



1 June 2018

Ms Megan Mitchell
Children and Young People Commissioner
Australian Human Rights Commissioner
Via email to: kids@humanrights.gov.au

Dear Megan,

Australia's progress in implementing the United Nations Convention on the Rights of the Child

Thank you for your invitation to provide input to the Australian Human Rights Commission's submission to the United Nations Committee on the Rights of the Child.

A submission from the ACT Human Rights Commission is attached. In accordance with our jurisdiction, our submission focusses on notable developments and concerns in the Australian Capital Territory context. As requested, we have set these out against the listed clusters of relevant articles.

We note your intention to use the consultations and submissions to this process in preparing your 2018 statutory report to Parliament, as a 'state of the nation' report on child rights in Australia. We commend this approach as a vehicle for both giving greater coverage to the input received and continuing to keep children's rights in the focus of the legislature and the community.

If you have any questions or would like more detailed information on any of the matters raised in this submissions, please do not hesitate to contact us on (02) 6205 2222.

Yours sincerely,

Dr Helen Watchirs OAM
President and Human Rights Commissioner

Jodie Griffiths-Cook
Public Advocate and Children and Young People
Commissioner

AUSTRALIA'S PROGRESS IN IMPLEMENTING THE UNITED NATIONS CONVENTION ON THE RIGHTS OF CHILDREN -AUSTRALIAN CAPITAL TERRITORY-

GENERAL PRINCIPLES

Non-discrimination (art. 2)

Welcome developments

The ACT *Human Rights Act 2004* (HR Act) imposes direct obligations on ACT public authorities to act compatibly with the human rights protected in the Act, and to take relevant human rights into account in decision making (s 40B). Children and young people are entitled to all the human rights guaranteed under the HR Act. The HR Act also specifically provides in s 11(2) that 'every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind'. This is a right to special or positive measures, which also requires a higher standard to be adopted in relation to children and young people when the application of other human rights are considered. Section 31 of the HR Act recognises that international law can be used to interpret human rights, and is an important source of guidance as to the scope and meaning of rights protected in the HR Act. In this way, the UN Convention on the Rights of the Child assists to elucidate the content of rights protected in the HR Act where relevant to children and young people.

In 2016 the HR Act was amended to include the recognition of Aboriginal and Torres Strait Islander People's cultural rights in s27. Specifically listed are the rights to:

- (a) maintain, control, protect and develop their –
 - a. cultural, heritage and distinctive spiritual practices, observances, beliefs and teachings; and
 - b. languages and knowledge; and
 - c. kinship ties; and
- (b) have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

These cultural rights are recognised for all Aboriginal and Torres Strait Islander peoples, and as such include the cultural rights of Aboriginal and Torres Strait Islander children and young people.

Respect for the views of the child (art. 12)

Welcome developments

The ACT *Human Rights Commission Act 2005*, as amended in 2016, requires that the Children and Young People Commissioner, in exercising the commissioner's functions, must endeavour to—

- (a) consult with children and young people in ways that promote their participation in decision-making; and
- (b) listen to and seriously consider the views of children and young people; and
- (c) ensure that the commission is accessible to children and young people; and
- (d) be sensitive to the linguistically and culturally diverse backgrounds of children and young people.

In keeping with these legislated requirements, the ACT Children and Young People Commissioner has undertaken multiple consultations with the Territory's children and young people over the past five years; seeking, listening to and considering their views, and promoting these views to the public, policy makers and service providers. Such consultations have sought children and young people's views about:

- living in out-of-home residential care settings;
- life transitions and the most helpful sources of support during times of change;
- cultural competency in care and protection, from the perspective of Aboriginal young people;
- social exclusion and violent extremism;
- the environment and sustainability;
- child-safe, child-friendly organisations;
- children's rights; and
- participation in family court proceedings.

