

Submission to the National Human Rights Consultation June 2009

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NSW Commission for Children and Young People
NSW Office for Children - the Children's Guardian
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Rights mean we can learn, live or be whatever we want. (Boy, 11 years)

1. Introduction

The Children's Commissioners and Guardians promote the well-being of children and young people. Some of us have this role in relation to all children and young people in our State or Territory. Others focus on some particular groups of children and young people, such as those in out-of-home care, and others operate from within a statutory rights based framework. Our independent status allows us to build partnerships across the government, non-government and business sectors and positively influence legislation, policy and service delivery to achieve the best outcomes for children and young people. A key part of this role is promoting the voices of children and young people in decision-making so that policy reflects their lived experiences.

2. Recognising the human rights of children and young people

Like adults, children and young people are citizens with their own needs, rights and an entitlement to be protected and nurtured. However, they are not adults in miniature. Each child has particular needs and vulnerabilities that arise because of their age, size and stage of cognitive and emotional development.

Respect for the young child's agency – as a participant of family, community and society – is frequently overlooked, or rejected as inappropriate because of their age and maturity.¹

This is particularly true for very young children who have limited communication skills and need increased supports to have their perspectives shared and heard.

Children are dependent on adults for food, shelter, clothing, protection, information, education, entertainment, guidance and modelling. While adults are not completely independent, most adults can themselves access most of these items most of the time. Children have a limited capacity to do so, and are vulnerable if the adults on whom they depend cannot or do not provide adequately for them. As caregivers for children and young people, the broader community recognises the need for special protections. For

¹ United Nations Committee on the Rights of the Child, *General Comment 7: Implementing Child Rights in Early Childhood*, 2005, p. 6.

example, during consultations for a Human Rights Act conducted by the Western Australian Attorney General in 2007, children's rights were identified by the Western Australian community as among the most important rights they would like to see protected in law.²

Promoting children and young people's rights to improve their well-being is not just about protecting them. It is also about empowering them, a concept that concerns some people. Recognising children and young people's rights is not about undermining the role of parents or families. Supporting the rights of children and young people can, and should, strengthen families and communities.

Children and young people in Australia are entitled to the same basic human rights as adults under international conventions ratified by the Australian Government such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition, they have the benefit of additional human rights that recognise a need for protection under the Convention on the Rights of the Child (CRC).

However, these international conventions do not have the status of law in Australia and there have been matters before the courts where children have been denied their rights under CRC.³ In addition, no agency has been given the authority, role or resources to effectively monitor Australia's compliance with CRC. Within many of the contexts where children and young people are drawn into the machinery of law and/or government, there is no pervasive use of the language of CRC rights for their benefit. At the most basic level there is often no automatic recognition of the need to adopt special procedures for children and young people to either make "best interests" determinations or to facilitate their participation, as young people told us during our consultations.

Giving better legal and practical protection to the rights of children as recognised under these ratified international conventions will improve Australian children's well-being.

3. Consultations with children and young people

Children, even very young children, are knowledgeable about their own lives. The participation of children and young people is a core principle of the Commissioners and Guardians' work.

To inform this submission, the NSW Commission for Children and Young People consulted about 140 children and young people aged 4 to 18 years in NSW. The children and young people we spoke with had a diverse range of cultural backgrounds and life experiences. Children and young people in NSW and Queensland also contributed to this submission through an online survey. The Commissioners and Guardians have contributed additional information from previous consultations and research to inform this submission. These include a consultation on human rights in South Australia,

² Government of Western Australia, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act*, 2007, p. 63.

³ See *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20; (2004) 78 ALJR 737; [2004] HCA 20; 206 ALR 130 at 172-173; *Re Woolley; Ex parte Applicants M276/2003* [2004] HCA 49; (2004) 79 ALJR 43; *Singh v Commonwealth of Australia & Anor* [2004] HCA; and *Bakhtiyari v Australia* [2002] UNHRC CCPR/C/79D/1069/ (Unreported).

consultations in the ACT to inform the establishment of the ACT Children and Young People Commissioner and consultations by the Commissioner for Children and Young People, Western Australia.

The children and young people we spoke with were most concerned about the human rights that were important to their daily experiences, that is social rights. They had very few suggestions about how rights could be better protected, which is not surprising given that the legal processes typically involved in the protection of rights are beyond most children and young people's lived experiences. However, children and young people did speak about the need for education to help them understand their rights, how they can get help when they need it and about respect for rights amongst the community. These ideas will be further discussed in this submission.

