

Legal Affairs and Community Safety Committee

Human Rights Bill 2018

Children and Young People with Disability Australia

Submission – November 2018

INTRODUCTION

Children and Young People with Disability Australia (CYDA) applauds the Queensland Government's decision to introduce the *Human Rights Bill 2018*¹ (the Bill). It is a welcome and positive step towards strengthening the State's ability to acknowledge, respect and protect human rights.

CYDA thanks the Committee for the opportunity to provide feedback to this inquiry and can be contacted if you wish to discuss any of the matters raised in this submission further.

This submission will provide general comment and specific feedback on particular clauses of the Bill.

CHILDREN AND YOUNG PEOPLE WITH DISABILITY AUSTRALIA

CYDA is the national representative organisation for children and young people with disability, aged 0 to 25 years. The organisation is primarily funded through the Department of Social Services and is a not for profit organisation. CYDA has a national membership of 5300 and a growing social media presence with 22 500 followers across the three major platforms of Facebook, Twitter and LinkedIn.

CYDA provides a link between the direct experiences of children and young people with disability to federal government and other key stakeholders. This link is essential for the creation of a true appreciation of the experiences and challenges faced by children and young people with disability.

CYDA's vision is that children and young people with disability living in Australia are afforded every opportunity to thrive, achieve their potential and that their rights and interests as individuals, members of a family and their community are met.

CYDA's purpose is to advocate systemically at the national level for the rights and interests of all children and young people with disability living in Australia and it undertakes the following to achieve its purpose:

- **Listen and respond** to the voices and experiences of children and young people with disability;
- **Advocate** for children and young people with disability for equal opportunities, participation and inclusion in the Australian community;
- **Educate** national public policy makers and the broader community about the experiences of children and young people with disability;
- **Inform** children and young people with disability, their families and care givers about their citizenship rights and entitlements; and
- **Celebrate** the successes and achievements of children and young people with disability.

¹ *Human Rights Bill 2018* (Qld)

GENERAL COMMENTS

Specific Recognition of the Rights of People with Disability

CYDA believes it is critical that this Bill include a specific clause recognising the rights of people with disability.

As a State Party to the *Convention on the Rights of People with Disabilities 2006 (CRPD)*², Australia has an obligation to ensure the rights of people with disability are afforded. These obligations should be reflected in the current Bill.

The inclusion of a specific clause will help strengthen efforts to uphold the rights set out in the CRPD through enhanced protections as well as by facilitating public recognition, understanding and respect for the rights of people with disability, including children and young people.

Recommendation 1: *The Bill is amended to include a clause which specifically recognises the rights of people with disability, including children and young people, which aligns with the CRPD.*

SPECIFIC FEEDBACK

Economic, social and cultural rights

The Right to Education

CYDA strongly supports the inclusion of a right to education in this Bill. However, CYDA has serious concerns relating to the wording of clause 36 and its inconsistency with Australia's obligations under the CRPD.

Subclause (1) currently provides for the right of every child to access primary and secondary education 'appropriate to the child's needs'. In CYDA's view, the use of this qualifying term is inappropriate as it will create different expectations and rights for individual students, based on assumptions about what will be appropriate for a child's needs.

Australia is a very ableist community. Ableism involves discriminatory attitudes and practices arising from the perception that a person who experiences disability is in some sense inferior to a person who does not experience disability. Ableism is to disability what racism or sexism is to ethnicity and gender.

Ableism is evident in the Australian education system, which has a deeply entrenched culture of low expectations regarding students with disability. The value of education, which is so highly thought of and applied to children without disability, is often seen as inapplicable or irrelevant for students with disability. As a consequence, the unacceptable becomes acceptable and is legitimised. Further, poor educational attainment is often attributed to the impact of disability.

In this context, CYDA maintains that rather than acting to protect the rights of students with disability, this subclause could act to justify and further embed discriminatory practices, experiences and outcomes in education for children and young people with disability.

Finally, CYDA is concerned that the right to education, as articulated in this clause, does not specifically mention or reflect the right to inclusive education as set out in the CRPD³ and further

² United Nations General Assembly 2006, *Convention on the Rights of Persons with Disabilities*, <https://bit.ly/1qmcT8Z>.