Key concerns

While the Children and Young People Commissioner has a legislated requirement to consult with children and young people, resource limitations mean that these consultations are small and infrequent. Coupled with the fact that participation by children and young people is neither a required nor mainstay element of policy and service development, the views of children and young people are vastly underrepresented in the ACT. This is with regard to both individual decisions that affect children and young people personally, and public policy as a whole.

Of particular concern, the ACT Public Advocate and Children and Young People Commissioner noted in the current reporting period that the views of children and young people are not sufficiently heard or prioritised in the family law system:

To ensure child-centred and child-safe practices, additional resources would need to be invested into training for all Family Law Court staff and the specialised recruitment of 'experts' with child-focused practice experience is required, particularly for key positions such as Child Representatives.¹

Children and young people are key stakeholders in the outcome of family court proceedings, however the structure of the family law system largely alienates their involvement. Family conflict, perceived or actual risks to the child/young person, legal jargon and process, and courtroom design all work against meaningfully engaging and respecting the views of children and young people. These barriers are only magnified in contexts of family violence, or the care and protection system, which often intersect with family law. It is a key area of concern in which respect for the views of children and young people, and the wellbeing of the child or young person, must be upheld and safeguarded.

CIVIL RIGHTS AND FREEDOMS

Measures to promote physical and psychological recovery and social reintegration of child victims (art. 39)

Key concerns

The absence of an adolescent mental health facility in the ACT is a longstanding concern. A high proportion of young people in the youth justice system have mental health conditions, cognitive disability, problematic drug or alcohol use, or a background of childhood trauma. Many have themselves been victims of crime, of family and domestic violence, or other forms of child abuse. The ACT continues to see young people

¹ Submission to the Australian Law Reform Commission's Review of the Family Law System, May 2018.

remanded in youth detention not for community protection or due to risk of reoffending, but for their own wellbeing or protection due to lack of other appropriate options.²

There is a shortage of therapeutic placement options for children and young people with complex high-level needs even when they are engaged with the care and protection system. Options are even more limited for children and young people outside the care and protection system. The inadequacy of existing 'measures to promote physical and psychological recovery and social reintegration of child victims' in the ACT is evident in the repeat cycling of individual young people through the youth justice system.

VIOLENCE AGAINST CHILDREN

Right to live free from all forms of violence, abuse and neglect (art. 19)

Welcome developments

Some progress has been made in the ACT towards recognising children and young people as victims in their own right, in the context of family violence. The prevailing discussion, which framed non-violent partners as primary victims and children and young people as secondary (unless directly assaulted), has shifted. Discussion is now informed by the body of evidence that shows that exposure to family violence has traumatic and lasting effects. Children and young people are victims as a result of living within the dynamics of family violence. Further, their perspectives, experiences and needs differ to those of the adult victims in their home.

In this context, in April 2018 the ACT Human Rights Commission (ACT HRC) welcomed and participated in an Extraordinary Meeting of the ACT Domestic Violence Prevention Council, specifically focussed on responses and interventions for children and young people exposed to family violence.

Key concerns

Children and young people in the ACT continue to be subjected to violence, abuse and neglect. In 2016-17, 158 children and young people were taken into care through the emergency action of the Director-General. In that same year, 63 appraisals were made regarding allegations of abuse of children already in out-of-home care. Of these, 48 related to children under the age of 12 years and 24 related to children five years or younger.³

Right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, including corporal punishment (arts. 37(a) and 28(2))

Welcome developments

The ACT HRC welcomed the Government's establishment of an Inspectorate of Custodial Services and notes that if, as flagged, the Inspectorate's remit is extended to Bimberi (the ACT youth detention facility), an additional layer of oversight of the application of this article will exist.

The ACT Government has flagged its intention to establish an Office of the Senior Practitioner (OSP) for the reduction and elimination of restrictive practices. Initially focussed on people with a disability, the remit of the OSP is intended to cover all people potentially subject to restrictive practices, including in schools and out-of-home care.⁴ If implemented well, the OSP will be an important mechanism in upholding the rights articulated in articles 37 and 28(2).