4. Which human rights are the most important to children and young people?

Children and young people are diverse in their experiences and views. The children and young people we consulted with gave insights into the experiences and views of Australian children and young people. Their views and suggestions are similar to those expressed by children and young people in previous consultations and research conducted by all Commissioners and Guardians.

Children and young people identified a range of economic, social, civil and political rights as important to them. However, social rights were seen as the most important and relevant to their lives. Many children and young people identified basic social human rights such as a right to an adequate standard of living through adequate food, clean water, shelter, affordable education and income security as being essential. Young people also identified civil rights such as the right not to be subject to torture or inhuman treatment, and the right to freedom of speech as important. Young people in juvenile justice detention centres spoke about the right to a fair trial as being important given their experiences of the criminal justice system. All of the rights that children and young people identified as important are reflected in international conventions that Australia is signatory to, such as ICCPR, ICESCR and CRC.

However, there were a number of human rights that children and young people felt were the most important which they discussed in detail. These rights are the right to a family, the right to health care, the right to education, the right to a safe environment, the right to participate in decisions and the right to be free from discrimination. Some children and young people, such as those who are Indigenous or have a disability, face particular additional challenges in having these priority rights protected.

The views of children and young people about each of the six identified priority human rights are further discussed below.

4.1 Family

For children and young people, relationships are the most important thing in their lives. Many children and young people we spoke with identified the right to a family as being the most important right to them. Children and young people said that a right to family meant the right not to be separated from their family members, as well as the right to be cared for by a family.

The very young children in our consultations spoke about how important it was for them to be with their families and how their families look after them.

This [drawing] is my family, they love me and look after me.

(Girl, 4 years)

Young people spoke about how they could turn to their families when they needed help.

Family is the only thing you got.

(Boy, 15 years)

They also expressed concern about situations where children and young people have been separated from their families and said it was important for them to have a family around them. For example, some young people in juvenile justice detention centres spoke about how important visits from their families were to help them cope. They said that these visits were made difficult because their families often lived so far away from the centre they were in.

Children and young people in out-of-home care often talk of the importance of restoring or retaining close connections with other family members, particularly siblings.

4.2 Health care

Many children and young people we spoke with considered a right to health care to be one of the most important human rights.

Health care is something you need because you stay alive.

(Boy, 11 years)

NSW children and young people said that good health care when they were ill meant that they were able to enjoy all the other things in their lives. In much of our work with children and young people, we have found that they understand and experience 'health' as being about healthy development and 'feeling good', not disease management.

Children and young people felt that the right to health care was fairly well looked after in Australia through access to Medicare. However, they spoke about the difficulties some people have in accessing health care because of where they live and the distances they have to travel to services. They also mentioned that the cost of some types of health care, such as dentists, were difficult for some families to afford.

4.3 Education

Children and young people said that a right to education was also one of the most important human rights. They said that education was important not only for a person's future, but also their life today. For many children and young people education is mostly about learning for life as well as helping to create a better future through employment.

School is important. If they kick you out of school at a young age then of course you're gonna become a criminal and do bad stuff.

(Boy, 15 years)

By educating people we provide them with the knowledge to go further, not to repeat mistakes of the past and to allow them to do what they want.

(Girl, 15 years)

Children and young people said that the availability of free education through public schools and assistance through HECS helped to protect the right to education. However, in a consultation on human rights in South Australia the young people were concerned at the growing divide in the quality of education available in public and private schools. There were also concerns about access to quality education for children and young people in remote areas.

Many children said that they found school boring. Young people in juvenile justice detention centres spoke about being expelled from school because of their behaviour and other young people spoke about not fitting in. Young people spoke about the importance of alternative education programs in these situations. Children and young people said that while the right to education was important, it should be a right to all forms of education, not necessarily school.

Each school I went to didn't give me a second chance. I'm under 15.
(Boy, 14 years)

It should be the type of education that fits with you. (Girl, 16 years)

[My mentor] is the best person I have ever had. He pushes you in a good way.
(Boy, 15 years)

Children and young people were also concerned that while education is 'free' in Australia, there are still a lot of costs involved. They gave examples of families who had difficulty paying associated costs such as school fees, uniforms, equipment and excursions and how this meant that some children and young people missed out on opportunities.

4.4 A safe environment

The right to a safe environment at home, school and in the community was seen as important to many children and young people.

Very young children spoke about the safety that their parents provided in their lives. Older children and young people spoke about wanting to be safe at school or other places they visited often, and about the important role that adults played in creating these safe spaces. For example, some of the young people in juvenile justice detention centres said that they felt safe just because of the way they were treated by the workers.

