

## Day One of Public Hearings

### Session: A view to children's rights

#### Presentation from Tiffany Overall, Youthlaw, on behalf of the Child Rights Taskforce

*“What’s the point of human rights if you don’t uphold them?”*

*“It’s all well and good having these laws to protect an individual’s rights, but are they working in practice?”*

The protection of human rights is of great relevance to young people as they are vulnerable to diminution of their rights and are often less able to assert and protect their rights.

In addressing Consultation questions we have adopted a child rights based approach and have been guided by the views of young Australians we work with.

We ask the Committee to focus on the rights, interests and well being of children and young people to ensure their voices are not lost in a more general discussion about human rights. We request that children and young people be given the opportunity to participate and have a role in developing, implementing and reviewing any human rights protections developed.

#### *A child rights based approach*

The taskforce is of the view that rights specific to children and young people should be protected so as to reflect and address the special needs and the special place that children and young people have within society, both in needing to protect and promote their human rights as well as participating fully as the holders of human rights, ensuring children and young people may lead full and flourishing lives.

Children (aged under 18 years) are entitled to special protection in their best interests, on account of their vulnerability. Under article 19 of CRC Australia is obliged to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Participation by children and young people in public affair and policy decision making processes in relation to issues affecting is fundamental to their enjoyment of human rights. (Article 12 CRC)

A child-rights-based approach is *a complex set of ideas and principles which have their foundations in international human rights standards, principally the United Nations Convention on the Rights of the Child* (“CRC”)<sup>1</sup>. CRC establishes a comprehensive code of human rights for children and young persons that includes the right to life; the right to identity and culture; the right to family life; freedom from violence and discrimination; education; quality of life; freedom of expression and participation in decision-making<sup>2</sup>.

The child-rights-based approach applies three *general* principles:

1. the rights of children are interdependent and indivisible<sup>3</sup>;
2. states are accountable for securing the rights of children<sup>4</sup>; and
3. children’s rights are universally applicable<sup>5</sup>.

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<sup>1</sup> John Tobin, “The Development of Children’s Rights” in Geoff Monahan & Lisa Young (eds), *Children and the Law in Australia* (2008) at 32.

<sup>2</sup> United Nations Convention on the Rights of the Child articles 2, 6, 8, 9,12, 13, 19, 24, 27, 28, 30.

<sup>3</sup> Id at 39.

<sup>4</sup> Id at 40.

Universality means that children and young people hold all the same human rights as the broader community (within the limits of their evolving capacities). In addition, there are some rights that they hold due to the fact that they are children and in need of particular support and sometimes protection. For example, children have a right to be free from work, abuse, exploitation or neglect and they should only be detained as a measure of last resort.

The child rights approach is premised on 4 **specific** principles;

1. non-discrimination in the applicability of children's rights (Article 2);
2. the primacy of the consideration of the child's best interests (Article 4);
3. the child's right to survival and development (Article 6(1)); and
4. the child's right to participation in decision-making (Art 12)

There is a growing trend and awareness at both the international and domestic level of the need to specifically protect and promote the rights of children and young people, reflecting key principles in CRC.

Well over 20 national constitutions possess this characteristic and have provisions dedicated to the protection of children's rights.<sup>6</sup> In doing so, they recognize the limitations of placing exclusive reliance on ICCPR and ICESCR- both framed from adult's perspective, and not designed to address the special needs and experiences of children and young people.

### ***Views of young Australians***

It is the taskforce's view Government ensure that children and young people have a clear voice and role in the development of law, policy and decisions affecting them – including in the development of any processes that emerge from this Consultation

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.

Civil and political rights of particular importance to young people are:

- the right to non-discrimination based on age
- the right of participation
- freedom of speech
- right to feel safe (in public places, at home, work , school) and protected from violence

Social and economic human rights are often viewed by young people as 'basic rights' which are necessary pre conditions for further human rights protection. In particular right to access to safe, affordable housing, education, access health care, and fair conditions at work.