² Children and Young People Commissioner, March 2016, *Children and Young People with Complex Needs in the ACT Youth Justice System*.

³ ACT Human Rights Commission, *Annual Report 2016-2017*, pp 49 and 52.

⁴ <http://www.communityservices.act.gov.au/home/quality-complaints-and-regulation/office-of-the-senior-practitioner>

In 2017, inquiries conducted by members of the ACT Human Rights Commission established that a strip search procedure known as ‘squat and cough’ was being routinely conducted on detainees at the Bimberi youth detention facility. Given that this procedure had previously been identified as unlawful in the Commission’s 2005 Human Rights Audit of Quamby, serious concerns were raised and the practice was consequently discontinued.

Key concerns

Notwithstanding the above, following allegations brought through different avenues in 2016 and 2017, the ACT HRC began a Commission-Initiated-Consideration into Bimberi’s administration. Focussed on procedures and operations related to the safety and security of children and young people, staff training and responses to reportable incidents, the CIC is still ongoing.

Corporal punishment in the home remains legal in the ACT through the ‘reasonable chastisement’ defence. In the case of *LA v TC*, Chief Magistrate Walker found that the defence had been established in relation to an assault by a step-mother using ‘moderate force’ against a teenaged girl, noting the difficulty in determining the scope of ‘reasonable’ physical punishment. Her Honour highlighted the inconsistency of this common law defence with human rights obligations and the approaches taken in many other jurisdictions.⁵ The ACT HRC has made the case for change, noting that:

Having a clear legislative prohibition against the use of violence against children, including within the family, would be consistent with Australia’s obligations under the United Nations Convention on the Rights of the Child, and the right to protection in s 11 of the HR Act.⁶

FAMILY ENVIRONMENT AND ALTERNATIVE CARE

Children deprived of family environment (art. 20)

Welcome developments

In response to the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the care and protection system, the ACT Government has established a review that is currently underway. Encouragingly, the review is being overseen by a wholly Aboriginal and Torres Strait Islander Steering Committee and ‘conducted in accordance with the principles of self-determination’.⁷ This is a welcome acknowledgement of the principles underlying cultural rights and also the rights of children and young people deprived of their family environment.

Key concerns

In 2016-17, some 803 Territory children and young people were living in out-of-home care, an increase of 40% over the past five years. Notwithstanding the above welcome development, the underlying issue – the high rate of Aboriginal and Torres Strait Islander children and young people in care and protection – is an ongoing human rights concern. Twenty-eight percent of ACT children in out-of-home care are Aboriginal and Torres Strait Islander,⁸ despite Indigenous children making up only three per cent of the ACT’s child population.

The ACT HRC continues to monitor the implementation of *A Step Up For Our Kids*, the program under which provision of out-of-home care services has been contracted to a consortium of private providers. Concerns have been raised about the standard of care and safety within particular residential care houses, and

⁵ 14 December 2011 (CC 10/7532; CC 10/6854)

⁶ ACT Human Rights Commission, October 2017, Submission to the Standing Committee on Justice and Community Safety, Inquiry into Domestic and Family Violence – Policy approaches and responses, p. 7

⁷ https://www.strongfamilies.act.gov.au/__data/assets/pdf_file/0009/1188756/Our-Booris-Communique-and-Fact-Sheet.pdf

⁸ Australian Institute of Health and Welfare, *Child Protection Australia 2016-2017*, Table S43.

placement process.⁹ Concerns about system level flaws in the planning and implementation of transition supports as children and young people move beyond out-of-home care, coupled with individual complaints, have led the ACT HRC to commence a Commission-Initiated-Consideration in regard to transition arrangements.

As noted above, out-of-home care is not always a safe environment for children and young people. Abuse occurs; where reported or suspected this can be investigated, but oversight is not absolute.