³ Ibid, Article 24.

defined by *United Nations General Comment No. 4, Article: Right to inclusive education*⁴ (General Comment No.4). As a State Party to the CRPD, Australia and by extension Queensland, have an obligation to ensure the right to an inclusive education is upheld for children and young people with disability.

CYDA acknowledges and welcomes the Queensland Government's commitment to inclusive education consistent with General Comment No. 4 as outlined in its Inclusive Education Policy⁵.

A clear and explicit articulation of the right to an inclusive education consistent with General Comment No. 4 is therefore not only essential to ensuring Australia meets its human rights obligations, it will also reinforce and support existing Queensland policy.

Recommendation 2: *Subclause 36(1) is amended to remove the qualifying term 'appropriate to the child's needs'.*

Recommendation 3: *Clause 36 is amended to include the right to inclusive education consistent with the CRPD and General Comment No. 4.*

Scrutiny of new legislation

Statements of Compatibility

While CYDA acknowledges the Queensland Government has chosen to adopt a 'regulatory' or 'dialogue' model of human rights protection, the lack of enforcement mechanisms under this Division remains concerning. For example, CYDA notes that under subclause 38(4), statements of compatibility are not binding on any court or tribunal. Nor will a failure to adhere to the procedures set out in this Bill impact the validity of an Act, a non-Queensland law or subordinate legislation⁶.

CYDA is concerned that a lack of accountability and enforcement mechanisms, in relation to the scrutiny of legislation, risks undermining the ability of this Bill to ensure human rights are upheld and critical cultural change takes place.

Override declarations

Clause 43

This clause allows Parliament to expressly declare that an Act or a provision of an Act has effect despite being incompatible with one or more human rights. Subclause (4) clarifies that this section would only be used in 'exceptional circumstances' such as war or a state of emergency.

CYDA maintains that this clause should be amended to broadly align with provisions under the *International Covenant on Civil and Political Rights 1966* (ICCPR) regarding States Parties ability to take measures derogating from their human rights obligations in times of public emergency⁷. Article 4 of the ICCPR clearly indicates that there are certain rights that States Parties must uphold in all circumstances⁸.

⁴ United Nations Committee on the Rights of Persons with Disabilities 2016, *General comment No. 4, Article 24: Right to inclusive education*, CRPD/C/GC/4, viewed 21 November 2018, <https://bit.ly/2zjIArI>

⁵ Department of Education 2018, *Inclusive Education Policy*, Government of Queensland, Brisbane, viewed 21 November 2018, <https://bit.ly/2OmGE63>

⁶ *Human Rights Bill 2018* (Qld), clause 42.

⁷ United Nations General Assembly 1966, *International Covenant on Civil and Political Rights*, <https://bit.ly/2LIaXD>, Article 4.

⁸ *Ibid*, Article 4(2).

CYDA therefore believes clause 43 should be amended to explicitly state that the Parliament will not have the ability to provide an override declaration in relation to certain rights. In line with article 4 of the ICCPR, this should include:

- Clause 15 – Recognition and equality before the law;
- Clause 16 - The right to life;
- Clause 17 – Protection from torture and cruel, inhumane or degrading treatment or punishment;
- Clause 18 – Freedom from forced work;
- Clause 20 – Freedom of thought, conscience, religion and belief; and
- Clause 29 – Right to liberty and security of the person.

Recommendation 4: Clause 43 is amended to exclude specific rights in line with article 4 of the ICCPR.

Interpretation of laws

Declaration of incompatibility

Under subclause 53(2), the Supreme Court can make a declaration stating the court is of the opinion that the statutory provision in question cannot be interpreted in a way that is compatible with human rights. However, the declaration has no effect on the validity of the statutory provision and does not create a legal right or give rise to any civil cause of action⁹. Further, beyond requiring the relevant Minister to formally respond to the declaration¹⁰, there appear to be few consequences for Government if they fail to amend the provision and ensure it is compatible with human rights.

CYDA is concerned that a lack of enforcement mechanisms undermines the capacity of the Bill to effect change.

