in relation to children and young persons with disabilities.

In view of the vast range of complex, challenging and critical issues across life domains faced by children and young people with disabilities, of whom there are over 300,000 living in Australia, Novita strongly submits that the Bill should include specific reference to those persons, in a manner which is consistent with Australia's commitment to children and young people with disabilities under UNCRC and UNCRPD.

Inclusion of children and young people with disabilities should be made in Section 3 and in Section 9 of the Bill, by reference to them and to Article 23 of UNCRC.

3. BACKGROUND

The European Union's Charter of Fundamental Rights is legally binding. Children's rights form part of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights and Fundamental Freedoms. Under Article 24 of the Charter children are recognised as citizens with their own rights. This recognition is important because it demonstrates that children may be independent as autonomous holders of rights and not simply in need of protection. Four major areas have been given priority, as described in a speech by European Union (EU) Commissioner Viviane Reding, Vice-President European Commission responsible for Justice, Fundamental Rights and Citizenship (14 October 2010, at the 5th European Forum on the Rights of the Child). They are:

“child-friendly justice ... effective access to justice as active participation of children in administrative and court proceedings are basic requirements to ensure the protection of children's interests

fighting violence against children... it is our responsibility to prevent and protect children from violence. Too many children are still victims of trafficking, sexual abuse, exploitation and pornography

protecting vulnerable groups of children... including those who are orphans, missing, refugees or displaced; those with disabilities, children in institutional care or detention... the list is very long

fighting child poverty... the number of children living in poverty in the world is staggering. Fighting child poverty and promoting child well-being is a key priority for achieving children's rights...

Children and young people living in Australia are subject to the problems identified by EU Commissioner Reding in Europe. With important initiatives underway in Europe, Novita welcomes national leadership within Australia for the protection and enhancement of children's rights. A national approach will benefit all governments and service providers within Australia in the work that they undertake with children and young people.

The disability sector has been at the forefront over many years in calling for a National Commissioner for Children and Young People. For example, in May 2004, Australia's peak disability body, National Disability Services (then known as ACROD) published a paper in which it recommended that a national Commission be established to enhance the rights and protection for children and young people, including those with disabilities.

The key elements of the National Disability Services (NDS) recommendation in 2004 are still relevant today and they align with the notions contained within the Bill. The NDS position included propositions that a Commission should be an independent statutory body with capacity to report direct to the national Parliament and should be provided with adequate resourcing, together with clear and comprehensive powers. The principle that would guide the work of such a Commission would include the active promotion of rights, safety and well-being of children and young people with a special focus on vulnerable children and those with disability. It was considered that a Commission was necessary to provide leadership in policy matters and in advocacy, together with the ability to address the rights of children and young people through review of legislation and policies. Of

critical importance would be requirements ensuring that UNCRC is reflected in domestic legislation.

It is pleasing to note that these themes are contained in the Bill. The proposed functions of the Commissioner include provisions for advocacy, monitoring laws, co-ordination of policies, programs and funding, enhancing participation of children and young people in decision-making, promoting public education, and intervention in certain legal cases. Under Section 11 of the Bill, there is a welcome requirement that the Commissioner must act independently and not be under the control or direction of a Minister.

It is important to note that at the time it released its paper on the need for a Commission on children and young people, NDS represented more than 550 organisational members that provide supports throughout Australia to children and young persons with disabilities and their families. Since that time, the organisational membership has grown to over 650 not-for-profit organisations. NDS is the national industry association for disability services and it is represented on numerous groups and committees that advise the Australian Government and State/Territory Governments on disability issues. Specifically, the Chief Executive of Novita Children's Services is Chairperson of the NDS National Children, Young People and their Families Committee. NDS has a National Secretariat in Canberra. Novita actively participates on NDS committees and initiatives in national disability policy development, advocacy and research.

Novita has developed a strongly held view over some years in support of the establishment of a Commonwealth Commissioner for Children and Young People. For example, in its submission in October 2008 to the Australian Government National Disability Strategy, Novita identified a number of key issues, in particular that a national disability strategy should support the establishment of a Commonwealth Commissioner for Children and Young People so that all Australian children are afforded every opportunity to reach their full potential.

