



Human Rights Inquiry

Submission to the Legal Affairs and Community Safety Committee, Queensland Parliament

18 April 2016

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About UNICEF Australia

1. UNICEF is a multilateral organisation that works in over 190 countries to promote and protect the rights of children. UNICEF supports child health and nutrition, clean water and sanitation, quality basic education for all boys and girls, and the protection of children from violence, exploitation, abuse and HIV. UNICEF is unique among world organisations in our rights based and participatory approach to working with children and young people.
2. UNICEF Australia is a national committee of UNICEF which advocates for the rights of all children and works to improve public and government support for child rights and international development.

Executive summary

3. UNICEF Australia is pleased to provide a submission to the Legal Affairs and Community Safety Committee's Human Rights Inquiry. Public discussion about human rights and how they can best be protected is a welcome development and this is an important issue for Queensland, as it is for all communities.
4. Childhood is a unique stage of human development which creates certain vulnerabilities and dependencies. At the same time, children are agents in their own right, are entitled to participate in decisions which affect their lives and should be respected and active citizens in the communities in which they live. This is reflected in the *Convention on the Rights of the Child* (CRC) which is the fundamental articulation of the rights of children at international law. It sets out the rights that must be realised for children to survive, develop and realise their full potential and enjoy respect, dignity, equality and fairness.
5. Australia ratified the CRC in December 1991. Article 4 of the CRC states:
States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.
6. UNICEF Australia therefore submits that all governments, including the Queensland Government, should ensure that human rights, including the rights of the child as

outlined in the CRC, are duly incorporated in domestic law. This could be done through the adoption of a human rights act. UNICEF Australia submits that children in Queensland, alongside the community as a whole, would stand to benefit from the introduction of a human rights act. This is particularly so in the event that such a human rights act was to include economic, social and cultural rights, such as rights to housing, education and health.

7. UNICEF Australia has had the benefit of reviewing the submission that the Human Rights Law Centre (HRLC) has made to the Legal Affairs and Community Safety Committee's Human Rights Inquiry. **That submission is endorsed by UNICEF Australia.**
8. This submission seeks to expand upon some of the specific benefits that children in Queensland would be expected to experience through the enactment of a human rights act. Apart from several general recommendations, this submission does not seek to make detailed recommendations about the mechanisms which should be included in a human rights act, or a preferred model.
9. The current inquiry presents an opportunity for Queensland to benefit from the experiences of other jurisdictions including Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Charter) and the Australian Capital Territory's *Human Rights Act 2004* (ACT). A number of reviews have been conducted into the successes and shortcomings of these acts and these reviews have made recommendations for improvement. Queensland is in a unique position to benefit from the experiences of other jurisdictions and develop a clearer, more comprehensive and coherent human rights act from its introduction. In turn, Queensland would contribute to the advancement of human rights across Australia through becoming the third jurisdiction to contribute to an important body of law, policy, practice and jurisprudence which seeks to uphold the rights of every person. Perhaps more importantly, a human rights act could help ensure that children in Queensland grow up safe, healthy and reach their full potential in communities which uphold principles of respect, equality, dignity and fairness.
10. Although it is UNICEF Australia's view that there is compelling evidence and reasoning to support the recommendation that a human rights act be introduced in Queensland, should the Committee determine that a human rights act should not be recommended at this point in time, other actions can and should be taken by the

Queensland Government to help promote and protect the human rights of the people of Queensland in the more immediate future.

Recommendations

UNICEF Australia makes the following recommendations:

Recommendation 1: That the Committee recommend it is appropriate and desirable to **legislate for a human rights act.**

In doing so, UNICEF Australia further recommends:

- 1) That the Queensland Government **ensures accessible, open, inclusive participation and consultation** to draft a human rights act for Queensland, and that the same be required for any subsequent review(s) of the human rights act, if legislated. This should include broad consultation (including outreach) with communities, civil society, academia, businesses, people from groups that are particularly at risk of marginalisation and vulnerability, such as children and young people, people with disability, Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse communities and LGBTI communities.
- 2) That a human rights act:
 - a) **is inclusive of economic, social and cultural rights** to the fullest extent possible. As a minimum, a human rights act should promote and protect the following:
 - The right to an adequate standard of living – including adequate food, clothing and housing;
 - The right to enjoyment of the highest attainable standard of physical and mental health; and
 - The right to education.
 - b) **includes specific mention of the *Convention on the Rights of the Child*** and the rights articulated in it, including specifically, respect for the views of the child (article 12), the best interests of the child as a primary consideration (article 3), the right to non-discrimination (article 2) and the right to life, survival and development (article 6).
 - c) **includes**, in addition to the civil and political rights frequently included in human rights acts, the **right to birth registration**, as expressed in article 24 (2) of the ICCPR and article 7 of the CRC – noting that this has been omitted in the Acts in the ACT and Victoria.
 - d) **includes the right to self-determination of Aboriginal and Torres Strait Islander peoples.**