In a consultation with children and young people from the remote town of Halls Creek in Western Australia, they raised without prompting, their desire to ban alcohol. They also raised their reluctance to talk about this with the adult community for fear of retribution.

When a young woman said that she does not get hit, another student with the support of peers powerfully stated that any young person (Indigenous or not) was very lucky to not get hit when alcohol is around.⁴

This highlights the very fundamental desire of children to be safe, and to have established and secured protections in their community.

⁴ Mo-How, *School Based Youth Consultations: Halls Creek 25/26 September 2008*, 2008, p. 4.

Children and young people also spoke about their health in terms of having a safe environment. For example, many children shared their concerns about the effects that adult smoking had on children's health.

4.5 Participation in decisions that impact on their lives

During various consultations and research undertaken with children and young people across Australia, they have told us that it is important to their well-being to have the power to make choices in everyday situations and be involved in decisions about their lives.

Children and young people say that they want to participate in both formal and informal decision-making processes. Participation provides benefits to children and young people, as well as to organisations working with them and to the broader community.

In our consultations, children and young people of all ages spoke about the importance of the right to have a say and be listened to. They said that this right should be equally available to both adults and children. Being able to participate in decisions should apply at home, school, within organisations children are involved in and in government.

Children should have a right to have their say because they might notice something that adults don't.
(Girl, 11 years)

Some children and young people said that they wanted the right to vote in government elections before they turned 18.

Some children and young people we spoke with, particularly those in institutions, expressed frustration that while they often have the opportunity to share their views, no action follows.

Events like this [forum] are good – but only if the adults listen to what we have to say, otherwise it is pointless.
(High school student)

The right to participate in decisions is a particular issue for young people in the criminal justice system and in out-of-home care, often because they do not have their family to turn to for help. One young man who talked about his experience of the criminal justice system, and court in particular, said:

We never get to talk. Sometimes we have something to say. Some people want to say sorry.
(Boy, 15 years)

Children and young people's participation rights can be challenging for governments and the community. However, if we want to recognise children and young people's human rights and improve their well-being, we need to develop appropriate mechanisms that are adequately resourced to allow them to participate and become more visible in our communities.

4.6 Freedom from discrimination

In our consultations, children and young people spoke passionately about the need to live in a community that was free from discrimination. In particular, they spoke about the unfairness of discrimination based on culture, gender, religion and age.

Children and young people gave examples of racism at school and the negative impact this has on the victims. However, they also spoke positively about how this was dealt with through education, rules and punishment within the school.

In our consultations, children and young people clearly recognised that human rights include the responsibility to respect the rights of others and that a balance needs to be reached. For example, when children and young people spoke about freedom of speech they said this freedom should be limited so that people are not making comments that are offensive to others.

You have a right to have your say, but some things should be kept to yourself if they are nasty. (Girl, 10 years)

Young people spoke about their frustrations with the way that adults sometimes treated them because of their age.

[I want] the right to be treated fairly and to be seen as an individual with ideas, not a crazy teen. (Girl, 16 years)

Concerns about restricting young people's freedom in public places were also raised by some young people. One young person gave an example of a local council that had recently banned children and young people who were unsupervised from using the local swimming pool.

Some young people who worked said that they felt they were treated unfairly at work because of their age. They gave examples of unpaid trial work, and being paid junior rates of pay as unequal treatment. They said that the power imbalance between employers and young people made it difficult to assert their rights. Young people were not sure where to seek assistance about this issue and some felt that the cost of legal advice was a barrier to assistance.

You want the job so you don't say anything. (Girl, 16 years)

5. Children and young people who are particularly vulnerable to human rights breaches

While the children and young people we spoke with felt that their human rights were fairly well protected in Australia, there are some groups who may be particularly vulnerable to breaches of their human rights.

5.1 Young people in juvenile detention

Young people we spoke to in NSW juvenile justice detention centres spoke about the frustration of being in custody while on remand.

It used to be innocent until proven guilty, now you get locked up in here first and it all feels like it's guilty until you prove you're innocent. (Girl, 17 years)

In NSW over the past few years there has been a significant increase in the number of young people, particularly Indigenous young people, in custodial remand. This is attributed to changes to the *Bail Act 1978 (NSW)*, as well as more stringent policing of young people on bail and a welfare approach being taken by some Magistrates. However, the increase in young people on custodial remand is also occurring in other States and Territories. In Tasmania on any given day, two-thirds of the children and young people in detention are there on remand. In many jurisdictions youth detention centres are located in remote and rural settings with little or no possibility for low socio-economic status families to be able to visit.