4. CHILDREN AND YOUNG PEOPLE LIVING WITH DISABILITY

Australia's National Disability Strategy Consultation Report was prepared by the National People with Disabilities and Carer Council as key and comprehensive research for the Australian Government's development of the National Disability Strategy 2010-2020. In her preface to that report, "SHUT OUT: The Experience of People with Disabilities and their Families in Australia," Dr Rhonda Galbally AO stated:

"For many years people with disabilities found themselves shut in - hidden away in large institutions. Now many people with disabilities find themselves shut out - shut out of buildings, homes, schools, businesses, sports and community groups. They find themselves shut out of our way of life. As this report sadly illustrates, Australians with disabilities are among our nation's forgotten people."

There is a large number of these 'forgotten people'. According to the Australian Institute of Health and Welfare (AIHW) in 2003, the Australian Bureau of Statistics 2003 Survey of Disability, Ageing and Carers¹ reported:

- About 1 in 12 children had a disability (8.3% of all children, 317,900 children);
- About half of these children, 1 in 24, had a severe or profound core activity limitation (4.3%, 165,300);
- Boys were more likely than girls to have a disability (10% compared with 6.5%) and to have a severe or profound core activity limitation (5.4% compared with 3.1%);
- Autism and intellectual impairment were associated with high proportions of severe or profound core activity limitation – 87% and 75% of children with these respective conditions also had a severe or profound core activity limitation;
- An estimated 54,600 people were primary carers of co-resident children with a severe or profound core activity limitation; and the vast majority (91%) were mothers;
- About 1 in 2 (48%) co-resident primary carers of children reported needing more support – in fact more respite care and financial assistance were their greatest needs;
- Almost all (97%) children aged 5-14 year with a disability were attending school – 89% of them in 'mainstream' schools and 9% in 'special' schools;
- Around 63% of school children with disabilities experienced difficulty at school – intellectual / learning difficulties, 'fitting in' socially and communication difficulties were the most common.

In relation to child protection, AIHW has released a new report: Child Protection Australia 2009 - 2010². This report contains comprehensive information on state and territory child protection and support services, and the characteristics of Australian children within the child protection system. Across Australia in 2009 - 2010:

- over 187,000 children were the subject of a child protection notification;
- just over 31,000 children were the subject of a substantiation;
- around 37,000 children were on care and protection orders.

Since 2005, the number of children on care and protection orders increased by 57%

- almost 36,000 children were living in out-of-home care;
- there were almost 8,050 foster carer households;
- and the rate of Aboriginal and Torres Strait Islander children in out-of-home care was almost 10 times the rate of non-Indigenous children.

Studies in Australia and overseas have identified that children and adults with disabilities are at significantly higher risk of abuse and neglect than other children and adults. In particular, a review of British and American research literature examining child protection issues and disability (1999) indicates a higher prevalence and incidence of child abuse among children with disabilities. The overview of research from 1960 to 1999 showed

¹ Australian Government - Australian Institute of Health and Welfare (AIHW) 2006 - Disability Updates: children with disabilities Bulletin Issue 42

² Australian Government - Australian Institute of Health and Welfare (AIHW) 2011 - Child Protection Australia 2009 - 2010. Child welfare series no. 51. Catalogue no. CWS 39.

there was a consistent and higher vulnerability among children with disabilities to abuse in all its forms.³

Furthermore, children and young people who have a disability are more likely to live in poverty, live in single-parent families, experience difficulties at school, find “fitting in” socially and communication problematic; and as they move toward adulthood are more likely to have fewer educational qualifications, and experience prejudice and abuse.

In June 2010, the South Australian Department for Families and Communities confirmed that the number of people receiving disability services had grown significantly since 2007/2008.⁴ At Novita, the experience of growth in client numbers reflects a similar picture. Since 2005 new client registrations have increased by almost 300 without growth in base government funding. This places services at risks, and impairs the ability to activate citizenship for people with a disability.

Novita is concerned that children and young people living with disabilities have been overlooked in the Bill and wants to ensure that they are not – yet again - shut out.