- e) **makes effective remedies available** to all people, including children, for breaches of human rights.
- f) ensures that all measures to protect and promote international human rights (whether through a human rights act or otherwise), including **statements of compatibility and parliamentary scrutiny mechanisms**, consider and seek to protect, promote and fulfil the rights outlined in the international human rights treaties to which Australia is a party.
- g) **apply to private entities performing duties of a public nature and include an 'opt in' mechanism.**

Recommendation 2: that regardless of whether the Committee accepts recommendation 1, the Queensland Government should take immediate steps to:

- 1) Invest in holistic legal and social services to ensure availability for all children, particularly those in regional, remote and rural areas.
- 2) Invest in human rights education for children and young people, families, public servants and the private sector.
- 3) Adopt a child-rights based approach to the current youth justice reforms. In particular, reforms should ensure that 17 year olds should are not kept in adult correctional facilities and the *Youth Justice Act 1992* (QLD) should be amended to provide a definition of child as all people below the age of 18 years of age.
- 4) Review and reform school suspension and exclusion provisions under the *Education (General Provisions) Act 2006* (Qld). In cases where school principals suspend or exclude children based on a charge or conviction, parents or guardians should be informed of their right to appeal, and be supported to draft an appeal, by a designated senior school counsellor. The appeal should be considered by an appropriate and independent departmental staffer, rather than the school principal responsible for the decision.
- 5) Prohibit the use of corporal punishment.

Chief guiding instruments

11. UNICEF Australia's submission is informed by the following human rights instruments:

- *Convention on the Rights of the Child 1990* (CRC);
- *Declaration on the Rights of the Child 1959*;
- *Universal Declaration of Human Rights 1948*;
- *International Covenant on Civil and Political Rights 1966* (ICCPR);
- *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR);

- *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 2002;*
- *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2002;*
- *Optional Protocol to the Convention on the Rights of the Child on Communications Procedure 2011;* and
- *United Nations Declaration on the Rights of Indigenous Peoples 2007.*

Key concerns regarding children in Australia

12. Although many children in Australia have their rights promoted, protected and fulfilled, simultaneously, a significant number of children across Australia are falling behind their peers against key international measures. UNICEF's *Report Card 13, Fairness for Children: A league table of inequality in child well-being in rich countries*, published in April 2016 by the UNICEF Office of Research – Innocenti, ranks 41 EU and OECD countries according to how far children at the bottom of the distribution fall below their peers in the middle. The report looks at bottom end inequality of income, educational achievement, self-reported health and life satisfaction.¹ Australia ranked comparatively poorly in relation to both health and education, with Australia ranking 27 out of 35² and 24 out of 37³ respectively. As such, it is evident that a significant number of children across Australia are not enjoying the outcomes that they should, particularly given the economic conditions Australia has enjoyed in recent years.

13. Additionally, ACOSS research has recently found that an estimated 2.5 million Australians are living below the internationally accepted poverty line, including some 602,604 children (17.7% of all children).⁴

14. Additionally, in 2012 when Australia was examined by the UN Committee on the Rights of the Child, the Committee expressed concern regarding the following:⁵

- The principle of best interests of the child is not widely known, appropriately integrated and applied;

¹ UNICEF Office of Research (2016). 'Fairness for Children: A league table of inequality in child well-being in rich countries', Innocenti Report Card 13, UNICEF Office of Research – Innocenti, Florence.

² *Ibid*, p. 8.

³ *Ibid*, p. 6.

⁴ Australian Council of Social Services (ACOSS) Poverty Report 2014, accessed 15 April 2016 at <http://www.acoss.org.au/poverty-2/>.

⁵ Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia, UN Doc. CRC/C/AUS/CO/4 (28 August 2012).

- There has been inadequate avenues for taking into account the views of children, particularly Aboriginal and Torres Strait Islander children;
- Discrimination, particularly faced by Aboriginal and Torres Strait Islander children and also on the basis of sexual orientation and gender identity;
- Barriers to birth registration and to obtaining a birth certificate;
- The significant increase in numbers of children placed in out of home care, particularly Aboriginal and Torres Strait Islander children;
- Children not being allowed to assemble peacefully;
- Policies and procedures affecting asylum seeking and refugee children;
- Corporal punishment being allowed in some circumstances;
- The administration of juvenile justice and lack of conformity with international standards;
- High levels of violence against women and children;
- Health disparities, particularly of children in rural and remote areas, children with disabilities, Aboriginal and Torres Strait Islander children and children in out of home care;
- Insufficient funding for mental health services; and
- Inadequate care and education for children under four years of age and services being unaffordable for families.

15. Specifically in relation to Queensland, the youth justice system has also raised many concerns due to its inconsistencies with the rights of the child. The UN Committee on the Rights of the Child has repeatedly expressed concern about Queensland's criminal justice system and has called for 17 year olds to be removed from the adult criminal justice system,⁶ as has UNICEF Australia⁷ and the Australian Child Rights Taskforce.⁸ The Committee has also expressed concern about children being held in adult correction centres.⁹ That 17 year olds are treated as adults by virtue of the *Youth Justice Act 1992 (QLD)*¹⁰ is fundamentally inconsistent with the *Convention on*

⁶ UN Committee on the Rights of the Child 2005, *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 40th session, UN Doc. CRC/C/15/Add.268 (20 October 2005), [74], UN Committee on the Rights of the Child 2012, *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 60th sess, CRC/C/AUS/CO/4 (28 August, 2012), [84].