These practices are contrary to the principles of the juvenile justice system and international conventions in which custody is the last resort.

It's meant to be a training centre to do training so when you get out you might be able to do things differently and you're not coming back but it really doesn't help at all.
(Boy, 16 years)

5.2 Children and young people in out-of-home care

NSW, Queensland, Western Australia and Victoria recognise the vulnerability to rights breaches of children and young people in out-of-home care. The legislation in these states require a Charter of Rights for Children and Young People in Out-Of-Home Care. Only the NSW and Queensland legislation requires compliance with the Charter. However, there is no penalty for failing to comply with the Charter, or even a process for prosecuting a failure to comply. SA has a Charter of Rights for Children and Young People in Care but, as yet, with no legislative base. Tasmania has now adopted a Charter of Rights for Children and Young People in Out-of-Home Care, although it has no legislative status. No jurisdiction provides a legal remedy for children or young people if they consider that their rights, as outlined in the Charter, have been breached.

5.3 Aboriginal and Torres Strait Islander children and young people

The continuing disadvantage faced by many Aboriginal and Torres Strait Islander children and young people results in a vast number of situations where their rights and entitlements are not being realised. The Halls Creek example given above demonstrates how their right to protection and safety is being undermined by the drug and alcohol issues rife in their community.

In addition:

- The infant mortality rates in remote Indigenous communities are up to four times higher than in other communities.⁵
- Aboriginal children suffer a great burden of infectious disease and emotional and behavioural problems.⁶ For example: "...Indigenous children may have up to 32 months of their childhood spent with hearing loss as opposed to 3 months to the average non-Aboriginal child. This severely impacts on their potential speech and language acquisition and education as well as social interaction."⁷

⁵ Prime Minister Kevin Rudd, Apology to Australia's Indigenous Peoples, Wednesday 13 February 2008.

⁶ Kulunga Research Centre, <http://www.ichr.uwa.edu.au/kulunga/research/overview>.

⁷ Associate Professor Harvey Coates, cited in: *Healthy Child – Healthy State: Improving Western Australia's Child Health Screening Programs*, Education and Health Standing Committee, Western Australia Parliament, 2009, p. 23.

- Indigenous young people continue to be vastly overrepresented in the juvenile justice system. In Western Australia, Indigenous young people make up 75 per cent of young people in detention.⁸
- In 2008, Aboriginal children achieved worse outcomes than non-Aboriginal children across Australia in the national assessment of literacy and numeracy.⁹

This ongoing disadvantage has been the subject of comment from the United Nations Committee on the Rights of the Child, which recommended in its last concluding observations that Australia should:

*[prioritise] budgetary allocations so as to ensure implementation of the economic, social and cultural rights of children, in particular those belonging to disadvantaged groups, such as indigenous children, “to the maximum extent of ... available resources”.*¹⁰

We concur with the Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, that addressing this disadvantage is “the defining challenge for our nation” and that:

*Aboriginal children – wherever they live in Australia – deserve a future in which they have the same opportunity as other children to thrive, develop and enjoy life. They are entitled to such a future for no other reason than that they are human, born with dignity and in full equality to all other Australians.*¹¹

5.4 Children and young people who are refugees or otherwise not citizens

Some children and young people we spoke with expressed concern about the treatment of refugees in Australia. There are many shortcomings in Australian immigration law and practice, despite the Australian Government’s decision in 2005 to no longer detain all non-citizen children who are in Australia without a visa. For example: children born in Australia can still be rendered stateless, contrary to the ICCPR; the freedom of some undocumented children is still curtailed; children are still being sent to “excised offshore places” such as Christmas Island into situations that involve the breach of a range of their human rights; migrant children travelling alone are not always provided with an appropriate guardian.

Australian laws still contain inherent contradictions that require the Minister for Immigration to be both guardian and law enforcer for undocumented migrant children. Sadly, many of the criticisms made of Australia’s treatment of unaccompanied and separated migrant children in the *Seeking Asylum Alone* reports of 2006 and 2007 remain valid.¹²

⁸ Snowball, L., ‘Diversion of Indigenous Juvenile Offenders’, in *Trends & Issues in Crime and Criminal Justice*, No.355, Australian Institute of Criminology, June 2008, p. 1.

⁹ *National Report: Achievement in Reading, Writing, Language Conventions and Numeracy 2008*, http://www.naplan.edu.au/naplan_2008_reporting/naplan_2008_reporting.html.

¹⁰ United Nations Committee on the Rights of the Child, *Concluding Observations: Australia*, 2005, p.4.