Consistent with the purpose of inclusion, the Council of Australian Governments (COAG) has endorsed a National Disability Strategy 2010 - 2020. COAG has confirmed that the purpose of the National Disability Strategy is to:

- establish a high level policy framework to give coherence to, and guide government activity across mainstream and disability specific areas of public policy;
- drive improved mainstream services in delivering outcomes for people with disability;
- give visibility to disability issues and ensure they are included in the development and implementation of public policy that impacts on people with disability;
- provide national leadership towards greater inclusion of people with disability⁵.

5. THE BILL - CLAUSE 3 - OBJECT

The object of the proposed legislation is contained in Section 3 of the Bill. Section 3 (3) refers to UNCRC and specifically mentions Articles 2 (non-discrimination); 4 (child’s best interests); 6 (right to survival and development) and 12 (right to participation in decision-making).

Novita submits that a reference to Article 23 of UNCRC should be included in Section 3 (3) of the Bill. Article 23 is important because it highlights children with disability, their special needs, and particular responsibilities of Government to address those needs.

³ Westcott H & Jones D (1999) Annotation: The Abuse of Disabled Children, Child Psychology and Psychiatry Vol. 40 no 4 p504

⁴ South Australian Department for Families and Communities – Ageing and Disability Service improvements – Consultation paper 3 – June 2010

⁵ National Disability Strategy 2010-2020 – COAG – p8

UNCRC Article 23 states:

1. *States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.*
2. *States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.*
3. *Recognising the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.*
4. *States Parties shall promote, in the spirit of international cooperation the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.*

Australian children and young people with disabilities will have a better chance of inclusion within society, if UNCRC Article 23 is mentioned alongside Articles 2, 4, 6 and 12 in Section 3 (3) of the Bill. There is no good cause for omitting specific reference to children and young people with disabilities from this critical section of the Bill. Moreover, by referring to them in Section 3 (3), it would properly promote their circumstances and the principles which should guide the way in which governments, service providers and the community value their presence. Novita considers that those principles include the following norms:

- Children and young people with disability should have the right to feel valued in Australian society and to be free from discrimination; they are entitled to have access to opportunities, along with non-disabled children and young people, that assist them to achieve self-esteem;
- The rights of children and young people with disability accrue to them as individuals and are separate from those of adults;
- Children and young people with disability have the right along with other Australian children and young people to access education, training, and social options that equip them to take their place as adults in the community; their needs are the same as individuals who do not have a disability, but they have additional needs because of their disability;
- Children and young people with disability who live in Australia are entitled to be included in government and community programs set up to benefit all young Australians;

- Children and young people with disability are entitled to participate in governments' social inclusion agendas.

Novita submits that it would be appropriate to include reference to UNCRC Article 23 in the Bill by adding a new sub-paragraph (e) in Section 3 (3) as follows:

Section 3 (3) The Parliament intends the establishment of the Commissioner as a measure to assist Australia in meeting its international obligations under the United Convention on the Rights of the Child, particularly as they relate to the following Articles:

- (a) *non-discrimination in the applicability of children's rights (Article 2);*
- (b) *the primacy of the consideration of the child's best interests (Article 4);*
- (c) *the child's right to survival and development (Article 6 (1));*
- (d) *the child's right to participation in decision-making (Article 12);*
- (e) ***the disabled child's right to participate in the community (Article 23).***

6. THE BILL - DIVISION 2 - FUNCTIONS AND POWERS OF THE COMMISSIONER

Section 9 of the Bill sets out the functions and powers of the Commissioner. Section 9 of the Bill refers to particular categories of children, such as those in immigration detention. Novita submits that Section 9 should include specific reference to children and young people with disabilities. This is critical in the context of requiring domestic legislation to reflect and implement international commitments and obligations made by the Australian Government under UNCRC and UNCRPD.

Section 9 (1) (c) mentions indigenous children and young people, while Section 9 (d) mentions children and young people in immigration detention and children whose parents or guardians are in immigration detention. Section 9 (1) (e) mentions unaccompanied children and young people who arrive in Australia without the requisite authority. Regrettably, no specific reference is made to children and young people living with disabilities.