⁷ UNICEF Australia, letter to the Legal Affairs and Community Safety Committee re *Youth Justice and Other Legislation Amendment Bill 2015* (22 January 2016), available at: <https://www.parliament.qld.gov.au/documents/committees/LACSC/2015/11-YouthJusticeAOLAB15/submissions/018.pdf>.

⁸ Australian Child Rights Taskforce, *Listen To Children* (2011), accessed 15 April 2016 at <<http://www.unicef.org.au/Upload/UNICEF/Media/Documents/ListenToChildren2011report.pdf>>.

⁹ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia*, UN Doc. CRC/C/AUS/CO/4 (28 August 2012).

¹⁰ For example, Schedule 4, Dictionary, of the *Youth Justice Act 1992 (Qld)* states “child means (a) a person who has not turned 17 years; or (b) after a day fixed under section 6 a person who has not turned 18 years”.

the Rights of the Child, which defines a child as every human being below the age of 18, unless majority is attained earlier.¹¹

16. Although a number of the trends noted above are national, it is likely that children in Queensland are affected by many of the same issues. For example, the Australian Institute of Health and Welfare has indicated that, in Queensland, although Aboriginal and Torres Strait Islander children constitute only 8% of the state's population, they make up more than half (53%) of children in youth justice supervision.¹² This level was, in fact, higher than the national average of 45%, indicating that the level of over-representation of Aboriginal and Torres Strait Islander children in supervision is more pronounced in Queensland than in most other states and territories.¹³

17. In 2014, UNICEF Australia's Young Ambassadors conducted consultations with children and young people across Australia and recorded what they heard in a report called *Things That Matter*.¹⁴ Through such consultations the Young Ambassadors heard from a number of children from Queensland who responded to the following questions:

What is important to you? Why?

"Education because if you are educated this sets you up for a bright future." - Year 6 student, QLD¹⁵

"My family and friends and health. To be a better person." - Year 6 student, QLD¹⁶

"My family, friends, health and welfare, the safety of myself and others, social, political and economic justice, equal rights for all people, and environmental protection. These things are important because I want to live in a world where all people feel safe and loved, and on a planet that is being cared for. I know this isn't a reality, but I would love to be able to help change that." - Vivi, 12, QLD¹⁷

What worries you?

"The thing that worries me is that there are too many cars coming in and out, so when I am playing there I am scared that a car will come." - Jacob, 9, QLD¹⁸

¹¹ Article 2, CRC.

¹² Australian Institute of Health and Welfare, *Queensland: Youth justice supervision in 2013-14*, accessed 13 April 2016 < <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129550837> > p. 2.

¹³ Ibid.

¹⁴ UNICEF Australia Young Ambassadors, *Things That Matter*, November 2014, accessed 13 April 2016 <http://www.unicef.org.au/Upload/UNICEF/Media/Documents/UNICEF-Australia-Things-That-Matter.pdf> (Things That Matter).

¹⁵ Ibid, p. 10.

¹⁶ Ibid, p. 11.

¹⁷ Ibid, p. 14.

¹⁸ Ibid, p. 28.

“I’m worried about the kids that don’t have enough money in their families to get a proper education.” - Cait, 14, QLD¹⁹

18. It is clear from these studies, observations and the voices of children in Queensland themselves, that children across Australia would benefit from frameworks that seek to ensure their human rights, including economic, social and cultural rights, are fulfilled in practice.

The benefit of a human rights act for children in Queensland

19. With regard to Victoria and the ACT in particular, the Human Rights Law Centre has observed that human rights acts in those jurisdictions have resulted in numerous benefits, including:²⁰

- (a) improving law making and government policy;
- (b) improving public service delivery;
- (c) protecting marginalised people by addressing disadvantage;
- (d) contributing to the development of a human rights culture;
- (e) creating and adding economic value;
- (f) assisting to fulfil Australia’s human rights obligations; and
- (g) 'bringing rights home' by enabling human rights complaints to be heard and determined within the state.

20. UNICEF Australia has had the benefit of reviewing the submission that the HRLC has made to the Legal Affairs and Community Safety Committee’s Human Rights Inquiry²¹ and UNICEF Australia endorses that submission.

21. *A Human Rights Act for Queensland* has also helpfully provided compelling examples of how human rights acts benefit many members of the community.²² In relation to children and young people in particular, there are illustrative examples of how the Victorian Charter has:²³

- effectively protected a girl who experienced abuse from giving evidence against the alleged perpetrators;

¹⁹ Ibid, p. 38.

²⁰ Emily Howie, Human Rights Law Centre, *It’s time for a Queensland Human Rights Act – Submission to the Legal Affairs and Community Safety Committee’s Human Rights Inquiry* (24 March 2016), p. 2-3.

