

NGO Sector Position Paper

A National Commissioner for Australia's Children

The Role, Functions and Powers of the
Office of the National Children's Commissioner, Australia

December 2011

List of Endorsing Organisations

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CHILDREN WITH DISABILITY AUSTRALIA	Stephanie Gotlib	Executive Officer
CREATE FOUNDATION	Jacqui Reed	Chief Executive Officer
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PLAN INTERNATIONAL AUSTRALIA	Mr Ian Wishart	Chief Executive Officer
REFUGEE COUNCIL OF AUSTRALIA	Paul Power	Chief Executive Officer
SALVATION ARMY	Commissioner Raymond Finger	Territorial Commander
SAVE THE CHILDREN	Suzanne Dvorak	Chief Executive Officer
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ST VINCENT DE PAUL SOCIETY NATIONAL COUNCIL	John Falzon	Chief Executive Officer
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UNITING CARE CHILDREN, YOUNG PEOPLE AND FAMILIES NSW, ACT	Claerwen Little	Acting Director
UNITING CARE AUSTRALIA	Lin Hatfield Dodds	National Director
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Purpose of this Position Paper

The time is right for the establishment of a national focal point with responsibility for Australia's children and for children's issues at the Federal Government level.

This position paper sets out the view of non-government organisations and individuals working in the children's and youth sector in Australia¹. This paper delineates the agreed key principles which the NGO sector proposes as a minimum requirement for the establishment of an effective and independent National Children's Commissioner who meets the leadership, advocacy and monitoring capacities required to safeguard and improve the rights and well-being of Australian children. This list of agreed key principles is not intended to be exhaustive. This paper also outlines the roles, functions and powers which all of the endorsing organisations have achieved consensus on, and deem necessary.

Background

Australia ratified the UN Convention on the Rights of the Child (CRC) in 1990 under the Hawke Government, committing to ensuring that every child in Australia has their rights clearly articulated under the Convention.

In 2005, the UN Committee on the Rights of the Child recommended in its Concluding Observations that Australia strengthen its efforts to bring domestic laws and practice into conformity with the principles and provisions of the Convention. It was recommended that this be achieved through mechanisms such as the adoption of a national framework for children, enshrined in federal legislation, to make state-based children's policies more consistent. To date, the development of a broad national policy framework to promote the long term development and well-being of children has not been established in Australia.

In June 2011, Australia's official response to the UN Human Rights Council's Universal Periodic Review of Australia accepted-in-part the continuing commitment to '*exploring a possible role for a national children's commissioner*' under Recommendation 28.²

On 17th October 2011, the UN Committee on the Rights of the Child released its List of Issues³ to the Australian Government concerning additional and updated information related to Australia's fourth periodic report scheduled for the May-June 2012 session of the Committee. The Committee has requested that the Australian Government '*please provide information on progress, if any, concerning the establishment of a National Commissioner for Children and Young People*'. The Australian Government is required to respond in writing before 1 March 2012, ahead of its scheduled appearance before the Committee in Geneva.

It is widely recognised that the appointment of an Australian National Children's Commissioner is needed to assist in building a society that values children and young people, listens to their views and ensures every child has the means and opportunity for safety and well-being. The appointment of this statutory authority would contribute to the national leadership to monitoring and advocating for the safety and well-being of Australian children and young people.

¹ The full list of endorsing organisations is at page 13

² Australia's response to the UPR is available at: <http://www.hrlc.org.au/files/Australias-Formal-UPR-Response.pdf>

³ The UN Committee's List of Issues is available at: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.AUS.Q.4.doc>

The call for the appointment of a National Children's Commissioner is not a new one in Australia. Bills for the appointment of a National Children's Commissioner have been introduced by The Hon Nicola Roxon MP in 2003, by former Democrats Senator Andrew Bartlett in 2008 and most recently by the Australian Greens Senator Sarah Hanson-Young in 2010.

