

Submission by
YOUTH ADVOCACY CENTRE INC
to the
Inquiry of the Legal Affairs and Community Safety Committee
In relation to the
Human Rights Bill 2018



“Young people that we work with have a clear message – they wish to see their rights better recognised and protected and they wish to be treated fairly, with respect and in a just manner.”¹

¹ Tiffany Overall, Youthlaw, Child Rights Taskforce presentation National Human Rights Consultation, 2009

INTRODUCTION

The Youth Advocacy Centre Inc (YAC) is a community legal and social welfare agency for young people generally aged 10-18 years in the greater Brisbane region who are involved in, or at risk of involvement in, the youth justice and/or child protection systems and/or are homeless or at risk of homelessness. YAC has been operating for nearly 35 years. YAC appreciates the opportunity to contribute to this important discussion.

It was the lack of legal representation for young people alleged to have broken the law; the detention, by way of administrative decision, of young people (particularly young women) who had not broken the law; and the general lack of regard for children's rights in the youth justice and child protection systems which led to the establishment of YAC in 1981 by a group of concerned citizens led by Father Wally Dethlefs.

YAC believes Queenslanders should have a Human Rights Act to ensure that their human rights are actively recognised and protected from arbitrary removal, being ignored or actively abused. Queensland is fortunate in that it has a number of Human Rights Acts it can turn to, including the recent review of the Victorian legislation, in determining the right balance for the content and structure of a Human Rights Act in Queensland. In line with Article 29 of the Universal Declaration of Human Rights, it is important to note that rights are not always absolute - "everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

A Human Rights Act would hold elected representatives and public authorities more accountable in their decision making as well as those who are delivering what have been traditionally public services which government has now outsourced.

YAC therefore commends the Government for fulfilling its commitment to bring a Human Rights Bill before Parliament for its consideration.

The need for human rights legislation

"...human rights are about everyone; about our everyday hopes for ourselves and for our families; about how we expect to be treated when interacting with the world ... about the innate humanity in us all....human rights are a formal manifestation of the fair go, that quintessentially Australian characteristic about which we so readily soliloquise...it is a very Australian thing to want our rights articulated."²

Human rights are relevant to the lives of every person, every day. For many people, Australia is a good place to live and they enjoy a good standard of living by world standards and in relative safety. However, that is not the case for everyone and people may find their life circumstances change which puts their human rights at risk. "Australia has a healthy respect for the rule of law, but its system of checks and balances has not always protected the human rights of all people in Australia"³.

While life is going well, people do not think about human rights – it is when things go wrong that we need to know that they are there, recognised and can be acted upon. An individual, a family member or friend, may find themselves in a situation where human rights may be ignored or even abused. A car accident can leave a person with an acquired brain injury or in a wheelchair; an elderly parent is in need of aged care services, and for some older people there are concerns about elder abuse; a family member may suffer from a mental illness and have to spend time in a mental health facility.

Rights have been hard won but they can be easily lost, especially if that happens in a non-transparent manner. Those most at risk when this occurs are usually those who have the least ability to fight against it and whose voice is not heard – those who are marginalised from mainstream

² Rob Hulls, 'A New Magna Carta? Six steps towards a Queensland Human Rights Act' (Speech delivered for the Queensland Council of Civil Liberties, Brisbane, 13 May 2015)

³ Australian Human Rights Commission submission re NHRC

society. Discrimination on the basis of social status (such as homelessness, mental health) can have serious negative consequences for those affected, psychological and practical, including being denied access to goods or services.⁴

Aboriginal and Torres Strait Islander peoples experience ongoing discrimination in many aspects of their lives with corresponding poor life outcomes and experiences. Following allegations that Aboriginal singer Gurrumul Yunupingu was not treated appropriately at a hospital presentation, his medical specialist noted that “the singer's experience was endemic of a broader problem across Australian health care.....The idea is not that individual people are racist but that the whole system is designed with certain assumptions that lead to people not receiving appropriate treatment for their conditions because of issues related to race”⁵. Twenty five years after the Royal Commission into Aboriginal Deaths in Custody, twice as many Aboriginal people are in custody. “Young Indigenous people in detention are 74% more likely to end up in adult prison than those diverted to other forms of rehabilitation” and “Indigenous children are 26 times more likely to be in juvenile detention than non-Indigenous children”⁶.