²¹ See Emily Howie, Human Rights Law Centre, *It’s time for a Queensland Human Rights Act – Submission to the Legal Affairs and Community Safety Committee’s Human Rights Inquiry* (24 March 2016).

²² *A Human Rights Act for Queensland*, accessed 13 April 2016 at <<http://www.humanrights4qld.com.au/resources>>

²³ Ibid.

- helped a boy with a learning disability to access the supports required for him to stay in school; and
- helped protect the right to housing of a young woman and her three younger siblings after the death of her father and incarceration of her mother.

22. In addition to these, UNICEF Australia has listed additional examples of how a human rights act could assist children in Queensland at Appendix 1, namely, through:

- helping siblings stay together, receive the care of their family and be connected to culture;
- ensuring the youth justice system adopts a child rights based approach; and
- realising a child's right to birth registration.

23. These examples are indicative of the types of benefits that would be expected to flow to the children of Queensland through a human rights act. They are in no way exclusive and UNICEF Australia would expect to see numerous other ways and means that a human rights act would stand to benefit children in Queensland, their families, carers and communities.

The need to strengthen human rights protections through domestic legislation

24. The *Convention on the Rights of the Child*, and the *Declaration on the Rights of the Child* before it, was developed in the recognition that children require special safeguards, care, legal protection and provision to ensure they can survive, develop and reach their full potential.²⁴

25. The legal frameworks existing at the federal, state and territory levels across Australia are, however, insufficient to ensure that all members of the community, children included, have their rights protected, promoted and realised in practice. This was observed by the National Human Rights Consultation Committee in 2009 when, after extensive consultation and consideration, it concluded that "there is a patchwork of human rights protection in Australia. The patchwork is fragmented and incomplete,

²⁴ United Nations General Assembly *Declaration of the Rights of the Child* General Assembly Resolution 1386(XIV) of 20 November 1959; also cited in the preamble to the *Convention on the Rights of the Child* (1990) adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.

and its inadequacies are felt most keenly by the marginalised and the vulnerable.”²⁵ Further, in the areas of regulation that do exist, policy and law is not necessarily consistent with the rights of the child and challenges remain around resourcing and ability to ensure implementation, monitoring and enforcement.

26. The UN Committee on the Rights of the Child has observed that, in the absence of a federal act which enshrines the *Convention on the Rights of the Child*, a fragmented and inconsistent system of rights protections exists across Australia.²⁶ The Committee has recommended that Australia “strengthen its efforts in bringing its domestic laws and practice into conformity with the principles and provisions of the Convention, and ensure that effective remedies are consistently available in cases of violation of the rights of the child.”²⁷ Doing so is required under article 4 of the CRC and a similar obligation regarding legislative measures exists with the rights as articulated in the ICCPR²⁸ and the ICESCR.²⁹

27. Despite these widely known shortcomings of our legal systems at and despite the recommendation of the National Human Rights Consultation Committee that the Federal Government adopt a federal human rights act,³⁰ Australia does not have a federal human rights act. Only two jurisdictions, Victoria and the Australian Capital Territory, have introduced a human rights act. It is noteworthy that a number of other comparable jurisdictions have introduced human rights protections through human rights acts including in the United Kingdom and New Zealand, or within the national constitution, such as is the case in South Africa. Additionally, many regional human rights frameworks exist throughout the world.

28. In the absence of such domestic human rights legislation, there is a real risk that the rights of children and others which have been considered, agreed and articulated by the international community, including Australia, remain largely theoretical.

29. It is important to note that although the CRC was ratified by the Commonwealth of Australia, in practice, the day-to-day lives of children in Australia are often more directly impacted by law, policy and services determined by State and Territory

²⁵ National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Commonwealth of Australia (September 2009) (‘National Human Rights Consultation Report’), p. 127.

²⁶ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia*, UN Doc. CRC/C/AUS/CO/4 (28 August 2012), [11].

²⁷ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia*, UN Doc. CRC/C/AUS/CO/4 (28 August 2012), [12].

²⁸ ICCPR, Article 2(2).

²⁹ ICESCR, Article 2.

³⁰ National Human Rights Consultation Report, p. xxxiv.

governments. In particular, housing, care and protection, education and healthcare are directly controlled by State and Territory Governments, albeit with funding arrangements with the Federal Government. In these areas and more, State and Territory Governments, like the Queensland Government, are uniquely placed to protect, promote and realise the rights of children. Indeed, without the will and resources to do so at the level of State and Territory governments, many rights of children in Australia would never be realised in practice.