The Commonwealth Commissioner for Children and Young People Bill 2010, introduced by Senator Hanson-Young, was reviewed in May 2011 by the Senate Legal and Constitutional Affairs Legislation Committee which recommended it not be passed and instead be considered in deliberations under the *National Framework for Protecting Australia's Children 2009-2020*. This Framework was agreed by all State and Territory governments and the federal government in 2009. It articulates a shared agenda for change, with national leadership towards common goals. It is founded on a shared belief that all children have the right to be safe and to receive loving care and support and that children also have a right to receive the services they need to enable them to succeed in life.

2011 NGO Roundtable

On 27th September 2011, key children's and youth organisations and individuals met at an NGO Roundtable hosted by the Australian Human Rights Commission (AHRC) and the Australian Youth Affairs Coalition (AYAC) to share perspectives on a potential National Children's Commissioner and to come to some common agreement on the key principles of that Office. This position paper states the 14 agreed key principles agreed upon by the organisations in attendance at the NGO Roundtable and by additional organisations who were not present, but who have endorsed the principles in full.

Children and Family Roundtable

On 30th November 2011, the first meeting of the Gillard Government's new Children and Family Roundtable was held in Melbourne made up of 14 child and family experts and advocates including members from peak bodies, academia, service providers and representatives of carers, children and young people. The meeting was Chaired by then Parliamentary Secretary for Community Services, Julie Collins and also attended by then Attorney-General, Robert McClelland, the then Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin, the Minister for School Education, Early Childhood and Youth, Peter Garrett, and the Minister for Employment Participation and Child Care, Kate Ellis. A Discussion Paper outlining the role and function of a National Children's Commissioner was released, inviting submissions until 16th December 2011. We commend the development of this Discussion Paper and welcome the invitation for submissions.

Role of a National Children's Commissioner

The role of a National Children's Commissioner is to protect and promote the rights, well-being and development of Australia's children and young people.

Agreed Key Principles of a National Children's Commissioner

1. Effective Independence

The Office of the National Children's Commissioner should have effective independence from Government.

As required by the United Nations Paris Principles⁴, the Office of the National Children's Commissioner should act independently, not under the control or direction of the Government, to promote and protect the rights, interests and well-being of children and young people in Australia.

Features that would address this requirement would include:

- i. statutory mandate;
- ii. statutory commitment to the Paris Principles;
- iii. statutory provision of security of tenure;
- iv. direct reporting to Parliament; and
- v. guarantee of adequate resources.

2. Participation of Children

Children and young people should be involved meaningfully in all aspects of the Office of the National Children's Commissioner.

The Office of the National Children's Commissioner should have an explicit commitment to using best practice and continuous improvement approaches to involve children in the development, appointment, engagement, planning, operation and evaluation of this Office.

The National Children's Commissioner should proactively involve and consult children and young people from diverse groups with different needs, in ways that are appropriate to their circumstances, age and maturity so that their views are taken into account in the exercise of the Commissioner's functions. These approaches of engagement should be developed by drawing on international experience from public, corporate and non-government sources.

⁴ The UN Paris Principles are available at: <http://www2.ohchr.org/english/law/parisprinciples.htm>

3. Child Rights Principles

The mandate of the Office of the National Children's Commissioner should be based on the United Nations Convention on the Rights of the Child and all other relevant human rights instruments.

The Office of the National Children's Commissioner should have a mandate to protect and promote the well-being, interests and rights of all children in Australia. This could be established by a statutory commitment to the monitoring and implementation of the Convention on the Rights of the Child (CRC) and other relevant human rights principles. This would not be a substitute for the additional respective and distinct roles of Government and the NGO sector in implementing and monitoring the CRC.

The CRC will provide the Office of the National Children's Commissioner with a broad mandate across all issues affecting children including health, education, child protection and participation. It will incorporate principles of non-discrimination and afford priority to vulnerable groups. Importantly, CRC rights are broader than child well-being, but are inclusive of this aim.