Young people do not talk about human rights using an arbitrary division of rights as "*civil and political*" or "*economic, social and cultural*". Rather they talk about human rights as a collective set of rights many of which are interdependent and mutually re-enforcing.

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<sup>5</sup> Id at 41.

<sup>6</sup> National Constitutions with a section dedicated to the rights of children: Albania, s54; Angola- s30&31; Brazil- s227; Colombia-s44; East Timor-s18-19, Ecuador- s47&50; Ethiopia-s36; Finland- s5(3); Gambia-s29; Ghana-s28; Honduras-s119-126; Malawi-s23, Moldova-s 50; Nicaragua- s75; Namibia-s15; Paraguay-s54; Portugal- s69&70; Romania-s45; Slovenia-s56; South Africa-s28; Uganda, s34; Poland, s72; Thailand, s53, Ukraine, s52; Switzerland s11.

## Gaps and failures in current protections of human rights for children and young people

### A. Experiences of discrimination

Children and adults

*“should be treated equally the same, like one shouldn’t get more than the other in ways of better treatment, like treat them better just because they’re older or younger” (age 10)*

Young people regularly experience forms of discrimination, the most common being systemic discrimination on the basis of their age and status as young people.

We are aware of many situations where young people are not being treated equally to adults or in accordance with international human rights obligations. This includes unequal treatment on the basis of;

- a. Laws that make it lawful to discriminate against young people;
- b. Laws that criminalise behaviour based on their age and status as young people (“status crimes”);
- c. Discriminatory treatment and practices (e.g. shopkeepers, police and ticketing inspectors).

#### **Below are some examples of each**

**E.g.** the continuing disproportionate rates of Indigenous children in the justice system and their related experiences of policing and detention (including of deaths in custody).

**E.g.** youth wages allow employers to discriminate against young people under 21 years and perpetuates stereotypes of young people as being inexperienced and unskilled.

**E.g.** *Laws criminalising behaviours on basis of age - Status crimes*

While legislation may not explicitly target specific groups, experience in Australian and international jurisdictions indicate that young people, Indigenous people, the homeless and mentally ill are disproportionately impacted by laws regulating public space.

Public space regulation legislation such as anti social behaviour orders, curfews, move on powers, and graffiti prevention laws not only discriminate against young people

**E.g.** Young people described many instances of discriminatory treatment, including being harassed by police and ticketing inspectors. This treatment raises many questions about whether their right to equality and respect are adequately protected.

*“The people who are supposed to protect human rights are the ones who abuse them the most – police, government, transit officers.”*

*“The police treat us like shit for being homeless and just don’t respect us either verbal or physically”*

*“We’ve been threatened with pepper spray”*

*“Our friend Zach got bashed. How can we complain? ‘Who would believe it?’”*

*“It’s a way of life, you get used to it after a while”.*

Unfortunately many young people told stories of general harassment in public places, young people being treated as suspects, and subject to random and arbitrary searches.

## **B. Failure to afford children and young people the right to special protection from a abuse and violence**

Significant numbers of young people are not being afforded this right to special protection in the home, at school, in out of home care, in the community, and in the criminal justice system.

### **Examples**

- the recent experience of children in immigration detention;
- ongoing reports of abuse to children in the care of the State;
- the conditions within which many Indigenous children continue to live particularly in remote and regional communities across the country;

*E.g* Children remain the only people in Australia against whom violence may be justified as discipline. Children can be beaten and punished with impunity especially by their parents who have a defence in law to use “reasonable chastisement”.

*“...if [adults] physical contact with someone, like punching ‘em, it’s against the law...they could go to jail, they could be charged with assault...And that’s exact same for smacking. But...if you’re a kid, and it’s in the house, it’s o.k because they’re your kids...If you are a kid, it doesn’t really matter...because...you barely have any say” (age 9) from Children’ Perspectives on Physical Punishment’*<sup>7</sup>

*E.g* The number of children on care and protection orders across the country has steadily risen in the last ten years.<sup>8</sup>

*E.g* *Excessive force by police*; death of Tyler Cassidy in Victoria  
The use of physical restraint and force on children shall only be in exceptional circumstances and employed only when all other control measures have been exhausted and have failed, and only for the shortest possible time.