¹¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission, 2008, p. 5.

¹² See Mary Crock *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia* (Sydney: Themis Press, 2006); and Jacqueline Bhabha and Mary Crock *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US – A Comparative Study* (Sydney: Themis Press, 2007).

Australian courts have provided no protections for these children. A series of rulings by the High Court in 2004 confirmed that there are no constitutional constraints on the ability of the Federal Parliament to enact laws that are fundamentally in breach of the human rights of these children.¹³

6. How could Australia better protect and promote children and young people's human rights?

The Consultation Background Paper discusses three areas where human rights could be better protected and promoted:

- Democratic Institutions and Human Rights (including increased parliamentary scrutiny);
- The Legal Framework and Human Rights (including strengthening anti-discrimination laws, enacting a Human Rights Act and a strengthened role for the Australian Human Rights Commission);
- Human Rights Awareness (including a National Human Rights Action Plan, a community charter, increased community participation and increased human rights education).

This section of our submission discusses how each of these can improve children and young people's well-being through better protection of their human rights.

6.1 A Human Rights Act

We support initiatives which provide a greater role for the Australian Parliament in protecting human rights, including increased parliamentary scrutiny so that proposed legislation is compatible with an agreed set of human rights, particularly children and young people's rights. In particular, we consider that a federal Human Rights Act would be an appropriate mechanism to better protect children and young people's human rights.

However, a Human Rights Act alone is unlikely to have a significant impact on children and young people's rights. It must be accompanied by other mechanisms as discussed below.

6.1.1 Which human rights should be included in the Human Rights Act?

The agreed set of human rights should include civil and political rights, economic, social and cultural rights and children's rights.

The Australian legal system is familiar with protecting civil and political rights and these categories of rights are often promoted as being the most important to protect. However, we recommend that the recognition and protection of rights needs to be broadened to social, economic and cultural rights in order to best promote children and young people's well-being. The types of human rights that children and young people consulted for this submission recognised as being most important were social, economic and cultural rights. As the children and young people pointed out, human rights do not exist in isolation; the enjoyment of social, economic and cultural rights is essential to civil and political rights.

If you are sick then the other things don't matter. (Boy, 11 years)

¹³ See Mary Crock, 'Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2005) 22 *Law in Context* 120.

The ICCPR and the ICESCR each contain general rights that apply to all people, including children and young people. However, these general rights do not adequately articulate the specific needs of children and young people. For example, the human rights of children will sometimes conflict with rights of those who care for them, be they parents, guardians, adults in loco parentis and other carers.

We recommend that the Human Rights Act contain provisions to protect the specific rights of children and young people. This should include a provision similar to Article 3 of CRC that recognises the best interests of children and young people in actions concerning them. The provisions of a Human Rights Act need to recognise that children and young people are people unto themselves, as well as being dependent on others.

6.1.2 How should the Human Rights Act protect human rights?

These human rights should be included in an ordinary piece of legislation, together with a requirement that Government Ministers make a statement to the Parliament on how proposed legislation is, or is not, compatible with the specified rights.

The legislation should require all Courts to interpret legislation and apply the common law in a way that is compatible with the human rights contained in the legislation. If such a compatible interpretation is not possible, the incompatible legislation should be referred to the Attorney-General, to be tabled in Parliament. The Attorney-General should then be required to present a response regarding the incompatibility to Parliament within six months.¹⁴

In addition, the legislation should include an obligation for all public authorities and Australian Government agencies to act in accordance with the human rights included in the legislation. This includes an obligation that all of their practices, procedures and contracting arrangements with third parties are in accordance with the specified human rights. A failure by public authorities to act in a manner which is consistent with the human rights protected by the legislation or to fail to consider all relevant human rights in their decision making should be grounds for complaint to an agency such as the Commonwealth Ombudsman, for example. We consider that these initiatives would improve compliance with human rights in legislation, policy and practice across Government.

That human rights are enforced was very important to the children and young people we spoke with during our consultations.

There is no point of introducing laws if they go unprotected, not recognised and are not effectively enforced.
(Girl, 17 years)

One child suggested that human rights would be better looked after if:

There was a group of police that specialised in stopping human rights being ignored.
(Girl, 11 years)

We consider that in addition to the specific legal protections and remedies that a Human Rights Act can provide, the legal recognition of human rights in Australia may help to

¹⁴ This is only one example of a possible process. The Commissioners and Guardians are aware that there is significant debate on the constitutionality of a Human Rights Act and that there may be other models that are constitutionally sound. It is not our intention to provide a detailed description of the process, as we consider this is best left to those with expertise in these matters.

create a culture of greater respect for rights in our community. For children and young people who are unlikely to seek individual legal redress under a Human Rights Act, the development of a culture of respect for human rights is likely to have more impact. The experience from the United Kingdom, Canada and South Africa, where people and groups are using the language and ideas of human rights to challenge poor treatment by agencies provides an example of the positive effect of human rights legislation on culture. Many children and young people we spoke with said that a greater understanding and respect for human rights was the most important way to protect rights.