4. Coordination and Non-Duplication

The Office of the National Children's Commissioner should coordinate with other relevant bodies to avoid duplication of function and to identify failure of collective or particular government responsibility.

The Office of the National Children's Commissioner should coordinate with State and Territory Children's Commissioners and Guardians and other relevant bodies to ensure efficient and comprehensive monitoring, reporting and action.

The Office of the National Children's Commissioner will develop agreements with Commonwealth agencies, State and Territory bodies on the jurisdiction of work and process of cooperation and interaction between these bodies to ensure coordination and non-duplication. For example, an agreement delineating the process of accessing and sharing information required by the Office of the National Children's Commissioner in relation to his or her functions will be agreed with State and Territory bodies.

The Office of the National Children's Commissioner will complement the work of existing institutions (e.g. The Australian Human Rights Commission, Public Advocates, Ombudsman schemes) that are responsible for promoting and protecting the rights of all citizens, including children and young people. The Commissioner could provide expert advice to these existing institutions about responding better to the needs and interests of children and young people.

5. Prioritising Vulnerable Groups

The Office of the National Children's Commissioner should have a specific mandate to protect and advocate for the rights of all vulnerable children and young people in Australia.

The Office of the National Children's Commissioner should have authority to represent all children in Australia. The Office should also have a specific priority to afford special protection for all vulnerable or at risk groups of children and young people in Australia. At this current time, these groups would include, but would not be limited to, Aboriginal and Torres

Strait Islander children, children seeking asylum in Australia, refugee children, non-citizen children, children with disability and children in the child protection system including those in out of home care. The mandate should allow for flexibility in the role of the Office of the National Children's Commissioner to respond to the changing nature of children who are recognised as vulnerable or at-risk based on best-evidence.

6. Recognition of Aboriginal and Torres Strait Islander children and young people

Legislation governing the Office of the National Children's Commissioner should give special recognition to the unique status of Aboriginal and Torres Strait Islander children and young people as the First Peoples of Australia.

The Office of the National Children's Commissioner should give explicit recognition to the rights and unique status of Aboriginal and Torres Strait Islander children and young people as the First Peoples of Australia. This special status of Aboriginal and Torres Strait Islander children and young people could be recognised in a variety of ways such as through a Deputy Commissioner role. Such a dedicated role would redress the persistent experience of discrimination, exclusion and poverty suffered by many Aboriginal and Torres Strait Islander children and young people and provide visibility and leadership for strengths-based approaches, and ensure suitable and culturally appropriate engagement with Aboriginal and Torres Strait Islander children and youth.

7. Non-Discrimination and Accessibility

The Office of the National Children's Commissioner should be accessible to all children and young people in Australia, representing their interests on a non-discriminatory basis.

The principles of non-discrimination and accessibility should guide the work of the Office of the National Children's Commissioner. This Office should take all appropriate measures to ensure all groups of children and young people receive access to the services provided by this Office to encourage their participation, in particular those most vulnerable and at risk. The Office should represent the concerns and rights of children on a non-discriminatory basis to ensure children and young people do not face exclusion based on a parent's or legal guardian's race, colour, gender, disability language, religion, political or other opinion, national, ethical or social origin, property, birth or other attribute. Ensuring this outcome will require priority attention be given to the most disadvantaged, vulnerable and marginalised groups of children and youth.

8. Proactive and Systematic Approach to Policy

The Office of the National Children's Commissioner should take a proactive and systematic approach to policy. It should pursue evidence-based policy based on up to date and accurate research.

The Office of the National Children's Commissioner should proactively advocate for effective policies and good practice in policy making which deliver quality outcomes for children and young people. This could take the form of developing

guidelines for government departments to use when developing legislation, similar to what has been developed by the WA Commissioner for Children and Young People⁵.