The scope of rights which should be covered in a human rights act

30. Governments at all levels, have obligations to promote, protect and fulfil all rights, including civil, political, economic, social and cultural rights. It is undeniable that the economic, social and cultural conditions a child experiences has deep and profound impacts on their life. Youthlaw observed in relation to the Victorian Charter, which largely focuses on civil and political rights, that “[t]he ability of the Charter to promote children’s rights effectively is undermined [sic] by the narrow scope of civil and political rights and exclusion of important social and economic rights in the charter, in particular the right to education, health and housing.”³¹ Likewise, the 2009 National Human Rights Consultation highlighted that issues of health, housing and education were of major importance to submitters.³²
31. Human rights are universal, interdependent, indivisible and interrelated. This understanding of rights must inform and guide consideration of the potential scope of a human rights act and other ways and means of promoting, protecting and fulfilling human rights.
32. UNICEF Australia submits therefore that a human rights act should include:
- rights of the child through specific reference to the *Convention on the Rights of the Child*;
 - economic, social and cultural rights³³ (in particular, the right to an adequate standard of living, the right to the highest attainable standard of physical and mental health and the right to education);
 - the right to self-determination of Aboriginal and Torres Strait Islander peoples; and

³¹ Tiffany Overall (Youthlaw) *Review of the Victorian Charter of Human Rights and Responsibilities* (June 2011), p. 4.

³² National Human Rights Consultation Report, pp. 78-82.

³³ Including the rights outlined in both the *International Covenant on Economic, Social and Cultural Rights* and the *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations General Assembly, 61/295 United Nations Declaration on the Rights of Indigenous Peoples - Annex (13 September 2007).

- civil and political rights, including, importantly for children, the right to birth registration.
33. Enshrining these rights through legislation would mark a significant milestone of the protection and promotion of the rights of children in Queensland.

The need for effective remedies

34. A human rights framework should also provide for access to effective remedies in instances where human rights are breached. Remedies are required under the *Universal Declaration of Human Rights*³⁴ also the *International Covenant on Civil and Political Rights*.³⁵ The need for effective remedies is also implicit in the CRC, including, importantly, for breaches of economic, social and cultural rights.³⁶ A range of both judicial and non-judicial avenues should be available and experiences of other jurisdictions indicate that a direct cause of action must be available.³⁷
35. Importantly for children, young people and others who might be experiencing disadvantage and marginalisation, avenues to access remedies must be accessible, affordable and be accompanied with appropriate advice and support for them to effectively use these mechanisms.
36. For children in particular, complaints processes must be child sensitive, and incorporate due consideration to the individuals age, cultural background, maturity and specific circumstances. Personnel who have contact with children in the course of complaints procedures should be adequately trained in communicating effectively with children in their early, middle and adolescent years. This includes relying on simple language, explaining the principles of privacy and consent, ensuring that parents, guardians or identified support people are present wherever possible, explaining the complaints process and its implications, and checking for understanding.

³⁴ Universal Declaration of Human Rights, Article 8.

³⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

³⁶ UN Committee on the Rights of the Child, *General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child* (27 November 2003), UN Doc. CRC/GC/2003/5, [24] – [25].

³⁷ See, for example, Michael Brett Young *From Commitment to Culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 – Summary Report*, September 2015, p. 131, George Williams and Daniel Reynolds, Gilbert + Tobin Centre of Public Law, submission to the Legal Affairs and Community Safety Committee re Human Rights Inquiry (11 March 2016), p.4, Ben Schokman and Philip Lynch, Human Rights Law Centre, *Human Rights Law Centre submission to the Inquiry and Review of the Charter of Human Rights and Responsibilities Act 2006*, 1 July 2011, pp. 24-25, Sarah Joseph, Erica Contini and Marius Smith, Castan Centre for Human Rights Law, Monash University, *Submission to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament – Inquiry into the Charter of Human Rights and Responsibilities Act 2006*, p. 15.

Potential application to businesses

37. It is important that a human rights act apply to private entities performing duties of a public nature, for example, prisons, education, health, child protection services, early childhood care, aged care, transport, supply of utilities (including water, electricity and gas), and housing services. UNICEF Australia submits that the focus should always be on ensuring that children and others have effective and equal access to quality services, delivered consistently with their human rights, regardless of the means or entity which delivers the particular public service. Government contracts and procurement policies should also incorporate a requirement that contractors respect human rights, particularly when performing duties of a public nature.³⁸ UNICEF Australia further submits that it is desirable for a human rights act to include 'opt in' mechanism to enable businesses to demonstrate their leadership and commitment to respect human rights.

Improvements which could be made with, or without, the introduction of a human rights act

38. Although UNICEF Australia hopes that the Human Rights Inquiry will result in a human rights act, it is important to note that children in Queensland could benefit from more immediate reforms and investments, with such changes being possible with, or without, the introduction of a human rights act. Specifically, UNICEF Australia recommends that the Queensland Government takes immediate action to:

- a) **Invest in holistic legal and social services to ensure availability for all children, particularly those in regional, remote and rural areas** – The Queensland Government must ensure sufficient funding of advice and support agencies, including the Legal Aid Commission and community legal centres, so as to ensure that children and their parents, guardians and advocates can access quality advice, representation and holistic support in relation to legal and non-legal services.