There was more education about these human rights issues so there is less social acceptance of racism and sexism.
(Girl, 13 years)

It would be good if the law filtered down to make other laws fairer.
(Girl, 16 years)

Importantly, if enacted in federal legislation, a Human Rights Act would have the potential to become a framework for service delivery. Currently the existing human rights framework for children and young people, CRC, is very rarely translated into action or considered in the development of policy or programs. We are concerned about the ability of services for children to be inadequate and diminished, largely because governments do not have a political imperative to provide for them. For example, children cannot vote and rarely form lobby groups.

Australia has been a signatory to CRC for 19 years. However, this Convention becomes a series of aspirational phrases unless services are implemented to realise those rights. For example, Article 31 of CRC provides for the right of the child to age appropriate play and recreation and it is well established in research that creative play is central to healthy child development. However, achieving developmentally rich play experiences for all children is not possible if we do not provide the places, the spaces, and the opportunities for it. Similarly, under CRC, our children and young people are entitled to the highest attainable standard of health. However, many children and young people across Australia are not receiving basic health services to enrich their development. Western Australia, for example, is in urgent need of an additional 105 community child health nurses, 135 school nurses and 126 child development service staff, just to keep pace with its growing population.¹⁵

We believe that a Human Rights Act would go some way to bringing the rights of the child embedded in CRC more closely into our national sphere by encouraging policy makers and service deliverers to view their activities through a rights-based lens.

6.1.3 Consistent human rights protection across all States and Territories

Many of the models being suggested for a Human Rights Act apply only to actions and decisions of the Federal Government.¹⁶ We consider that such a model would have limited benefit for children and young people as there are many actions and laws of state and territory governments that impact on their human rights. For example, the significant increase in the number of young people on custodial remand in NSW over the last few years is due to NSW Government policy and legislation.

¹⁵ *Healthy Child – Healthy State: Improving Western Australia’s Child Health Screening Programs*, Education and Health Standing Committee, Western Australia Parliament, 2009, p. xi.

¹⁶ For example, Law Council of Australia submission.

In order to promote the well-being of children and young people, we consider that a consistent and harmonised approach needs to be taken to protect human rights in Australia. Model human rights legislation based on the National Human Rights Act should be developed for enactment in each State and Territory. Such an initiative should be given a high priority through the Coalition of Australian Governments (COAG) and the Standing Committee of Attorney-Generals (SCAG).

Young people and the criminal justice system

In the ACT, s. 21 of the *Human Rights Act 2004* enshrines the right to a fair trial. This was used by the ACT Supreme Court to reconcile two apparently contradictory provisions under the *Domestic Violence and Protection Orders Act 2001* (ACT) whereby interim protection orders can be converted automatically to “final” (permanent) protection orders if uncontested. A young person was made the subject of an interim protection order. Although he attended court to contest the order, his failure to notify the court had already resulted in a permanent (and uncontestable) order being made. At appeal the Supreme Court overruled the permanent order on the basis that the young person’s right to a fair trial had been breached. The case is an example of how human rights legislation at a state/territory level can alter the interpretation placed on legislation that affects the rights of children and young people.¹⁷

6.2 Other mechanisms to protect children and young people’s human rights

As noted above, a Human Rights Act alone will not improve children and young people’s well-being. To better promote and protect the human rights of children and young people, a human rights framework needs to be developed that includes improved resolution and complaints processes and access to the legal system, advocacy for children and young people and community education.

6.2.1 Raising community awareness

The benefits of a Human Rights Act can only be fully realized if people and agencies are aware of their rights and responsibilities under the legislation.

If there is a law it needs to be put in a way that kids get. (Girl, 16 years)

Public awareness should focus on informing people how relevant human rights are to their lives and that recourse to the courts is not necessary in order to assert human rights. People need to be given the information and skills to use the language of human rights in their day-to-day dealings with government agencies and others.