The Office of the National Children's Commissioner should monitor and hold the Government to account on the development and application of laws and cross-jurisdiction agreements (e.g. Housing Agreement, Disability Agreement and National Framework for Protecting Australia's Children), including related policies, programs and funding affecting children and young people across Australia.

9. Adequately Resourced

The Office of the National Children's Commissioner should be adequately resourced to conduct and carry out the functions demanded of this role at a national level.

The Office of the National Children's Commissioner should be provided with adequate funding and allocated resources to effectively fulfill the role and functions of this Office. A Commissioner will need staffing, an office, technical and other resources sufficient to conduct his or her work on a national scale.

10. Mechanism of Appointment

The process of appointing the National Children's Commissioner must include children and young people as well as engage key representatives within the Australian children's and youth sector.

As the Office of the National Children's Commissioner will directly impact and represent the rights of children and young people in Australia, the appointment of the decision making process for appointing the National Children's Commissioner should proactively involve children and young people.

Key representatives from the Australian children's and youth sector should be consulted during the drafting of legislation, and the nomination, selection and appointment process to ensure an appropriate level of expertise, experience and personal integrity is secured for this Office. A framework for effective consultation with both the diverse groups of young people and sector representatives must be developed in collaboration with child participation experts from the sector.

11. Communications Mechanisms

The Office of the National Children's Commissioner must implement the most effective communications mechanisms available to allow for maximum accessibility by children and young people.

Regardless of where the Office of the National Children's Commissioner is physically located, the Office must utilise social media platforms and other communications mechanisms which permit easy access by children and young people. These mechanisms must continuously evolve to reflect the changing preferences of children and young people over time. The Office must prioritise adequate funding for the establishment and maintenance of these mechanisms.

⁵ <http://www.cyp.wa.gov.au/content.aspx?cld=259>

12. Functions

i. Monitor and Review Laws, Policies and Programs

The Office of the National Children's Commissioner should monitor and review laws, policies, programs and practices, conduct research and investigations, and report to Parliament and to children.

The Office of the National Children's Commissioner should be responsible for providing national leadership in monitoring and advocating for the well-being of all children and young people in Australia. A primary function of this responsibility should be to monitor, investigate and report on the implementation of children's rights under the UN CRC as an independent human rights body i.e. in addition to the Government's own report to the UN CRC Committee.

An important function must be to lead action on the child protection reform agenda and undertake effective monitoring of the National Framework for Protecting Australia's Children 2009-2020.

The Office of the National Children's Commissioner should not be responsible for the development and coordination of government policy but should seek to consult relevant Commonwealth agencies, State and Territory bodies and other appropriate organisations, including the NGO sector, to ensure coordination and non-duplication.

Functions of the Office of the National Children's Commissioner could include:

- i. reviewing proposed and existing laws, policies and resource allocations relating to children and young people;
- ii. making recommendations to relevant Ministers about laws which should be made or amended;
- iii. conducting inquiries and reporting to Parliament;
- iv. establishing ongoing dialogue with providers of public services to families, children and youth;
- v. advocating for effective data collection on children's health, well-being, development and participation;
- vi. assisting governments by analysing key policies to ensure they are consistent with Australia's international obligations;
- vii. independent monitoring and reporting against Australia's obligations under the UN CRC; and
- viii. independent monitoring and reporting more broadly to other UN mechanisms such as the Universal Periodic Review, the UN Convention Against Torture, and other UN Committees affecting children and young people.

ii. Complaints Mechanism

The Office of the National Children's Commissioner should encourage the broad development of accessible, effective and child-friendly complaints mechanisms and remedies in existing forms.