UNICEF Australia is concerned that funding for legal assistance in Queensland is comparatively low, with the Productivity Commission into Access to Justice Arrangements observing that “[s]tate and territory government funding for LACs [Legal Aid Commissions] ranges from just under

³⁸ The Victorian Charter Review recommended that “a whole-of-government policy be developed for relevant State contracts to include terms that contracted service providers will have public authority obligations when performing particular functions under the contract and a provision be included in the Charter to authorise this” Michael Brett Young *From Commitment to Culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 – Summary Report*, September 2015, p. 7.

\$10 per capita in Queensland through to \$16 per capita in the ACT”.³⁹ Further funding cuts to legal services in Queensland have been announced since then.⁴⁰ Additionally, holistic services are often required to assist children and young people with issues affecting their lives and access to legal advice alone is often insufficient to help support and advise children and young people through these. Services such as the Youth Advocacy Centre⁴¹ offer a good model of such holistic legal and social services, however, further resources are required so as to ensure that children across the state are able to access such integrated services.

- b) **Invest in human rights education for children and young people, families, public servants and the private sector** – The Queensland Government should ensure that all members of the community; including children, families, schools, government service providers and the private sector (particularly those performing public functions on behalf of the Queensland Government) understand and respect human rights.

UNICEF Australia also encourages the Queensland Government to seek conformity with the UN Guiding Principles on Business and Human Rights,⁴² *General Comment No. 16 on State Obligations regarding the impact of the business sector on children’s rights*,⁴³ and promote to businesses, particularly those performing public functions, voluntary frameworks such as the Children’s Rights and Business Principles⁴⁴ and the United Nations Global Compact.⁴⁵

- c) **Adopt a child-rights based approach to the current youth justice reforms** – The current Government review of the youth justice system is a welcome development. UNICEF Australia recommends that the Queensland Government:

³⁹ Productivity Commission, *Access to Justice Arrangements – Productivity Commission Inquiry Report No. 72* (5 September 2014), p. 29.

⁴⁰ Stephanie Smail ‘Legal aid funding cuts prompt fears vulnerable will be turned away’ *ABC News* (31 March 2016) accessed on 15 April 2016 at <<http://www.abc.net.au/news/2016-03-31/legal-aid-cuts-prompt-fears-vulnerable-will-be-turned-away/7288982>>.

⁴¹ See Youth Advocacy Centre, *About us* <<http://www.yac.net.au/about-us/>>.

⁴² UN Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights – Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011), accessed 15 April 2016 at <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

⁴³ Committee on the Rights of the Child, *General comment No. 16 On State obligations regarding the impact of the business sector on children’s rights* (15 March 2013), UN Doc CRC/C/GC/16.

⁴⁴ UNICEF, United National Global Compact and Save the Children, ‘Overview’, *Children’s Rights and Business Principles* viewed 27 January 2016 at <<http://childrenandbusiness.org/sample-page/overview/>>.

⁴⁵ See United Nations Global Compact <<https://www.unglobalcompact.org/>>.

- ensure that the youth justice system is consistent with international standards,⁴⁶ including requiring the use of diversion and alternatives to detention and ensuring that detention is used only as a measure of last resort.
 - address the underlying risk and causative factors leading to a child being in conflict with the law, noting the high correlation between the child protection system and youth justice contact or supervision, particularly for children who have been in out of home care arrangements.⁴⁷
 - as a matter of urgency, amend the *Youth Justice Act 1992* (QLD) and review all other laws to ensure that, at a minimum, all persons below the age of 18 years (including 17 year olds) are recognised as a child and benefit from differential treatment as a child, particularly in the context of criminal justice.
 - ensure that all children (including 17 year olds) are kept separate from adults.
 - review the minimum age of criminal responsibility and seek to raise it so that it is consistent with international good practice.⁴⁸
- d) **Review and reform school suspension and exclusion provisions under the *Education (General Provisions) Act 2006*** – UNICEF Australia notes that school principals in Queensland have broad exclusion and suspension powers, along with a high level of discretion for related decision making. Under current arrangements children can be suspended for long periods based on charges, and ultimately excluded if they are convicted of those charges.⁴⁹

⁴⁶ Including the CRC, [UN Rules for the Protection of Juveniles Deprived of their Liberty](#), General Assembly Resolution A/RES/45/113 (14 December 1990), [United Nations Guidelines for the Prevention of Juvenile Delinquency \(The Riyadh Guidelines\)](#), General Assembly Resolution 45/112 (14 December 1990), annex, [United Nations Minimum Standard Rules for Non-custodial Measures \(The Tokyo Rules\)](#) General Assembly Resolution 45/110 (14 December 1990), [United Nations Standard Minimum Rules for the Administration of Juvenile Justice \(The Beijing Rules\)](#), General Assembly Resolution 40/33 (29 November 1985), annex, [Guidelines for Action on Children in the Criminal Justice System](#), Economic and Social Council resolution 1997/30 (21 July 1997), annex, [Basic principles on the use of restorative justice programmes in criminal matters](#). Economic and Social Council Resolution ECOSOC Resolution 2000/14 (5 to 28 July 2000).

⁴⁷ Australian Institute of Health and Welfare (AIHW) *Young people in child protection and under youth justice supervision 2013–14*. Data linkage series no. 21. Cat. no. CSI 22 (2016) Available at <<http://www.aihw.gov.au/publication-detail/?id=60129554445>>.

