



## Public Submission

# Commonwealth Commissioner for Children and Young People's Bill (2010)

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## **SUMMARY**

Berry Street supports the introduction of measures at the national level to strengthen children and young people's rights and efforts aimed at increasing their participation in policy and legislation about them. Specifically Berry Street supports the establishment of a National Commissioner for Children and Young People and has advocated for the creation of such a position for a number of years. Hence we welcome the opportunity to comment on the Commonwealth Commissioner for Children and Young People bill (2010) [herein referred to as the bill].

After considering the details of the bill and its model for a Commonwealth Commissioner for Children and Young People we believe the model as proposed should not proceed. As an alternative we propose that a National Commissioner for Children and Young People be established within the Australian Human Rights Commission (AHRC) with powers, functions, duties and resources commensurate with the existing AHRC Commissioner positions.

In summary we believe the current bill should be withdrawn and legislation drafted to establish a National Commissioner for Children and Young People under the Australian Human Rights Commission act (1986).

## **SPECIFIC COMMENTS**

### Goal of establishing a National Commissioner

To properly consider and respond to the bill Berry Street believes it is important to make clear what our goal has been in pursuing the establishment of such a position. Our goal in seeking the establishment of National Commissioner has been to create a robust, well resourced role with significant powers and capacity to impact on public policy as it relates to children and young people. We support the use, application and adherence to human rights frameworks as an appropriate, transparent and consistent approach to pursuing the rights of children and young people across all states and territories.

With this in mind Berry Street cannot support the establishment of the position as currently framed in the Commonwealth Commissioner for Children and Young People bill (2010). The legislation does not on balance provide the appropriate roles, functions and powers to ensure that the proposed Commissioner could act with sufficient impact. On our reading, the role and functions seem quite limited and unlikely to provide the Commissioner with the scope or capacity to systematically pursue the rights, needs and aspirations of children and young people. There is a strong emphasis on consultation and generating public awareness of the rights of children and young people but insufficient attention to securing those rights.

### Role Clarity

Given that the potential role, scope and activities of a Commissioner for Children and Young people are potentially so broad it is important to carefully scope and consider the integrity of the role prescribed in legislation.

As drafted the bill creates some inherent conflicts within the role of the Commonwealth Commissioner. The breadth of proposed functions and powers outlined in Division 2 Section 9 require independence of government, a requirement to represent and act on behalf of the government of the

day, a capacity to act as the parent and legal guardian for children in certain circumstances and a capacity to hear complaints from children. These distinct roles should not be located with the one position. In particular, we are concerned about the proposal that the Commissioner act as legal guardian for unaccompanied children and young people who arrive in Australia, section 9(e), and those they prepare the Australian Government reports on domestic application of the UN Convention on the Rights of the Child, section 25. Berry Street believes that these functions should be removed from the role of the Commissioner.

#### Alignment with Australian Human Rights Commission functions

Berry Street believes the role, functions and powers available to Commissioners of the Australian Human Rights Commission are more extensive, more clearly articulated within legislation, provide a stronger degree of independence and more appropriately set out the relationship between Commissioners, the Minister, the Government and the Parliament.

We support a rights based approach for all Australian children and young people and believe that the position should be located with and within the Australian Human Rights Commission as the sixth designated Commissioner. This would require the withdrawal of the Commonwealth Commissioner for Children and Young People bill (2010) and the drafting of amendments to the Australian Human Rights Commission Act (1986).

Berry Street sees the current Commissioner positions with the Australian Human Rights Commission as a superior model to that being proposed for the Commonwealth Commissioner for Children and Young People.

The success of the AHRC (and HREOC) over a number of decades points to the value of Commissioners being located within a 'team' structure. The existing structures of the AHRC would provide an appropriate collegiate environment for the proposed Commissioner and enable the human rights of children and young people to be alongside existing AHRC priorities. Such an arrangement would ensure that the role was less dependent on the individual appointed as the AHRC and the President of the AHRC would have overall responsibility to ensure the success of the position.