A complaints function is a significant administrative undertaking and has not yet been conceived in a manner that allows for the effective participation of children. The Office of the National Children's Commissioner should not directly receive complaints but rather should ensure the well-being of children by responding to systemic issues emerging from existing Australian complaints mechanisms. This Office should advocate for all relevant government bodies that deal with children and young people to develop their own child friendly complaints mechanisms. This would not impede the Commission from its own systemic monitoring and advocacy but rather improve the scope and coverage of complaints by facilitating the development of mechanisms that are effective, consistent and child-friendly.

iii. Independent Guardian for Unaccompanied Children

There should be an independent guardian for unaccompanied children seeking asylum in Australia, but the National Children's Commissioner should not act as that guardian.

The role of the National Children's Commissioner and the role of the Guardian for unaccompanied children are distinct and should not be combined. Both roles are required for the effective protection of children's rights.

Guardianship of non-citizen unaccompanied minors seeking asylum in Australia is currently a responsibility vested in the Minister for Immigration and Citizenship. This current political and bureaucratic system for protecting children in immigration detention is inadequate and requires the establishment of an additional role that is separate from the Government and that provides a Children's Guardian for unaccompanied children or children whose parents are in immigration detention. The role will be similar to that of the office of Guardian (in SA and NSW) for children in care.

Guardianship of unaccompanied minors seeking asylum in Australia is a responsibility that ultimately rests with the Government. Such a role may conflict with the functions of the National Children's Commissioner to independently monitor, assess and report on the well-being of such children, and to ensure the Government meets and upholds its responsibilities under the CRC for all children and young people seeking asylum in Australia. Further, the role of Guardian for unaccompanied children seeking asylum, should, on a practical basis, be undertaken by persons in close contact with unaccompanied children, which may be impractical for a National Children's Commissioner.

iv. Engage in Public Education and Community Awareness

The Office of the National Children's Commissioner should have the mandate to engage in public education to increase public awareness and understanding of children's rights and the UN Convention on the Rights of the Child.

The Office of the National Children's Commissioner should be responsible for developing and promoting public education programs to raise community awareness on children's rights as protected by the UN CRC and defined in Article 42 of this Convention.

These public education programs should not act as a substitute for the responsibilities of the Government but help to promote children and young people's understanding of their rights and entitlements and ensure these are understood by the broader community, as well as government and public agencies.

The Office of the National Children's Commissioner should collaborate and coordinate with the community and business sectors, as well as existing State and Territory children's commissioners and guardians to develop and strengthen this public education program.

13. Powers

i. Role and Power as Intervener

The Office of the National Children's Commissioner should have the powers to intervene on behalf of children and young people in legal proceedings affecting them.

This Office should have the power to intervene in legal cases brought by individuals alleging a breach of their rights as set out in the Convention on the Rights of the Child or relevant human rights instruments. This power could include assisting courts in providing expert advice on child rights issues in important cases impacting on the rights of children and young people.

The Office of the National Children's Commissioner should also use this power as intervener to identify areas in need of policy change and take a pro-active role in achieving this.

ii. Drive Own Agenda and Initiate Inquiry

The Office of the National Children's Commissioner should have the powers to direct its own agenda and initiate inquiry.

The Office of the National Children's Commissioner should have the power to direct its own agenda and undertake any function or activity the Commissioner deems necessary for the fulfillment of his or her duty. The Commissioner should be able to require participation of government bodies in the Commissions inquiries. This function would include proactively identifying its own motions, not simply under the direction of the Government. This power can sit alongside a power to investigate matters on referral from Government. This Office should have the power to report directly to the Parliament on any matter related to its functions.

iii. Require action on recommendations made to government about law, policy or institutions

The Office of the National Children's Commissioner should have the capacity to require government action on recommendations, or at least require a response from Government on recommendations in order to ensure that children's and young people's best interests are being pursued by Government.

iv. Report on progress and effectiveness of actions by governments and other bodies to Parliament

The National Children's Commissioner should report on progress on recommendations and other actions taken by Government and other bodies that contribute to the health, well being and rights of children. Such reports should identify steps taken to address recommendations as well as any material outlining why recommendations could not be addressed.