DISABILITY, BASIC HEALTH AND WELFARE

Measures taken to ensure dignity, self-reliance and active participation in the community for children with disabilities (art 23)

Key concerns

Issues with the implementation of the National Disability Insurance Scheme in the ACT impact the fulfilment of this article. The ACT HRC has received numerous complaints regarding the NDIS, some of which concern children and young people. Issues include: not having sufficient funds approved to cover all the supports required; reductions of the funding amount previously approved, despite needs remaining unchanged or having increased; the provision of incorrect or conflicting information by the NDIA; and long administrative delays.¹⁰

The ACT provider market is currently unable to meet the level of demand for disability services, with long wait times for some therapeutic supports. This includes early intervention services that stand to significantly reduce some children and young people's needs for ongoing services or services later in life, if provided in a timely manner. There are insufficient supports for people with high and complex needs, and family members report 'often being advised by providers that they are unable to meet their needs'.¹¹

In addition, the ACT HRC is concerned that the NDIA has refused to engage with the Commission in the exercise of its complaint investigation functions. The NDIA has asserted that the ACT HRC does not have jurisdiction over the NDIA. This leaves NDIA participants living in the Territory who have a complaint about the NDIA itself without access to the complaints resolution functions that the HRC provides in relation to other disability services in the ACT.

EDUCATION, LEISURE AND CULTURAL ACTIVITIES

Right to education, including vocational training and guidance (art 28)

Key concerns

While the right to education for children and young people is explicitly recognised in the ACT *Human Rights Act 2004* (27A), fully realising that right requires further action. Over the five years from 2012-2017, 53 complaints were investigated by the ACT HRC pertaining to education matters.¹² Treatment of children and young people with disability by the education system was the dominant reason for the complaints (40% of complaints). Such complaints were most commonly about gaining access to education for students with disability, but also about the availability of supports and treatment within schools. Complaints about other forms of discrimination, primarily related to race, comprised nearly 20 per cent of education complaints.

⁹ ACT Human Rights Commission, *Annual Report 2016-2017*, p. 53.

¹⁰ ACT Human Rights Commission, Submission to the Legislative Assembly Inquiry into the Implementation, Performance and Governance of the National Disability Insurance Scheme in the ACT, March 2018.

¹¹ ACT Human Rights Commission, Submission to the Legislative Assembly Inquiry into the Implementation, Performance and Governance of the National Disability Insurance Scheme in the ACT, March 2018, p.7.

¹² ACT Human Rights Commission, Submission to The Future of Education, October 2017, p.3.

Clearly there is room for improvement in making sure the right to education is upheld for all ACT children and young people.

In 2015, the ACT HRC supported an expert panel to review policy and practice in all ACT schools with regard to students with complex needs and challenging behaviour. The report of the Expert Panel said "there is a small number of students with very challenging behaviour in the ACT school system who are currently not receiving an adequate education, as they cycle through repeated suspensions, are reduced to part time attendance, or are transferred between successive schools, with each struggling to meet their needs".¹³ The ACT has a history of struggling to develop effective education for children and young people with challenging behaviours. Previous attempts have failed, and previous recommendations in this area have not been implemented.¹⁴

The Expert Panel made 50 recommendations across areas including school culture and relationships, physical environments, student supports and services, leadership, collaboration and funding. Progress has been made in response to many of these recommendations. However at least 15 have not been implemented or fully implemented.¹⁵ Some of the critical reforms that still need to be implemented include:

- appropriate educational settings for primary school students with very challenging behaviours,
- alternative education options for students at risk of disengaging from secondary school,
- consultation and engagement with students.

The ACT HRC continues to be made aware of children and young people who are suspended from school, truant from school or who attend school irregularly. Children and young people in out-of-home care, those in contact with the youth justice system, and those who have experienced trauma, including through family violence, are particularly at risk of disengaging from education.

SPECIAL PROTECTION MEASURES

Cultural rights of children belonging to indigenous and minority groups (art. 30)

Welcome developments

As noted above in relation to the General Principles, the recognition of Aboriginal and Torres Strait Islander People's cultural rights within the ACT *Human Rights Act 2004* is a welcome protection for the cultural rights of children and young people in the ACT.