## **C. Deprivation of right of participation**

*Young people don’t get taken seriously at all. We don’t get a fair say. This needs to change.*

*Our perspectives are not taken into account. Older generations don’t have a good enough understanding of the issues that effect us*

Young people suffer a unique deprivation of their participation rights in the current structure and framework of Australian governance and legal processes; they have a lack of a voice in the decisions that affect them.

Participation by children and young people in public affairs and policy decision making processes in relation to issues affecting and of relevance to them is fundamental to their enjoyment of human rights.<sup>9</sup>

Young people are excluded from participating in society in many ways adults take for granted, and their active participation in the community, in legal and governmental processes does not seem to be appropriately valued and respected.

In 1997, the Australian Law Reform Commission and the (then) Human Rights & Equal Opportunity Commission jointly published the *Seen and Heard: Priority for Children in the Legal*

<sup>7</sup> Bernadette Sanders and Chris Goddard, *Children and Society* Vol 22 (2008) pp405- 417

<sup>8</sup> Australian Institute of Criminology, <http://www.aic.gov.au/stats/victims/juveniles.html>, accessed on 10 June 2009.

<sup>9</sup> See Article 12 of United Nations Convention on the Rights of the Child (CROC) and section 18 of the *Charter of Human Rights and Responsibilities* (‘the Charter’).

Process report (“the Seen & Heard Report”). The Seen & Heard Report detailed the systemic failures of the legal, political and social systems to provide for children and to ensure that their voices are heard in decision-making processes concerning matters affecting them.

Children rarely have had experience in engaging with formal decision-making processes. Often the experiences that they have had have been controlled by adults and the outcomes have been dictated by adults.

**D. Other failures to provide the necessary support and services to promote the survival and development of children and young people**

The myriad of ways we fail to provide the necessary support and services to promote the survival and development of children and young people, including a lack of housing, an inadequate youth income via social security, and high numbers of young people disengaged from the mainstream education system.

*E.g.* A recent inquiry by the National Youth Commission has found the number of young homeless people in Australia has doubled in the last two decades, leaving more than 36,000 Australians under the age of 25 without stable accommodation.<sup>10</sup>

*Everyone should have a place to stay – a roof over their head – don’t like not having a place in life.*

*Lack of housing – stresses homeless people out, puts at risk – many locked up or getting stabbed.*

*E.g.* Research undertaken by welfare organisations such as the Australian Council of Social Services (ACOSS), consistently shows that Youth Allowance recipients live below the poverty line.

*Centrelink doesn’t cover it – it’s a real struggle*

During our consultations we heard many experiences of young people disengaged from school and not enjoying their right to education.

*to get to uni, to get a good job - which, if realized, then enables people to participate – (if you can’t write/speak well, you won’t be listened to). People(who are disadvantaged) need to be supported to access and obtain education. There needs to be equality of opportunity in terms of accessing Education. (participant of Frontyard workshop)*

**How can Australia better protect & promote human rights?**

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**a. National policy framework for children and young people**

The development of a clear national policy framework based upon the international framework set out in the Convention is vital in ensuring the protection of the human rights of children within Australia.

In order to be effective, this Policy Framework must be supported by legislative and administrative measures and implemented with adequate resources, including cross-governmental budgetary allocations.

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<sup>10</sup> National Youth Commission, *Australia’s Homeless Youth: A Report of the National Youth Commission Inquiry into Youth Homelessness*, 2008, available [http://www.nyc.net.au/files/Australias\\_Homeless\\_Youth.pdf](http://www.nyc.net.au/files/Australias_Homeless_Youth.pdf)

The Framework should include mechanisms for the evaluation, monitoring and reporting of the status of Australian children and their protection and participation - to the Australian community, to the international community and in particular to children themselves.

The participation of children and young people in the development of this policy would be a vital and important first step towards an inclusive and non-discriminatory environment for the development, protection and participation of children and young people in Australian society.