There has been a number of cases where treaty bodies have found a breach of human rights within Australia. For example⁷:

In *Brough v Australia*, the UN Human Rights Committee found that the conditions of detention of an Aboriginal boy with a mild intellectual disability violated the right of persons deprived of their liberty to be treated with humanity and respect for their dignity, the right of juvenile offenders to be segregated from adults, and the right of all children to special protection without discrimination. The boy was held in solitary confinement in an adult prison, his clothes and blankets were removed from him, and he was exposed to prolonged periods of artificial light. While being detained in these conditions, he attempted suicide.

In *Young v Australia*, the UN Human Rights Committee found that an Australian law discriminated against same-sex couples, in breach of the right to equality before the law. Mr Young had been in a relationship with Mr C for 38 years. Mr C was a war veteran. When he passed away, Mr Young applied for a veteran's pension under the *Veterans' Entitlements Act 1986* (Cth). The Department of Veterans' Affairs denied his application on the basis that he did not fall within the definition of persons who could be a veteran's 'dependant', which covered members of de facto couples but not same-sex couples.

Australia is the only western democracy that does not have a national Human Rights Act or a constitutional bill of rights. People living in the ACT or Victoria have the benefit of protection at a Territory/State level, but Queenslanders currently do not. This is particularly important in Queensland which does not have a second house or chamber of review as part of its Parliamentary system.

The reasons for a Human Rights Act were succinctly put by the Australian Human Rights Commission⁸:

- Human rights treaties to which Australia is a signatory have not been adequately incorporated into Australian [or Queensland] law
- Australia's constitution does not fully protect human rights
- Human rights can be overlooked in law and policy development
- The common law does not properly protect human rights
- Administrative decisions may breach human rights

⁴ ACOSS Submission re NHRC

⁵ Dr Paul Lawton quoted on ABC Darwin April 2016

⁶ *Indigenous incarceration in Australia at a glance* 15 April 2016 <https://theconversation.com/indigenous-incarceration-in-australia-at-a-glance-57821>

⁷ Examples taken from ACOSS Submission to the National Human Rights Consultation June 2009

⁸ National Human Rights Consultation 2009:

<http://pandora.nla.gov.au/pan/94610/201003240000/www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Home.html>

- Anti-discrimination laws do not protect all human rights or prohibit all types of discrimination.

A Human Rights Act will build on existing protections and strengthen democratic government, particularly in Queensland, by requiring greater transparency in, and accountability for, decision-making by elected representatives and public authorities and *providing important checks and balances on government which protect people from abuse of power. This can have a direct effect on people's everyday lives*⁹ as the following examples¹⁰ indicate:

- In the UK the experience of public authorities that have begun to embed human rights into their service provision is that the services are more responsive to the users, improving relationships between public service providers and the users of their services.
- The ACT Attorney-General acknowledged “a marked shift” in how government undertakes its work: “many agencies, particularly those with a service delivery focus, are exploring the opportunities to better serve the community through human rights compliant policies, legislation and operational practices.”

Rob Hulls, former Victorian Attorney-General, has identified the following examples of how the Human Rights Charter has positively assisted the everyday lives of individual Victorians:

- better accessibility on public transport
- older same sex couples able to access superannuation benefits
- a more flexible approach to tax collection for disadvantaged families
- improved enforcement of the right to a fair hearing
- rate payers having better access to interaction with local councils
- the prevention of eviction from their homes for disadvantaged Victorians including single mothers, elderly people and people with disabilities
- a man with a disability gaining access to his own mail
- a woman in residential care having better protection to privacy through the simple provision of a shower curtain when showering.¹¹

At a time when government is increasingly concerned about the outcomes being achieved for those receiving government and public services with the use of public monies, rather than simply the number of services being delivered, a Human Rights Act could be a useful tool because of its focus on addressing people's fundamental needs and supporting prevention and early intervention work.

