

Parliamentary Joint Committee on Human Rights inquiry into Australia's human rights framework

Human Rights Law Centre answers to questions on notice

Question from Graham Perrett MP at the 25 August inquiry hearing. Transcript:

Mr PERRETT: This is to the HRLC: you say children's rights could be strengthened by explicitly requiring that the views of children and young people be taken into account in all decision-making processes affecting them. How do you think this would work in practice, particularly when it comes to child protection investigations and the like?

Ms Drury: Thank you for the question. That is correct. The agency of children should be respected at international law in accordance with their age and their capacity. That should be entirely uncontroversial. It doesn't mean to say that that is the only consideration, but that is the international best practice and also the best practice recognised by child rights experts in Australia, like Di Otto, at the moment. That is the standard that we believe should be applied in Australia. There are many people involved in the decisions around taking children away from their guardians and their families, and an important consideration, as ensured by a charter, would be the desires of the child commensurate with their capacity and their age. Mr PERRETT: I'm just wondering how that would work practically. Do you think it is being utilised at the moment when it comes to taking the agency of the child? I'm not sure if you're going to go into competency or that sort of level of input. How would it practically change if this were implemented?

Ms Drury: We'd be very happy to take that question on notice and confer with our colleagues who work in the child rights space.

Mr PERRETT: Do you know of any other countries that implement this? That might be useful for the committee.

Ms Drury: I missed that word, sorry. Any other—?

Unidentified speaker: Overseas jurisdictions.

Ms Reiger: We'd need to take that on notice as well. It's worth reflecting that in terms of what's proposed for the participation duty with regard to this, we already do have examples in Australia of implementing the legal obligations under the Convention on the Rights of the Child and the best interests of the child test. The Family Court and others are examples of where that's being used. This is definitely one of the technical details that would need to be worked out in terms of how that would operate in practice, but we definitely support it in principle.

Mr PERRETT: Alright. Thanks, Chair.

Answer from Human Rights Law Centre

State and Territory governments have primary responsibility for children in out-of-home care, although the Commonwealth government is responsible for delivering universal support and services to assist families to support their children. Under the *National Framework for Protecting Australia's Children 2021 – 2031*, the federal government works with State and Territory governments to "improve services and systems integration and to take a national approach to improving outcomes" for children in Australia.¹

How a federal Charter would apply to a decision about removing any one child from their home would depend on any responsibility the federal government had taken with respect to support services provided to the family or child protection, through federal/State cooperative schemes and funding. But insofar as the federal government would be involved, a participation duty enshrined in a Charter would ensure that children are able to participate in the decision as to who should look after them. Consistent with international law, their ability to participate in the decision-making will be commensurate with their age and capacity.

With respect to Aboriginal and Torres Strait Islander children in out-of-home care, we echo SNAICC's oral evidence given to this committee on 25 August 2023: the right to culture is additionally important in considering the best interests of Aboriginal and Torres Strait Islander children. In order to make a decision about out-of-home care consistently with an Aboriginal or Torres Strait Islander child's human rights, the children's community and family must be involved.

1. *Safe and Supported: National Framework for Protecting Australia's Children 2021 – 2031*, Commonwealth of Australia, Department of Social Services (2021), 46.

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Question from Senator Lidia Thorpe:

You have said the Federal HRA should operate alongside state and territory legislation to manage issues arising in the operation of s 109 of the Constitution (pp. 10-11). How would this work in relation to public authorities who act in both federal and states spheres? (e.g., service providers) and how are private-sector third parties acting to provide public services currently held accountable for their human rights practices in Victoria under s 38(1)?

Answer from Human Rights Law Centre

With respect to public authorities who act in both federal and state spheres, we broadly agree with the Australian Human Rights Commission's proposal that a Charter apply to "federal-state cooperative schemes... [and] state authorities that exercise public functions on behalf of the Federal Government".¹ The federal Charter rights should extend to services for which the federal government has taken responsibility, including through public funding. This includes, for example, disability care, schools and hospitals.

A federal Charter is a first step towards greater coherence and respect for human rights across Australia. But the journey must continue to full implementation of ambitious and consistent Human Rights Acts or Charters in every jurisdiction in Australia. The federal Charter should be drafted with a view to becoming the gold standard, which every other State and Territory jurisdiction should meet.

With respect to the second part of your question, about the operation of the Victorian Charter with respect to public authorities that are private-sector third parties, the answer is section 39 legal proceedings of the Victorian Charter, and complaints to the Victorian Ombudsman. To provide a specific example, the coronial inquest into the passing of Veronica Nelson made many adverse findings against Correct Care Australasia (**CCA**), a third party contracted by the Victorian government to provide services to people in prison. Coroner McGregor found that CCA's opioid treatment policy constituted cruel and inhumane treatment contrary to s 10 of the Charter, and the absence of bed-based care at Dame Phyllis Frost Centre infringed Veronica's right to life and equality under s 8 and s 9 of the Charter.

We believe that the Victorian Charter (like a federal Charter) should go further to provide a more robust and prompt way of redressing human rights breaches. Section 39 should allow for direct causes of action and complainants should be able to turn to the Victorian Equal Opportunity and Human Rights Commission for resolution. Finally, damages to be available as a remedy.

1. *Free and Equal position paper: A Human Rights Act for Australia*, Australian Human Rights Commission, March 2023, pages 243-244.