An important element of the national police framework is the establishment of an independent National Commissioner for Children and Young People. The role of the commissioner would include the monitoring laws, regulations and government policy for compliance with the human rights of children and be empowered to investigate human rights violations (individual and systemic) and bring complaints on behalf of young people in the event of an inconsistency with human rights obligations.

#### **b. Development of a comprehensive national human rights education strategy**

The Taskforce calls for the development of a broad community-based education strategy that provides all Australians (including children and young people) with the knowledge and skills to be able to use the framework provided by the international human rights treaties that Australia has ratified (including the Convention). This education strategy should involve the inclusion of human rights education in the curricula of primary and secondary schools and human rights training in all tertiary institutions and professional and technical training programs.

Education in all aspects of the community is necessary to create a comprehensive approach to human rights education and the development of a culture of respect of human rights. For young people, human rights education of sectors with significant youth interaction is particularly important. This includes, for example, Centrelink and housing authorities, hospitality and retail employers, police, transport employees and real estate rental agencies.

Community wide education about the substantive human rights issues facing young people, such as barriers to political participation, discrimination in access to public space, youth wages, and issues around access to education, is necessary in order to raise awareness among both young people themselves and the broader community of the need to consider and strengthen the protection of the youth human rights in a manner analogous to the consideration given to other minority groups in Australian society.

#### **C. Promote effective youth participation in legal & government processes**

The Seen & Heard Report identified that children do not use adult decision-making processes or complaints mechanisms for decisions made that affect them[1]. These processes and mechanisms have not been designed for use by children and young people.

The Seen & Heard Report underlined the need for the implementation of complaint mechanisms which are child-friendly and child-focused, particularly with regards to the agencies with which children have contact (such as schools, the police and child protection agencies).

The Seen & Heard Report made significant recommendations seeking to address these systemic failures. However, to date, little progress has been made in implementing these recommendations[2]. These recommendations included: the development of a national policy for children with appropriate structural mechanisms within government; The Taskforce recommends Government call a review of the report by the AHRC and ALRC and wherever relevant implement recommendations of the 1997 Report *Seen and Heard: priority for children in legal processes*.

#### **A Human Rights Act?**

The Taskforce submits that if the federal government introduces a Human Rights Act, it should protect and promote all civil, political, economic, social and cultural rights human rights, and specific children's rights contained in the United Nations Convention on the Rights of the Child ("CROC").

The international human rights legal framework (“Framework”), of which CRC forms part, establishes the rights and responsibilities to which, by virtue of Australia’s ratification of its constituent treaties, every adult, young person, and child within Australia is entitled. Each human right articulated under this Framework should be given appropriate recognition by the various arms of Australian Government

Many young people we have spoken with also think it’s a good idea, and ask:

*“If the National Human Rights Charter is going to happen we all feel it is a good idea, but we will have to wait and see what will become of it all. Is it just all talk?”*

A Human Rights Act should provide for a freestanding, independent cause of action for breaches of rights which is accessible and appropriate to all in the community, especially children and young people.

### **Victorian experience of a human rights law**

Youthlaw is aware of a growing body of case studies from Victoria of how human rights are being used to change, not only the culture of government action and decision making in issues that affect children and young people, but also the approach of young people and their advocates. The Charter provides great potential to promote a culture of positive and respectful decision making by all arms of government where policy and law reform processes are informed by young people’s voices and experiences.

In our project work we have found young people are quick to grasp and arm themselves with the language of human rights in their advocacy work on a range of issues impacting on them, including:

- Interaction with police
- Lack of personal attendant care at university of disabled students
- Discrimination on grounds of sexuality

Benefits of the Charter are summed up powerfully by project participant Stuart *Youth Disability Advocacy Service*

*“I’ve found that my involvement with ... this project to be sort of a watershed moment for me, because I haven’t really had the opportunity to consider what my rights are... I’ve been fighting against the system my whole life and didn’t realise that there was these supports available for me to utilise in order to fight for m own advocacy rights & to fights for other people.”*