It’s so overwhelming when you don’t know what to do. (Girl, 17 years)

In response to the Victorian human rights community consultation, initiated by the Victorian Government in 1995, the Victorian Human Rights Consultation Committee stated that a broad-based community education strategy was critical so that a Human Rights Charter achieved its objectives of enhancing human rights for everyone. They held the view that wide-ranging human rights education and promotion is an important investment for the community and democracy.¹⁸

¹⁷ See *SI bhmf CC v K bhmf IS* [2005] ACTSC 125 (2 December 2005).

¹⁸ *Rights, Responsibilities and Respect – The Report of the Human Rights Consultation Committee*, State of Victoria Department of Justice, 2005, pp. 97-8.

The Committee also found that education strategies in schools, business and in the general community are vitally important for promoting a culture of respect for rights. In particular, they referred to a human rights teaching programme in Nova Scotia, Canada, which showed a positive impact on pupil behaviour, values and attitudes, including:

- Children showing higher self-esteem and feeling valued;
- Children perceiving greater levels of peer and teacher support;
- Children being more optimistic about their future;
- Teaching children's rights necessitated more democratic, egalitarian teaching styles; and
- A 'contagion' effect – learning about one's own rights results in support for the rights of others, including adults and teachers.¹⁹

An education campaign should also focus on making sure the rights of children and young people inform service delivery and policy making at all levels of government, the private and not-for-profit sectors. There is a need to improve understanding of how a rights-based framework can, and should, have practical application; putting child rights at the front of the agenda, and then basing policy and practice on them.

*We should be building policy and practice from values, not seeing values as a belated after-thought. And the first of our values should be children's rights. Our vision for children, the only acceptable basis of any national framework, should be their full enjoyment of all their fundamental human rights.*²⁰

We strongly support a broad-based human rights community education strategy, so that a Human Rights Act enhances human rights for all children and young people. This strategy should contain targeted campaigns for children and young people that are informed by their views on what works for them.

6.2.2 Improving children and young people's access to the legal system

A Human Rights Act that protects human rights and provides remedies to individuals is meaningless for many children and young people unless they have adequate access to legal advocacy support. The difficulties confronted by children and young people in accessing the legal system and legal advocacy support was comprehensively detailed in the Australian Law Reform Commission/Human Rights and Equal Opportunity Commission Report: *Seen and Heard: A Priority for children in the legal process* (ALRC Report No. 84, 1997).

As children and young people have difficulties in accessing the legal system, other mechanisms need to be put in place so that they benefit from a Human Rights Act. In particular, children and young people need greater access to specialist legal advocacy services which can assist them if they believe that their rights have been breached. Without such access, it is unlikely that children and young people would be able to avail themselves of any remedies to address breaches of their human rights.

6.2.3 Advocacy for children and young people

A number of children we spoke with suggested that human rights would be better protected if there were people who could listen to children and their families and talk to

¹⁹ I Massey, 'Developing a Rights-Based Culture in Schools', (2005) *BIHR BRIEF: The Newsletter of the British Institute of Human Rights*, 9, as quoted in *Rights, Responsibilities and Respect – The Report of the Human Rights Consultation Committee*, State of Victoria Department of Justice, 2005, p. 94.

²⁰ Sidoti, C., 'Advocacy and Leadership in Early Childhood Services: A Personal Reflection on Promoting Children's Rights', Presentation Early Childhood Australia Biennial Conference, Canberra, 5 October 2008, p. 11.

governments to make things better. Of course, this is one role of the Commissioners and Guardians. However, as young people said during our consultations:

There are obviously good things in place but we just don't know about them.
(Boy, 17 years)

Having someone to ask, somewhere to go, being able to understand them in your own language really helps.
(Boy, 16 years)

We need somewhere to voice our opinions, e.g. internet – could there be a better system where people can tell ideas and be listened to?
(Girl, 13 years)

Currently advocacy services for children and young people are provided in a very ad hoc manner. In various jurisdictions, Ombudsman offices and a range of similar complaints-handling bodies have taken steps to provide more accessible complaints procedures to children and young people. One example is by providing specialist youth officers, though with limited success. Most of these bodies are limited to dealing with complaints about public sector authorities and children and young people may need advocacy support to deal with a range of other organisations.

During consultations in the ACT on the establishment of a Children and Young People Commissioner, many young people felt that there was no point raising concerns about government services. As one young person said:

Because you never knew who you were speaking to or whether they had the power to do anything.

Young people said they wanted to share their stories and get support rather than making a formal complaint in writing or over the telephone.

Generally children and young people tell us that do not really want their complaint investigated or adjudicated over several months; they want their problem resolved now. Complaints procedures can not take the place of effective and adequate advocacy structures and mechanisms.