The powers and functions under the Australian Human Rights Commission Act (1986) are consistent with those proposed within the Commonwealth Commissioner for Children and Young People bill (2010).

Section 46(c) of the Australian Human Rights Commission Act (1986) establishes the Aboriginal and Torres Strait Islander Commissioner position as follows:

- 46 (c) (1) The following functions are conferred on the Commission:
- (a) to submit a report to the Minister, as soon as practicable after 30 June in each year, regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, and including recommendations as to the action that should be taken to ensure the enjoyment and exercise of human rights by those persons;
  - (b) to promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders;
  - (c) to undertake research and educational programs, and other programs, for the purpose of promoting respect for the human rights of Aboriginal persons and Torres Strait Islanders and promoting the enjoyment and exercise of human rights by

- Aboriginal persons and Torres Strait Islanders;
- (d) to examine enactments, and proposed enactments, for the purpose of ascertaining whether they recognise and protect the human rights of Aboriginal persons and Torres Strait Islanders, and to report to the Minister the results of any such examination.
- (2) The functions of the Commission under subsection (1) are to be performed by the Commissioner on behalf of the Commission.
  - (3) In the performance of functions under this section, the Commissioner may consult any of the following:
    - (a) organisations established by Aboriginal or Torres Strait Islander communities;
    - (b) organisations of indigenous peoples in other countries;
    - (c) international organisations and agencies;
    - (d) such other organisations, agencies or persons as the Commissioner considers appropriate.
  - (4) In the performance of functions under this section, the Commissioner must, as appropriate, have regard to:
    - (a) the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child; and
    - (b) such other instruments relating to human rights as the Commissioner considers relevant; and
    - (c) the object of the Council for Aboriginal Reconciliation Act 1991.

Berry Street believes that section 46(c) as outlined above provides the most effective model in terms of the range of powers and functions for a National Commissioner for Children and Young People.

#### Definition of Children and Young People

Berry Street notes that the proposed legislation is defined as relating to children and young people aged 0-18 in line with UN CROC provisions. However we contend that to limit the scope of the Commissioner in this manner is unnecessary and will leave a significant proportion of young people outside their scope.

The United Nations defines 'youth', as those persons between the ages of 15 and 24 years and children as persons up to age 15. This definition was agreed during the lead up to International Youth Year (1985), and endorsed by the General Assembly (see A/36/215 and resolution 36/28, 1981).

The Commonwealth has lead or sole responsibility for matters relating to higher education, housing, housing assistance, income support, primary health care, employment and labour market assistance. These are all areas within which young people aged 18 to 25 could benefit from the independent analysis that a Commissioner could provide. As such it is critical that the mandate of the Commissioner extend to age 25.

## Vulnerable Children and Young People

While the Bill is clear that the proposed Commissioner's role relates broadly to the interests of children and young people we believe there is merit in highlighting, within legislation, three particular groups of children and young people. Specifically;

- Aboriginal and Torres Strait Islander children and young people,
- children and young people that are or have been in the care of State or Territory Child Protection; and
- refugee children and young people.

In the case of Aboriginal and Torres Strait Islander children and young people the ongoing impact of colonisation, dispossession and past policies of family separation have created a form of intergenerational trauma and disadvantage that warrants specific monitoring and intervention. There should also be a requirement that the Commissioner work collaboratively with the existing AHRC Aboriginal and Torres Strait Islander Commissioner.

Children and young people in state care remain among the most vulnerable, despite persistent State and Territory legislative overhauls and Ombudsman inquiries. Berry Street contends that when the state takes on the role of parent it is critical that the highest levels of scrutiny are applied to the appropriateness of the state care provided and the outcomes achieved for children and young people. Notably from this cohort is the additionally at-risk group of those who are exiting state care, in many cases into homelessness and trajectories of poor mental health, incarceration and physical ill health.

