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### **Logan Youth Legal Service Submission to the National Human Rights Consultation**

We write in response to the call for submissions to the National Human Rights Consultation and would like to register our support of an Australian Human Rights Act. This submission first directly addresses the three key questions proposed for the consultation with a focus upon the need to better protect the rights of the young people who are the clients of our service.

#### ***Logan Youth Legal Service***

Logan Youth Legal Service (LYLS) provides free legal information, advice and representation for young people in Logan City and surrounding areas. During the 2007-08 financial year LYLS delivered services to 229 clients. Most young people supported by the service are aged under 18 years, and dealing with criminal law or child protection matters. LYLS provides support to young people regarding a range of other legal issues. The team also regularly engages in community education, law reform and crime prevention projects. LYLS is part of a larger community agency called Youth and Family Service (Logan City) Inc (YFS).

### ***How could Australia better protect and promote human rights?***

The introduction of a federal Human Rights Act (HRA) would serve to both protect and promote human rights in Australia. To make the HRA truly effective it will need to be enforceable not just against government decisions but also against businesses and individuals. This would provide for true protection for human rights and increase the level of awareness and consideration which every day people take in their lives towards respecting the human rights of others. Also, to include business as liable to human rights violation would keep business and industry in line with the ethical standards which our community expects.

The HRA should also provide for increased powers for the Australian Human Rights Commission (AHRC) to investigate human rights beyond its current limited scope of discrimination investigation and conciliation. AHRC is ideally placed to investigate claims of breaches of the human rights contained in the HRA which would then facilitate the judiciary in determining the existence or extent of a breach. In cases where individual wish to enforcement their human rights against government, business or other individuals, AHRC could prepare a report to be presented to the court to assist in the courts determination of the case. Such reports though not binding on the court, would greatly assist the judiciary to adjudicate human rights cases. This process would guide the development of jurisprudence in the area of human rights in keeping with international developments. These human rights reports prepared by AHRC may also be used by parties to negotiate settlement out of court thus minimising the cost of enforcing human rights for the aggrieved party.

### ***Are human rights sufficiently protected and promoted?***

Currently in Australia there are a number of avenues through which a person may complain when they feel they have been discriminated against. This means that Australia has codified a limited right to be free from discrimination in certain areas due to certain personal attributes. Such protection of Article 7 of the Universal Declaration of Human Rights is not the same as protecting and promoting human rights. Freedom from discrimination is just one of the

many human rights which Australia has agreed to support. The other rights in the above Conventions are not guaranteed to the Australian public by the existence of the Australian Human Rights Commission (the Commission) or the federal Acts under which the Commission is able to investigate complaints.

In the Commission's current form it will conduct an investigation and seek to conciliate between the aggrieved and the respondent to allegations of discrimination. If this process fails to adequately meet the needs of the aggrieved party they may take their complaint to the Federal Court for adjudication under the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975*, *Age Discrimination Act 2004*. It is arguable that the cost to the aggrieved party of such an action prohibits all but the most heinous acts of discrimination from coming to the attention of the judiciary. Critically, the federal Anti-Discrimination Acts do not enact all of the human rights contained within the United Nations Conventions which the Australian executive has ratified. The ratification of these conventions has been considered significant by the Australian judiciary. Mason CJ and Deane J stated,

*"[R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the [convention]. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the [convention]".<sup>1</sup>*

This legitimate expectation was subsequently qualified such that government decision makers may derogate from observing their Human Rights obligations

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<sup>1</sup> Minister for Immigration and Ethnic Affairs v Teoh (1995) (1995) 183 CLR 273, 291-292.

by informing the party concerned of this intention and allowing for natural justice by way of submissions in response to the intended derogation.<sup>2</sup>

It is the role of the judiciary to ensure that the executive does not act beyond the power granted to them by the legislature, which in turn is ultimately responsible to the electorate who will vote them out if they fail to fulfil the majority of the public's political desires. Currently the legislature has little beyond the need to fulfil procedural natural justice requirements when they intend to derogate from their international human rights commitments.

To return to the perspective of LYLS clients, governments are legally able to deny young people the right to contact with their family if the government decides this is not in the young person's best interests. A young person who has at least a year until their case can come to trial, can be left with no option of seeking bail due to a lack of funding to programs that support the bail supervision requirements that the magistrate requires to allow the young person to be released.

***Which human rights (including corresponding responsibilities) should be protected and promoted?***

The LYLS client group would benefit from a Australian Human Rights Act which codified into Australian Federal law the rights contained in the following United Nations Conventions:

- The Universal Declaration of Human Rights
- Convention on the Elimination of all Forms of Discrimination Against Women
- International Convention on the Elimination of all Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities
- Convention against Torture

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<sup>2</sup> Ibid.