⁴⁸ The UN Committee on the Rights of the Child has suggested that this age should be 12 years of age as a minimum, but ideally 14 or 16 years of age. UN Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's rights in juvenile justice* (25 April 2007) UN Doc. CRC/C/GC/10, [30].

⁴⁹ *Education (General Provisions) Act 2006* (Qld). See also Queensland Government, 'Education' accessed on 14 April 2016 at <<http://education.qld.gov.au/behaviour/exclusions.html>> and <<http://education.qld.gov.au/behaviour/suspensions.html>>.

UNICEF Australia is concerned that this could constitute a form of double punishment for a child who has already potentially fulfilled the terms of a sentence. Additionally, this approach not only considerably disrupts a child's education, but can inhibit access to other schools post-conviction. This approach is not in accordance with article 28 of the CRC and UNICEF Australia encourages the Committee to recommend that these provisions be reviewed and reformed. Additionally, in cases where school principals suspend or exclude children based on a charge or conviction, parents or guardians should be informed of their right to appeal, and be supported to draft an appeal, by a designated senior school counsellor.

- e) **Prohibit the use of corporal punishment** – Currently, s 280 of the *Criminal Code Act 1899* (Qld) allows for the use of corporal punishment against a child. This is inconsistent with the rights of children to be protected from all forms of violence under article 19 of the CRC and the UN Committee on the Rights of the Child has on numerous occasions called for reform.⁵⁰ UNICEF Australia recommends that the Queensland Government take immediate steps to expressly prohibit corporal punishment in all settings and ensure that “reasonable chastisement” cannot be used as a defence. It is further recommended that awareness-raising and education campaigns are developed and rolled out which promote positive and non-violent forms of discipline.

Contact

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⁵⁰ See, for example, UN Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia, UN Doc. CRC/C/AUS/CO/4 (28 August 2012), [43] – [44].

Appendix 1 – Examples of how a human rights act could protect the rights of children

EXAMPLE 1: Helping siblings stay together, receive the care of their family and be connected to culture

1. The case of *Secretary to the Department of Human Services v Sanding* [2011] VSC 42 was about a decision of the Secretary of the Victorian Department of Human Services (Vic) to separate four Aboriginal siblings and place them in out of home care due to concerns about their protection. They could not go relatives and no Aboriginal families were available. The magistrate considering the case made orders to allow the children to live in the care of the grandmother of the children, on conditions. The Secretary considered that to be an error of law.
2. Under the *Children, Youth and Families Act 2005* (Vic), the best interests of the child are paramount. In addition to that fundamental right of the child, Bell J considered the impact of the Victorian *Charter of Human Rights and Responsibilities Act 2006* and outlined the following rights which are relevant to protection proceedings:
 - The right to protection of the family (s 17(1) of the Victorian Charter);
 - The right to the protection of children in their best interests as children (s 17(2));
 - The right to be afforded a fair hearing (s 24(1));
 - Freedom of movement (s 12);
 - Freedom from arbitrary and unlawful interference with privacy, family and the home (s 13(a)); and
 - Right to culture (ss 19(1) and (2)).
3. It was found that, in particular, the right to a fair hearing applied to the Children's Court.⁵¹ The Charter of Human Rights therefore helped inform the Court's process and ultimate decision. The outcome for those four Aboriginal children was that they were able to stay with together and receive care from their grandmother. The alternative outcome would have been the separation of siblings, placement with non-relatives and disconnection from culture.

⁵¹ *Secretary to the Department of Human Services v Sanding* [2011] VSC 42 at 167.

EXAMPLE 2: Ensuring the youth justice system adopts a child rights based approach

1. UNICEF Australia has observed with concern the increasing numbers of children and young people being incarcerated in Queensland and submits that adopting a human rights act, with appropriate mechanisms of parliamentary scrutiny, would result in a better approach to children in conflict with the law through addressing causal factors. In turn, this would be expected to bring better outcomes for the community.
2. The ICCPR provides children with special rights in the context of juvenile justice. These include that:
 - Children are to be separated from adults and brought before a court as speedily as possible.⁵²
 - The essential aim of detention should be rehabilitation.⁵³
 - Children are entitled to treatment which is appropriate taking into consideration their age, legal status⁵⁴ and the desirability of promoting their rehabilitation.⁵⁵
3. The CRC provides further articulation of the rights in the context of juvenile justice, including:
 - That in all actions concerning children, the best interests of the child shall be a primary consideration.⁵⁶
 - A prohibition on cruel, inhuman or degrading treatment.⁵⁷
 - A prohibition on detention that is unlawful or arbitrary.⁵⁸
 - That detention should be used only as a matter of last resort and for the shortest appropriate period.⁵⁹
 - The right to be treated with humanity and respect for the inherent dignity of the child, and in a manner which takes into account the needs of persons of his or her age.⁶⁰
 - The right to privacy at all stages of proceedings.⁶¹

⁵² ICCPR, Article 10(2)(b).