Obligations on public entities

Remedies

CYDA is of the view that the lack of a stand-alone cause of action under clause 59 will make it very difficult for individuals to seek remedies and relief on the grounds that a public entity has acted unlawfully under clause 58.

The Bill provides only that a remedy for the breach of human rights may be sought where a person has an existing right to seek remedy or relief, other than because the action or decision was unlawful under clause 58¹¹. This is referred to as a ‘piggy-back’ cause of action. As noted in the Department of Justice and Attorney General Briefing Paper¹², this broadly aligns with the *Charter of Human Rights and Responsibilities 2006 (Vic)* (the Victorian Charter)¹³.

Feedback from young Victorians with disability and families indicates that the lack of a stand-alone cause of action under the Victorian Charter has made accessing remedies an extremely difficult,

⁹ *Human Rights Bill 2018 (Qld)*, clause 54.

¹⁰ *Ibid*, clause 56.

¹¹ *Ibid*, clause 58 and clause 59.

¹² Department of Justice and Attorney General 2018, *Brief to the Legal Affairs and Community Safety Committee: Human Rights Bill 2018*, Parliament of Queensland, Brisbane, viewed 22 November 2018, <https://bit.ly/2qWt4MM>, p. 3.

¹³ *Charter of Human Rights and Responsibilities 2006 (Vic)*, clause 39.

frustrating and convoluted process which often prevents people from ensuring their rights are upheld.

The Victorian experience, as reported to CYDA, also demonstrates that the absence of strong, enforceable consequences for unlawful actions has not resulted in significant cultural change among public entities. For example, CYDA regularly receives reports of children and young people in Victoria whose rights have been denied by government schools.

These issues were acknowledged and addressed in 'Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities'¹⁴ (the Report). The Report found that unless the Victorian Charter was amended, the system would continue to present key problems including: a lack of consequences necessary to drive behavioural change; a focus on government administration rather than a remedy for the individual; and significant barriers to accessing justice¹⁵.

Further, the Report noted that the use of the 'piggy back' cause of action resulted in complex litigation where people could 'only argue human rights issues in convoluted ways that raise difficult jurisdictional issues' and are also 'likely to end up in Supreme Court'¹⁶.

In response to these issues, the Report made a number of recommendations including:

- *'amending the Charter to enable a person who claims a public authority has acted incompatibly with their human rights, in breach of section 38 of the Charter, to either apply to the Victorian Civil and Administrative Tribunal for a remedy, or rely on the Charter in any legal proceedings';¹⁷ and*
- *'amending the Charter to make it clear that a person who claims that a decision of a public authority is incompatible with human rights, or was made without proper consideration of relevant human rights, can seek judicial review of that decision on the ground that the decision is unlawful under the Charter, without having to seek review on any other ground.'*

As this Bill and the Victorian Charter are aligned in relation to remedies, CYDA believes that serious consideration should be given to the learnings from this Report. It is therefore CYDA's view that the Bill should be strengthened in line with the Report's recommendations to ensure similar issues do not arise in Queensland.

Recommendation 5: *That the Bill is amended to provide for a stand-alone cause of action for people who claim that a public entity has acted unlawfully under clause 58.*

¹⁴ Young, M.B 2015, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities, Summary Report*, Department of Justice, Melbourne, viewed 23 November 2018, <https://bit.ly/2OXAaKH>.

¹⁵ Ibid, p.10-11.

¹⁶ Ibid, p. 11.

¹⁷ Ibid, p. 13.

Human rights complaints

Clause 64

CYDA believes that the term 'agent of the individual' under subclause (1)(b) lacks clarity and that a definition of the term should be provided.

In addition, it appears from the wording of clause 64, that a systemic human rights complaint could not be made to the commissioner under this Bill. CYDA believes this could be further clarified and that consideration should be given to allowing organisations and others to raise systemic complaints with the commissioner as a means of facilitating broader, system wide change.

Clauses 69 and 70

Under clause 69 the commissioner 'must' refuse to deal with particular complaints which it considers to be 'trivial, vexatious, misconceived or lacking in substance'. Additionally, clause 70 provides that the commissioner 'may' refuse to deal or continue to deal, or defer dealing, with a complaint under certain circumstances. For example, if the commissioner considers that the complaint has been appropriately dealt with by another entity¹⁸.