In particular we would like to draw the Consultation committee's attention to the following rights which we feel should be protected and promoted.

Accompanying each article is a brief explanation of either:

- Why this right deserves special attention; and/or
- how this right is currently being breached or in danger of being breached; and/or
- examples from our case work were applicable.

## **Universal Declaration of Human Rights**

### **Article 2.**

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The age of a person fits within the context of 'other status'. This means that young people under 18 years of age have equal status to adults in the entitlement to the rights contained in this Declaration.

### **Article 7.**

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Young people have the right to be free from discrimination.

### **Article 8.**

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

The *Anti-Discrimination Act (1991)* (the Act) Qld (s7) makes discrimination due to a person possessing certain attributes unlawful. These specific attributes and their corresponding areas of operation in Part 4 of the Act create the field in which a person may pursue a claim of discrimination. Similarly, in federal legislation the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975*, and *Age Discrimination Act 2004*, all create viable areas of unlawful conduct. An action may be discriminatory and yet not fit within the attributes or areas of discrimination in the above state and federal Acts. Subsequently, these Acts can be a limiting factor in the enforcement of this right to not be discriminated against. A federal Human Rights Act which creates enforceable rights against those who discriminate against a person regardless of the attribute or area of operation in which the discrimination took place would provide better protection from discrimination.

**Article 13.**

- (1) Everyone has the right to freedom of movement and residence within the borders of each state.
- (2) Everyone has the right to leave any country, including his own, and to return to his country.

Young people are restricted in their movements when they are in the care of the Department of Child Safety or under a Parenting Order due to family breakdowns. This restriction is justified in the valid interest of protecting young people. Unfortunately this desire to protect young people is some times overly privileged to the detriment of the young person's right to freedom of movement. For example, clients of LYLS who are in the care of the Department have, at times, been unable to engage in the ordinary activity of staying over at their friends house. This is often due to the lack of resources and heavy case loads of Child Safety Officers that does not enable them to engage in the process of approving the friend's family as suitable within a reasonable time frame. This inhibits the right to freedom of movement for these young people in care and can compound the disadvantage many of them face in engaging in social activities that other children take for granted.

**Article 25.**

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Young people, whether in their usual place of residence or in the care of the Department of Child Safety, may face homeless due to complications with their living situation. This homelessness can lead to issues of lack of access to basic needs such as food and clothing, and can reduce access to basic services such as medical care and other social services. A federal Human Rights Act would enable these young people a stronger voice and perhaps more effective advocacy in accessing services that would be a right under any Act.

**Article 26.**

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- 3) Parents have a prior right to choose the kind of education that shall be given to their children.

When young people are excluded from schools for behavioral issues, this can impact on their education opportunities by limiting access to other schools. In cases where young people are excluded from all schools, and they do not have access to alternative education services, their access to education is no longer feasible. This can

lead to, or continue, the cycle of poverty for the young person by limiting their future opportunities. A Human Rights Act that covers education will enable young people and their advocates stronger support in making sure they receive suitable education and support services to help them stay engaged with the process. When difficulties arise with individual students, an Act would provide a stronger mandate for those within the education system to support these young people in a more consistent and relevant way.

## **Convention on the Rights of the Child**

### **Article 3**

(1) - In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In considering the best interests of the child, the opinions of the child are often not given due weight or, at times, the young people's opinions are not given the opportunity to be formed. For example, a young person who has been identified as being harmed or at risk of being harmed in their regular home environment, may be in the care of The Department of Child Safety. The Department Case Worker for the young person may hold a Family Group Meeting for those who are involved with the young person in which a Care Plan for a young person is discussed and then constructed. While many young people have thoughts and ideas about their situation, due to failures in the system (including heavy case loads for Case Workers), some of our clients at LYLS have been given little opportunity to engage in these Family Group Meetings and have their views known about what they want to see happen in their lives. This can be very disempowering for the young person and may lead to situations where the young person does not feel supported.

If the young person's thoughts and ideas about their own needs and ways that these might be met are given due weight, the young person is more likely to see outcomes delivered to them by government services which they feel are relevant. This will in turn mean that young people will be more interested in and motivated to achieve these goals, leading to better outcomes which is in the best interests of the child.

### **Article 4**

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

In failing to codify these rights into domestic legislation Australia has not conformed to this article. It may be argued that the *Family Law Act 1976* (Cth) and other state legislation relating to child welfare does cover this field,

due to the emphasis these Act's place on 'the best interests of the child', but these Act's fail to create positive enforceable rights for young people.