In addition to our argument above for the mandate of the Commissioner to extend to young people up to age 25 we highlight the situation of young people leaving state care. Exiting the nation's most vulnerable cohort from care and support at 18 is at odds with community norms for non-statutory young people. Given the number of children and young people in care who have intellectual, cognitive and functional issues such that their chronological age is markedly different from their developmental level puts them at greater risk. We believe that these young people need to remain a specific focus of Commonwealth concern.

The recent development of the National Framework for Protecting Australia's Children and National Standards for Out-of-Home Care provide additional context for scrutiny of these systems from an independent National Commissioner for Children and Young People.

In relation to refugee children and young people we note that section 9 (d) makes reference to children and young people that may be held in detention or whose parents may be held in detention. Section 9(e) refers to unaccompanied children and young people that arrive in Australia without the requisite visa or authority for entry to Australia. Berry Street believes that it would be consistent with UN human rights conventions for the legislation to use the term 'refugee' and not limit concerns to children or young people who are being held in detention, whose parents are in detention or who arrive unaccompanied. Australia has obligations, both legal and moral, to these children and young people regardless of where they are held or live after their arrival. Refugee children and young people placed in community based settings should fall within the areas of concerns for the Commissioner.

## Research and Evaluation

We strongly support the proposed Bill's emphasis on research into the issues affecting the lives of children and young people in Australia. We hope that this renewed emphasis on research may shed some light on the current paucity of relevant information into issues such as the separation of siblings in out-of-home care placements and the absence of young people's input to policies about them. We note that the voices of young people are often excluded from research regarding them, not by ill-intent but by university and/or government department ethics demands which while seeking to protect young people effectively exclude them from research. Of similar concern is the persistent call from research for reliable data about children and young people in care. The lack of data will hamper research and leaves policy making ad hoc at best and based on limited information.

## Review of State, Territory and Commonwealth Legislation

We strongly support the Bill's approach to a review of varied legislation in each state and territory to protect children. We would particularly welcome a review of differing legal approaches to very young children's representation in children's, youth and family court jurisdictions when this is sometimes done from a best interests approach and at others from a child's wishes, however expressed. Independent analysis of the outcomes achieved, from the perspective of children and young people, through differing legislative frameworks could contribute significantly to ongoing reform of child welfare legislation and programs.

As noted above the National Standards for Out-of-Home Care endorsed on December 17th by the Community and Disability Services Ministerial Council provide a framework for assessing the relative strengths and weaknesses of existing State and Territory systems.

## National Commissioner for Children and Young People

Berry Street prefers the title National rather than Commonwealth Commissioner for Children and Young People. The former suggests and implies that the position takes a national focus as distinct from focusing on the Commonwealth level of government. National Commissioner is more likely to resonate with children and young people and communicate a stronger sense of independence. This title suggests that they act for the Nation rather than acting for the Commonwealth.

## Australian Government Reports to the United Nations Committee on the Rights of the Child (UNCRC).

Compilation of these reports is an existing responsibility of the Federal Attorney General's Department and Berry Street does not support the proposed Commissioner taking on this role.

Including this within the functions for the Commissioner would effectively make them a representative of the Australian Government to the United Nations Committee on the Rights of the Child (UNCRC). As such they would be bound to represent the views of the Australian Government to that committee. This would remove their independence and create a conflict within their role. Appropriate roles for the Commissioner would be to comment upon Australian Government reports, act as an expert witness to the UN CRC and assist the non-government sector to prepare alternative reports from that of the Australian Government.

The Australian Human Rights Commission Act (1986) already requires the AHRC to perform functions in relation to the UN Convention on the Rights of the Child. Locating a National Commissioner for Children and Young People within the legislative and administrative arrangements for the AHRC would provide a coordinated system for managing functions in relation to UN human rights conventions and protocols.