Key concerns

However, ensuring this right is upheld in practice requires ongoing advocacy. In relation to children and young people's education:

*Respecting culture within education requires forging deeper connections with Aboriginal and Torres Strait Islander families and community members and valuing and drawing upon their cultural expertise. It also means attracting and retaining more Aboriginal and Torres Strait Islander staff within schools. It is important that culture, and cultural perspectives are integrated into the curriculum and learning in every school, as well as celebrated through cultural events.*¹⁶

¹³ Report of the Expert Panel on Students with Complex Needs and Challenging Behaviour, 2015, Schools for All Children and Young People, p. 96.

¹⁴ Report of the Expert Panel on Students with Complex Needs and Challenging Behaviour, 2015, Schools for All Children and Young People, p. 96.

¹⁵ Schools for All: Executive Summary - May 2017, https://www.education.act.gov.au/__data/assets/pdf_file/0009/1095237/201808171SchoolsforAllExecutiveSummaryMay2017.pdf

¹⁶ ACT Human Rights Commission, Submission to The Future of Education, October 2017, p.8.

With respect to care and protection, upholding cultural rights includes implementing the Aboriginal and Torres Strait Islander Placement Principle in full: prevention, partnership, placement, participation and connections. As Aboriginal and Torres Strait Islander young people in out of home care have said:

“Supporting Aboriginal identity is more than just placing a child with an Aboriginal family.”

“You can make more of a difference by providing support to keep kids safe with their families... people need to think differently about how they first respond.”

“Aboriginal kids in care need to be together with their families. With Aboriginal culture, the oldest one is kind of like the mother or father figure and they have to look after the younger ones... it’s expected...”

It’s like repeating history over and over again... and if it’s not cut off, it’s just going to keep leaving scars.”¹⁷

Administration of juvenile justice (art 40), the existence of specialised and separate courts and the applicable minimum age of criminal responsibility

Welcome developments

The passage of the *Crimes Legislation Amendment Act 2018* has enabled the ACT Children’s Court to undertake circle sentencing for Aboriginal and Torres Strait Islander offenders in relation to particular matters. The Children’s Court is known as the Warrumbul Court when it is sitting to provide circle sentencing, and members of the Aboriginal and Torres Strait Islander community are integral to the process. This is a welcome development supporting the principle of article 40, which promotes a child or young person’s sense of dignity and worth, and the desirability of constructively reintegrating the child or young person in society.

Key concerns

The ACT Human Rights Commission continues to be concerned and to advocate for an increase in the minimum age of criminal responsibility in the ACT. Despite repeated calls to the ACT Government for review,¹⁸ and the concluding observations of the UN Committee on the Rights of the Child in 2012 calling for Australia to ‘consider raising the minimum age of criminal responsibility to an internationally acceptable level’, the legal age of responsibility in the ACT remains unacceptably low at 10 years of age.

As a result, children have been detained in Bimberi Youth Detention Facility, in some cases on multiple occasions. We consider that community based therapeutic protection facilities should be developed as a matter of urgency to meet the needs of children under 14 years of age who are using violence or becoming involved in other criminal activity, and who may otherwise be placed at Bimberi due to the lack of alternative options to meet their complex needs.

Concluding comments

Thank you again for the opportunity to provide input to the AHRC’s submission to the United Nations Committee on the Rights of the Child. While there have been a number of progressive developments within the ACT jurisdiction, there remains a need for continued efforts to fully realise the rights of children and young people in all aspects of community life, in particular to ensure the views of children and young people themselves contribute to decision-making in respect of matters that impact their lives.

¹⁷ Public Advocate and Children and Young People Commissioner, Consultation on Cultural Competency in Care and Protection, presented at the Child Aware Conference, Brisbane, 2017.

¹⁸ The ACT Human Rights Commission most recently wrote to the ACT Attorney-General, the Minister for Justice and the Minister for Disability, Children and Youth about this matter on 8 December 2017.