#### **Article 6**

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

It is arguable that Australia does not "ensure to the maximum extent possible the survival and development of the child." Homelessness Australia, the peak body representing Homelessness Services across Australia report that 23% of Australia's homeless are children. That is 24 150 young Australians. Further, every 2 out of every 3 children who apply for support from housing agencies are turned away .<sup>3</sup>

#### **Article 12**

1. States Parties shall assure to the 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 weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

It is arguable that Australia could do better in this regard. Young people need to be informed of this right and given active encouragement and facilitation in expressing their views. Non-government organisations such as the CREATE Foundation<sup>4</sup> do excellent work in encouraging and facilitating young people in care to express their views. Additional funding and accountability for failures to consider young people's views are required to make this right positively enforceable for young people. It may be argued that such failures to consider young people's view, which are required by decision makers, are currently open to the judicial review of administrative decisions. This right lacks any meaning for young people who will not be aware of their right to access this process. The solution is to create an over arching codification of this right of young people to have their views considered and to increase the funding given to educating young people of this, and other rights.

#### **Article 28**

1. States Parties recognize the right of the child to education, 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;
  - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;

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<sup>3</sup><http://www.homelessnessaustralia.org.au/UserFiles/File/Homelessness%20in%20Australia%20for%20web.pdf>

<sup>4</sup> <http://www.create.org.au/index.php>

(d) Make educational and vocational information and guidance available and accessible to all children;

Client's of LYLS have been excluded from participation in government State School education due to Education Queensland's ability to exclude student's from all school's who pose an unacceptable risk to the safety of other's at the school. Student's may then have the opportunity to engage in alternative schooling<sup>5</sup> if the alternative school's have the capacity to accommodate the student. Due to the lack of funding of these Alternative Schools a young person who has been excluded from all schools may be denied the formal education which is required to enter the workforce and lead a productive life.

**Article 29**

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

One of the factor's of commonality between the clients of LYLS is the lack of awareness that the young people possess regarding human rights. This fundamental breach is arguably prevalent within the adult population also. The introduction of a federal Human Rights Act with accompanying education and promotion programs are desperately needed to develop the respect for human rights and fundamental freedoms within Australia. This respect needs to also be accompanied by positively enforceable human rights to address failures to respect these rights.

**Article 37**

States Parties shall ensure that:

- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

LYLS operates in the State of Queensland where the right is clearly violated. Young people in Queensland are accountable to the adult criminal law<sup>6</sup> at 17 years of age and can then be placed within adult detention at this age. The *Juvenile Justice Act 1992* (Qld) s6, allows for the government to change this age by regulation. It is hoped that the enactment of a federal Human Rights Act would force the Queensland government to make use of this provision to rectify this breach of young Queenslanders human rights.

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<sup>5</sup> See 'The spot' <http://www.thespot.net.au/thespotyouth.htm> and Centre Education Programme <http://www.learningplace.com.au/defaulteqa2.asp?orgid=72&suborgid=482>

<sup>6</sup> *Criminal Code 1899* (Qld)

### **Article 39**

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Many of the clients of LYLS are victims of neglect, exploitation or abuse and as such are living within the care of the Department of Child Safety (the Department). Due to the overwork of those in the Department and the private organisations which are funded to care for this young people, the standard of care can fall below that which 'fosters the health, self-respect and dignity' of the young person. Currently complaints can be made to the Department which are in turn investigated. Ultimately, a positively enforceable right to the human rights contained in the Convention on the Rights of the Child would add create a greater atmosphere of adherence to fundamental human rights than currently exists within the sector which cares for the young people in the care of the Department.

### **Article 40.**

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

2. (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

Young people are almost uniformly ignorant of their right to silence when confronted with the authority of Police Officers. This ignorance greatly impacts on their ability to prepare a defence for the allegations made by Police Officers. The introduction of a federal Human Rights Act which codifies this right to legal assistance would help to promote with young people the awareness that they can gain free legal advice and that they need not incriminate themselves.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Young people who have been charged with serious crimes may be held on remand until their trial can be heard. This process can take up to 18 months. The courts are more willing to give such young people bail if they can be placed on a supervised order which requires the young person to complete certain activities and live at a set address. Young people who do not have a family member who will allow them to be bailed to their address must wait until suitable accommodation and programs can be found.

Due to a lack of funding for such accommodation and programs, young people may not be able to successfully apply for bail. In this way the young person has their physical freedom significantly restricted due to government failure to fund the necessary programs. The introduction of a federal Human Rights Act would benefit those young people who can not get bail due to the lack of funding of programs to support them while they are on bail. If a federal HRA were introduced then government agencies who fail to provide the right to adequate housing for these young people would be legally liable for this breach of the young person's right to housing.

## **Conclusion**

Logan Youth Legal Service is heartened by this process of consultation on a potential federal Human Rights Act. We appreciate the opportunity to contribute and to have our submission considered. We look forward to the outcome of the consultation process and hope to be embracing a new instrument with which we are able to further assert and defend young peoples human rights.