Importance of human rights to children and young people

Children and young people in Australia are entitled to the same basic human rights as adults under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These rights are confirmed by the United Nations Convention on the Rights of the Child (UNCROC) which also provides for additional human rights that recognise the need for protection for those under 18 years of age and that adults are responsible for providing the resources for this. A Human Rights Act which provides for better legal and practical protection of the rights of children under the conventions has potential to improve children's well-being¹².

The right to education is of particular importance to children and young people: Chris Sidoti, a former Human Rights Commissioner, has noted:

⁹ Human Rights Law Centre, Victoria, submission to this Inquiry

¹⁰ Ibid

¹¹ Rob Hulls, *A New Magna Carta? Six steps towards a Queensland Human Rights Act* (Speech delivered for the Queensland Council of Civil Liberties, Brisbane, May 2015) quoted by The Honourable Justice Margaret McMurdo AC President, Court of Appeal, Supreme Court of Queensland at the University of The Sunshine Coast Inaugural Law Oration September 2015 *A Human Rights Act for Queensland?*

¹² Submission by six State and Territory Commissioners and Guardians with a mandate to promote the well-being of children and young people to the NHRC

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SUBMISSION RE HUMAN RIGHTS BILL

Education is fundamental to the development of human potential and to full participation in a democratic society. That's why it's recognised as a human right. Everyone has the right to education, regardless of where you live, what your race is or whether or not you have a disability.

Education is also fundamental to the full enjoyment of most other human rights: most clearly the right to work but also the right to health. And to the exercise of social responsibilities including respect for human rights.¹³

We also know that disengagement from education is a risk factor in relation to involvement in the justice system, which may have long term negative impacts as an adult.

Examples of how a Human Rights Act has assisted children¹⁴

- In **Victoria**, a primary school used human rights principles to inform its policies and processes in re-designing and developing the school building including special consideration given to disabled and Indigenous children. The school's principal noted that "the process had a positive effect on the students and broader school community through the development [of] strong relationships and positive, supportive community cultures".
- In the **ACT**, a single mother of two children was not entitled to remain in her mother's public housing property when her mother died, as the lease had been in her mother's name. The children had always lived in the house, had close links with the local community including school and friends and were at risk of being removed from their mother if she did not have a home for them. Advocates cited the right to protection of family life to the public housing authority, which granted a lease over the house to the mother.
- Pursuant to its powers under the Human Rights Act, the **ACT** Human Rights Commission provided advice in relation to ensuring human rights compliance of the new youth detention centre, Bimberi. The advice concerned matters including its design, physical structures, operating procedures and programs for residents, and identified areas for further development.
- In the **United Kingdom**, a young girl with a learning disability was denied school transport ordinarily offered to children with special educational needs, even though she was unable to travel independently. This decision was made on the basis that she lived 2.8 miles, rather than the prescribed 'more than 3 miles', from school. The mother argued that this inflexible application of policy disproportionately interfered with her daughter's right to respect for private life, and failed to consider her specific circumstances. The local authority reversed its decision.

Comments in relation to the Bill

We welcome the specific recognition of Aboriginal and Torres Strait Islander peoples as our First Nations peoples, in the Preamble, particularly their right to self-determination, as well as substantively in the Bill at clause 28 in relation to cultural rights.

Similarly, we are pleased to see recognition of cultural rights of other members of the community, thus embracing the rich multicultural nature of our society.

Whilst supporting the Bill overall, there are some aspects which we would draw attention to in terms of its impact on children and young people.

As noted above, the United Nations Convention on the Rights of the Child (CROC) affirms that children are entitled to the same rights in terms of their economic, social, cultural, civil and political rights as adults but have additional rights to recognize their dependence on adults.