As the Victorian Human Rights Consultation Committee found, the effectiveness of a Human Rights Charter will be significantly diminished if there is not appropriate and accessible advocacy support for disadvantaged people.²¹ An essential ingredient of human rights protection for children and young people is for them to have access to advocacy support.

The WA Commissioner for Children and Young People has produced guidelines for agencies on how to make sure their complaints systems are accessible and responsive to children and young people. The guidelines are based on information provided by children and young people.

We believe that encouraging agencies to open themselves to the views and feedback of children and young people will enhance the agencies' service while realising children and

²¹ *Rights, Responsibilities and Respect – The Report of the Human Rights Consultation Committee*, State of Victoria Department of Justice, 2005, pp. 128-9.

young people's right to have a voice and to be heard.

[you'd feel] mixed emotions probably because one part of you might be going, 'uh oh am I going to get into trouble?' and the other part might be relief because, 'thank gosh somebody's actually doing something about it'.

I guess it's more about respect, their attitude. That they would actually consider the fact 'OK we will talk to these children', not 'OK go away, we'll get to you two months later'... we want the actual respect where they say 'Ok I'll make an appointment for you, we will take you seriously'

(Young people in complaints consultation)

Providing advocacy support for children and young people is not to diminish the role of parents. Indeed, as children and young people often tell us, their parents are the first people they turn to when they need help with a problem. Support for child advocates is in fact a critical part of supporting children in the complaints process.

However, some children and young people cannot turn to their parents. Parents themselves are sometimes let down by a lack of assistance, information, resources and opportunities to be good advocates for their children.

We suggest that education on human rights also includes education on how children and young people can better advocate for themselves and this should include supporting parents. It should also include education and support so that those working with children and young people have better knowledge and skills to advocate on their behalf.

6.2.4 An Australian Children's Commissioner

Related to the need for better advocacy for children and young people is the need for an Australian Children's Commissioner to promote the well-being of children and young people at a national level and regionally.

In 1997, the United Nations Committee on the Rights of the Child noted its concern:

*... about the absence of a comprehensive policy for children at the federal level. It is also concerned by the lack of monitoring mechanisms at federal and local levels. Such mechanisms are of essential importance for the evaluation and promotion of development of policies and programmes for the benefit of children.*²²

In 2002, this Committee called on governments around the world to appoint Commissioners for Children.²³

In subsequent reports to the Committee, Australia has reported on how it has developed these roles in individual state and territory jurisdictions, most of whom have established Children's Commissioners, Guardians or their equivalent. However there is still no national advocate within Australia's highest level of government or representing Australia in international spheres. The lack of a specific national advocate threatens the coherence of a framework for promoting children and young people's well-being and protecting their rights.²⁴ It also weakens children's advocacy within the Commonwealth jurisdiction and

²² CRC/C/15/Add.79: Concluding Observations of the Committee on the Rights of the Child: Australia 10/10/97 at point 9.

²³ CRC/GC/2002/2: General Comment No 2 "The role of independent national human rights institutions in the promotion and protection of the rights of the child" 2002.

²⁴ Stalford, H. (2005) "Constitutionalising Equality in the European Union: A Children's Rights Perspective", *International Journal of Discrimination and the Law*, Vol. 8, pp. 53-73.

Commonwealth government processes.

An Australian Children's Commissioner could:

- fulfil Australia's obligation to CRC for a national mechanism to monitor compliance with the Convention;
- establish a long term commitment to promoting children's well-being;
- co-ordinate the development of the consistent standards in areas such as out-of-home care and juvenile justice detention;
- facilitate the long term development of child-focussed policies and procedures;
- bridge government and non-government sectors and their impacts on children and young people
- represent the interests of Australia's children and young people in international forums.

7. Conclusion

We support the introduction of a Human Rights Act in Australia to better protect children and young people's human rights and improve their well-being.

However, such an Act will only go some way to improving children and young people's well-being. Other mechanisms needed are:

- increased community awareness and education;
- an improved understanding of children and young people's human rights as a framework for policy and service delivery;
- improved access to legal systems and advocacy services;
- the creation of an independent Australian Children's Commissioner; and
- vesting an agency with the power to enforce the provisions of the Act.

We also encourage the Australian Government to provide adequate resources to support meaningful engagement with children and young people about human rights. Giving children and young people the opportunity to participate, and taking on board their ideas, is at the core of recognising their human rights and improving their well-being. However, the issues relating to human rights are numerous and complex. For children and young people to actively engage in discussions about rights, appropriate participation mechanisms need to be developed and funded.