From available information, it appears as though there is no explicit process set out for appealing a decision made by the commissioner under these sections. CYDA maintains it is critical to ensuring fair process, that a decision by the commissioner to not deal with a complaint can be appealed/reviewed.

Conciliation of human rights complaints

Clause 82

Subclause (2) provides for a complainant to be accompanied by a support person, with the consent of the commissioner. CYDA believes that 'support person' currently lacks clarity and a definition of the term should be included in this clause.

Clause 83

Under this clause, people may be represented by another person at the conciliation conference. CYDA understands from the Department of Justice and Attorney General Briefing Paper¹⁹ that this includes legal representation.

CYDA is aware through feedback from young people with disability, families and advocates that the use of legal representation in similar circumstances by government departments and agencies can often undermine procedural fairness. Experiences reported to CYDA include government departments sending multiple lawyers to attend dispute resolution where the complainant was representing themselves. This is reported to CYDA as an incredibly intimidating experience which create significant power imbalances. Many people undertaking the conciliation process will not have the resources to access legal representation.

¹⁸ Ibid, clause 70(1)(b).

¹⁹ Department of Justice and Attorney General 2018, *Brief to the Legal Affairs and Community Safety Committee: Human Rights Bill 2018*, Parliament of Queensland, Brisbane, viewed 22 November 2018, <https://bit.ly/2qWt4MM>, p. 4.

To ensure a fair process, it is critical that consideration is given under subclause 83(2) to the impact of allowing public entities to engage legal representation, including representatives from internal legal departments, on the complainant and the conciliation process.

Action on dealing with human rights complaints

Clause 88 and 89

An obligation is created under subclause 88(2) for the commissioner to prepare a report about unresolved human rights complaints 'as soon as practicable after the commissioner has finished dealing with the complaint'. Subclause 88(5) provides that a copy of the report must be provided to the complainant and the respondent.

Similarly, clause 89 provides for an obligation in relation to the preparation and provision of a 'notice' regarding resolved human rights complaints to complainants and respondents 'as soon as practicable'.

CYDA notes that the term 'as soon as practicable' lacks clarity. Feedback from young people with disability and families indicates that the use of clear timeframes is critical to ensuring prompt action and providing certainty for all involved.

Recommendation 6: *That clause 88 and clause 89 are amended to include clear timeframes for the provision of reports and notices to complainants and respondents.*

Commissioner's Power to Direct Action

From information available in the Bill and Explanatory Memorandum, it appears the commissioner does not have the power to direct public entities to take action either as a part of, or separate to, the conciliation process. Further, the Bill appears not to include any processes or consequences if public entities fail to implement actions they have agreed to during the conciliation process.

Without clear enforcement mechanisms and without clear consequences for failing to adhere to agreements made during conciliation, CYDA is of the view that this could limit incentives for public entities to change their practices.

At a minimum, CYDA believes that clause 91 should be amended to clearly include an obligation to report on public entities who have failed to adhere to commitments made during conciliation.

Recommendation 7: *That clause 91 is amended to include an obligation to include information regarding entities that have failed to adhere to actions agreed to during conciliation as part of reporting requirements.*

SUMMARY OF RECCOMENDATIONS

Recommendation 1: The Bill is amended to include a clause which specifically recognises the rights of people with disability, including children and young people, which aligns with the CRPD.

Recommendation 2: Subclause 36(1) is amended to remove the qualifying term ‘appropriate to the child’s needs’.

Recommendation 3: Clause 36 is amended to include the right to inclusive education consistent with the CRPD and General Comment No. 4.

Recommendation 4: Clause 43 is amended to exclude specific rights in line with article 4 of the ICCPR.

Recommendation 5: That the Bill is amended to provide for a stand-alone cause of action for people who claim that a public entity has acted unlawfully under clause 58.

Recommendation 6: That clause 88 and clause 89 are amended to include clear timeframes for the provision of reports and notices to complainants and respondents.

Recommendation 7: That clause 91 is amended to include an obligation to include information regarding entities that have failed to adhere to actions agreed to during conciliation as part of reporting requirements.

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