Section 9 (1) (c) enables the Commissioner to advance the status of "other groups identified as being at risk". Arguably children and young people may from time to time be included within that category, or they may miss out. Section 9 (3) reiterates broadly that the functions and powers of the Commissioner will apply to all children and young people in Australia.

However, it is no longer acceptable for children and young people with disabilities to be marginalised, in law, in policy and in practice. As the national 'Shut Out' report demonstrates, that era must draw to a close and the rollout of a new era, in accordance with the Australian Government's responsibilities under UNCRC and UNCRPD, must commence. There can be no more excuses for trying to keep disability out of mind, out of sight, and shut out.

Section 9 (1) (b) of the Bill specifically mentions the need for the Commissioner to promote the rights of children and young people at a national level so as to "meet Australia's international obligations." Its international and domestic obligations for

children with disabilities should be of high importance to the Australian Government, in view of Article 23 of UNCRC and especially now that Australia is a signatory to UNCRPD. Accordingly, Novita submits that the functions and powers of the Commissioner set out in Section 9 (1) (c) should be expanded to make specific reference to children and young people with disabilities, and could be drafted as follows:

(1) *The functions of the Commissioner are as follows:*

(a).....

(b).....

(c) *“advancing the status of children and young people in Australia, including Indigenous children and young people, **children and young people living with disabilities**, and other groups identified as being at risk by*

(i) reviewing existing laws;

(ii) proposing new policies; and

(iii) conducting research, undertaking inquiries and reporting to Parliament;

Novita commends the approach taken in sub-Section 9 (e) – (j) concerning the proposed powers and functions of the Commissioner to act in relation to public education programs, inclusion of children and young people in decision making, the right to intervene in particular legal cases, and involvement in policy, programming and funding. It is anticipated that these powers and functions can be utilised positively to assist children and young people with disabilities particularly in the context of:

- monitoring implementation of the Australian Government’s responsibilities under UNCRC and UNCRPD;
- monitoring policies which have an impact on the lives of children and young people with disabilities, particularly in education, the justice system and health;
- ensuring that children and young people with disabilities have equal rights and equal access to services in education, the justice system and health, at all levels;
- providing the Commissioner with power of advocacy at systemic level and at individual case level to advance the interests of children and young people living with disability.

It is respectfully suggested that the Commissioner could be given authority for scrutiny of new legislation to ensure consistency with obligations under other laws and instruments.

Novita strongly supports the principle of independence provided for in Clause 11 of the Bill. The Commissioner should be independent of Ministerial control and report direct to the national Parliament. Autonomy and independence are critical to the role. This autonomy is the only way to guarantee that the Commissioner’s role is free from political interferences.

The Commissioner’s role will be enhanced if it is provided with capacity and resources to work across a range of national policy areas including education, health, disability, indigenous matters and justice.

Novita suggests that there should be a mechanism for the meaningful involvement of children and young people to inform and support the work of the Commissioner.

7. RECOMMENDATION

7.1 Novita supports the proposal to enact legislation to establish an Office of the Commonwealth Commissioner for Children and Young People.

7.2 Novita recommends that an amendment be incorporated into **Section 3 (3)** of the Bill as follows:

“3. *Object*

(1)

(2)

(3) *The Parliament intends the establishment of the Commissioner as a measure to assist Australia in meeting its international obligations under the United Convention on the Rights of the Child, particularly as they relate to the following Articles:*

(f) *non-discrimination in the applicability of children’s rights (Article 2);*

(g) *the primacy of the consideration of the child’s best interests (Article 4);*

(h) *the child’s right to survival and development (Article 6 (1));*

(i) *the child’s right to participation in decision-making (Article 12);*

(j) ***the disabled child’s right to participate in the community (Article 23).***”

7.3 Novita recommends that an amendment be incorporated into **Section 9 (1) (c)** of the Bill as follows:

“9. *Functions and powers of Commissioner*

(1) *The functions of the Commissioner are as follows:*

(a)

(b)

(c) *advancing the status of children and young people in Australia, including Indigenous children and young people, **children and young people living with disabilities**, and other groups identified as being at risk by:*

(iv) *reviewing existing laws;*

(v) *proposing new policies; and*

(vi) *conducting research, undertaking inquiries and reporting to Parliament;”*