⁵³ ICCPR, Article 10(3).

⁵⁴ ICCPR, Article 10(3).

⁵⁵ ICCPR, Article 14(4).

⁵⁶ CRC, Article 3(1).

⁵⁷ CRC, Article 37(a).

⁵⁸ CRC, Article 37(b).

⁵⁹ CRC, Article 37(b).

⁶⁰ CRC, Article 37(b).

⁶¹ CRC, Article 40(2)(b)(vii).

- Diversion from the criminal justice system and use of alternatives to detention, where appropriate.⁶²
4. The *Youth Justice and Other Legislation Amendment Bill 2014* (Qld) was introduced into the Queensland parliament in February 2014. Some of the stated policy aims of the Bill were to publish the names of repeat offenders of youth justice matters, provide for the automatic transfer from detention to adult corrective services facilities of 17 year olds who have six months or more left to serve in detention and to require a court to disregard the principle of detention as a last resort for children.⁶³
 5. Despite concerns raised by many academics, civil society and human rights groups at the time, the Bill was passed by parliament and became the *Youth Justice and Other Legislation Amendment Act 2014* (The 2014 Act). Following on from the passing of the 2014 Act, Queensland saw an increase from 130 young people in detention in the June quarter of 2011 to 168 in the June quarter of 2015, with a peak of 187 young people in detention recorded in June 2014⁶⁴ soon after the introduction of the 2014 Act.
 6. The 2014 Act was therefore inconsistent with the rights of the child in many respects. In the absence of a human rights act and checks and balances that such an act would be expected to provide, laws which are fundamentally incompatible with the rights of children and others can be freely introduced without due and proper assessment of their compatibility or otherwise with human rights. A human rights act, including statements of compatibility and parliamentary consideration and assessment of a bill's compatibility or incompatibility with human rights, could have potentially avoided such problematic laws being passed or, at least, required an explicit acknowledgement of such incompatibility or otherwise alerted parliament of the need for amendments.
 7. UNICEF Australia is aware that the Queensland Government is currently in the process of reforming many of the aspects of the 2014 Act which were incompatible with the rights of the child. This is a welcome development.

⁶² CRC, Article 40(4).

⁶³ Queensland Parliament, *Youth Justice and Other Legislation Amendment Bill 2014 – Explanatory Notes*, accessed at 11 April 2016 at <<https://www.legislation.qld.gov.au/Bills/54PDF/2014/YouthJusticeOLAB14E.pdf>>

⁶⁴ Australian Institute of Health and Welfare (AIHW) 2015 *Youth detention population in Australia 2015*, viewed 5 January 2015, <http://www.aihw.gov.au/publication-detail/?id=60129553700> (AIHW 2015), p. 13.

EXAMPLE 3: Realising a child's right to birth registration

1. In 2005, it was reported that of the 9,900 children born to Indigenous mothers in Australia, 13% (1,300 children) were not registered.⁶⁵ The potential reasons for this are complex and it is not known what numbers of these births were in Queensland. However, it has been suggested that these figures, and the impact that a lack of birth registration and birth certificate has on the lives of individuals and families, are a "significant problem".⁶⁶ A person can encounter significant difficulties when their birth has not been registered and/or they do not have a birth certificate. They may be unable to obtain relevant identification documents such as a driver's licence or passport and, in turn, a person may be unable to obtain a tax file number or take up employment opportunities.⁶⁷ There have been reports that this can leave young people, particularly from remote locations, at heightened risk of coming into contact with the police due to unlicensed driving "because without a birth certificate they cannot get a driver's licence, and without public transport, driving is the only way of getting around."⁶⁸
2. A human rights framework which protects and promotes the rights of children to birth registration and which facilitates birth certification for those who might find difficulties in accessing government services would ensure that, upon entry to the world, every child is afforded the first and most basic step of recognition by the state. This is a fundamental pre-condition to the enjoyment of many other rights of the child and, as explained above, without such, Aboriginal and Torres Strait Islander children in particular can be at greater risk of contact with the criminal justice system, often at a young age.

⁶⁵ Orenstein J 'Being Nobody – The Difficulties Faced by Aboriginal Victorians in Obtaining Identification', Speech delivered at National Association of Community Legal Centres Conference, 14-17 September 2009.

⁶⁶ Castan Centre for Human Rights, Monash University, *Submission to the Queensland Legal Affairs and Community Safety Committee on the Electoral Reform Amendment Bill 2013*, 16 January 2014, p. 2.

⁶⁷ Paula Gerber and Melissa Castan 'Achieving Universal Birth Registration for Indigenous Australians: Recommendations from the Victorian Law Reform Commission' [2014], *IndigLawB* 34; (2014) 8(14) *Indigenous Law Bulletin* 11

⁶⁸ Paula Gerber and Melissa Castan 'Achieving Universal Birth Registration for Indigenous Australians: Recommendations from the Victorian Law Reform Commission' [2014], *IndigLawB* 34; (2014) 8(14) *Indigenous Law Bulletin* 11