# PROFILE OF BERRY STREET

Established in 1877 as the Victorian Infant Asylum, Berry Street chooses to work with children, young people and families with the most challenging and complex needs, including those for whom we are often the last resort.

These children and young people have suffered great distress and significant harm growing up in families where violence, chronic neglect, substance abuse, mental illness, and poverty have prevented them from having a good childhood. Incorporated under the Associations Incorporation (Amendment) Act 1997 with a voluntary Board of Directors, Berry Street is now the largest independent not for profit child and family welfare organisation in Victoria.

## VISION AND VALUES

The Berry Street believes *all children should have a good childhood - growing up in families and communities where they feel safe, nurtured and have hope for the future*. The Strategic Plan 2007-10 (available at [www.berrystreet.org.au](http://www.berrystreet.org.au)) includes a statement of beliefs and assumptions, the context within which we operate and our 5 values (and what they mean to us) of:

- Courage,
- Integrity,
- Respect,
- Accountability,
- Working Together.

Berry Street provides an extensive range of services for children, young people and families across rural, regional and metropolitan Victoria. We work from 20 offices and a further 34 worksites, with the majority of services in the Gippsland, Hume, North & Western Metropolitan and Southern Metropolitan regions. Berry Street employs approximately 550 (EFT) staff and has the support of over 250 volunteer caregivers and in excess of another 200 other volunteers. The budget for 20010/11 is more than \$53 million. Our greatest challenges today arise from the dreadful impact on children and their families of domestic violence, substance abuse, mental illness, poverty and unemployment.

Today we are the largest independent child and family welfare organisation in Victoria, providing an extensive range of services across metropolitan, regional and rural Victoria, to many thousands of people each year. Incorporated under the Associations Incorporation Act, Berry Street is an independent, Not-for-Profit Public Benevolent Institution with Deductible Gift Recipient and Income Tax Exemption status. Our voluntary Board of Directors has responsibility for governance and stewardship of Berry Street's good name and resources.

## **Berry Street Services**

### **RESIDENTIAL CARE**

Berry Street's residential care program is often the 'last resort' for young people whose traumatic childhood means they can't safely live at home or in foster care. Across Victoria, care is provided by rostered staff in small-scale group houses for up to four young people.

### **FOSTER & KINSHIP CARE**

When children can't live safely at home because of serious child abuse, neglect and family violence, the first preference is that they go to relatives (Kinship Care). Accredited volunteer foster carers also provide care for children and young people in their own homes (Foster Care). Our professional staff ensure these carers are properly screened, assessed and supported, as well as working directly with the children and ensuring they get the help they need to recover.

### **THERAPEUTIC**

Through clinical services and counselling programs, including Take Two, we work intensively with the distressed child or young person, their family, carer and other services, to help them recover from their trauma.

### **EDUCATION, TRAINING & EMPLOYMENT**

Too many of the young people with whom we work are either excluded from, or have dropped out of, school. We run an independent school with a number of campuses, and an extensive range of other education support and training programs. We strive to: maintain the participation of those who are at risk of disengaging from mainstream school; re-engage young people who are excluded from education or training; and promote pathways for young people into employment.

### **YOUTH**

We know that adolescence is a 'window of opportunity' to help young people recover from traumatic childhoods and prepare them for a successful adulthood. Our youth services include case management, outreach, leaving care, life skills, mentoring, and accommodation.

### **FAMILY**

Our family services support parents to better care for and nurture their children and help resolve conflict between parents and their adolescents. We also play a lead role in the delivery of services for families experiencing family violence: we help women keep themselves and their children safe; and we provide contact services for parents who cannot manage safe access arrangements for their children.

### **COMMUNITY**

Our community work includes two key approaches. Firstly, we deliver programs in local geographic communities, with a focus on the early years, financial inclusion and capacity building in rural communities. Secondly, we engage with particular groups within the community, with a significant emphasis on supporting Forgotten Australians, Aboriginal children and their families, and new arrival groups. We place a high value on working in partnership with and for these communities.