Article 12 of CROC provides that a child "who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due

¹³ 29th Annual Federal ICPC Conference, Griffith NSW, 3 August 2000

¹⁴ Submission to NHRC by Edward Santow Director, Charter of Human Rights Project, Gilbert + Tobin Centre of Public Law which draws on material by the Human Rights Law Resource Centre:

- *Fact Sheet on Charter of Human Rights and Responsibilities: Human Rights and Children and Young People in Care*
- *How a Human Rights Act can Promote Dignity and Address Disadvantage*

weight in accordance with the age and maturity of the child” and it would be appropriate for this to be included in clause 26, not least as a response to the far too many occasions when children have suffered at the hands of adults and systems because they have not had the ability to be heard.

CROC makes specific provision for children who are subject to the criminal justice system. Whilst Article 37 is generally captured in the Bill, the Bill does not require that “detention of a child should only be used as a measure of last resort and for the shortest appropriate period of time¹⁵” and we consider this is important to ensure ongoing conformity with CROC.

Article 28 of CROC repeats and extends Article 13 of the International Covenant for Economic, Social and Cultural Rights:

1. States Parties recognize **the right of the child to education**¹⁶, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

.....

Clause 36 of the Bill is headed “Right to education” but the provision states:

- (1) Every child has the **right to have access to primary and secondary education**¹⁷ appropriate to the child’s needs.
- (2) Every person has the right to have access, based on the person’s abilities, to further vocational education and training that is equally accessible to all.

It is unclear why the words underlined have been added and there is no indication in the Explanatory Notes. Our concern would be that this may be a lessening of the right. Education and training is critical to children and young people’s success in life (and therefore to the community as a whole). We would therefore propose the Review of the Act in 2023, as per clause 95 of the Bill (the first Review), consider whether the wording has had any detrimental or unintended impact which should be remedied.

In relation to health, Article 24 of CROC states:

- 1. States Parties recognize the **right of the child** to the enjoyment of the highest attainable standard of health and **to facilities for the treatment of illness and rehabilitation of health**. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Clause 37 is headed “Right to health services” but then states:

- (1) Every person has the right **to access** health services without discrimination.

Again, there is no explanation for this difference. We would again propose that the first Review consider whether the wording has had any detrimental or unintended impact which should be remedied.

Finally, we note the exemption in relation to the segregation of children on remand from those who are on sentence. We would have preferred to see a sunset clause on this provision and in its absence, the first Review must consider the need for segregation to occur as a priority.

¹⁵ Article 37(b) CROC

¹⁶ Our emphasis

¹⁷ Our emphasis

Remedies and Human Rights Education

YAC welcomes the ability to lodge complaints with the new Human Rights Commission as well as the ability to include human rights breaches in any proceedings where they may be relevant, thus improving on both the Victorian and ACT models. On the first Review, however, further consideration should be given to the issue of whether the remedies available should be extended to allow for actions to be to court on the basis of a breach of human rights alone where conciliation has failed and also to allow for compensation to be payable.

Rights and mechanisms to assert them are of little value if people do not know about them. The new Human Rights Commission must lead **comprehensive and ongoing** community education around the rights and remedies to fulfil its obligations under clause 61(f) but government departments and other entities covered by the legislation must also play an active role in relation to this.

Education material and the complaints mechanism must include “child friendly” options and be developed with an understanding that there will be a range of people who are disadvantaged or vulnerable who will need to use them. The first Review should consider the effectiveness of education campaigns and materials in informing the community and different cohorts within the community as well as the accessibility of the complaint mechanism.

Conclusion

YAC fully supports the need for human rights legislation and supports the current Bill. It is noted that the Bill only imposes responsibilities on those providing government services (directly or on behalf of government), but it is to be hoped that this encourages a greater knowledge of, and respect for, individuals and their human rights more broadly in the community, particularly for the more vulnerable and disadvantaged. We are hopeful that it will support the needs and interests of children and young people which are too often overlooked or minimised.