

Submission to Consolidation of Anti-Discrimination Laws 2012

Justice for Children Australia believes that children suffer severe discrimination in Australian legal processes and systems especially Family Law and 'child protection' which are purportedly set up to work in children's 'best interests' but are actually damaging them.

Our belief stems not only from the harmful and bitter experiences that children we know have endured – and continue to endure – but is also backed up by various reports and reviews over many years.

Below are two extracts from the current Human Rights Commission website, one of which deals with Human Rights generally as set out in the *UN Convention on the Rights of the Child*. The second is a summary of *Seen and Heard* the Commission's 1997 *Report of the National Inquiry into Children and the Legal Process*.

Electronic links are included and we hope you will have time to read the full report.

Nothing has been done to improve children's participation in Family Law since 1997. The 2006 'Reforms' drove children's rights backwards by placing their rights below those of parents.

The best interests of the child cannot be served unless assessment of their wellbeing, welfare, safety and happiness is taken out of the adversarial legal process and they are listened to.

http://www.hreoc.gov.au/human_rights/children/index.html

What are children's rights?

Human rights are children's rights too. International human rights instruments recognise that children as well as adults have basic human rights. Children also have the right to special protection because of their vulnerability to exploitation and abuse.

In November 1989 the United Nations General Assembly adopted the *Convention on the Rights of the Child* (the CRC). The CRC is the most widely ratified human rights treaty in the world . There are only 2 countries, which have not signed the CRC; the United States of America and Somalia.

- Click [here](#) for the full text of the Convention on the Rights of the Child
- Click [here](#) for a child-friendly version of the Convention on the Rights of the Child

The CRC incorporates the whole spectrum of human rights - civil, political, economic, social and cultural - and sets out the specific ways these rights should be ensured for children and young people. The CRC recognises that the degree to which children can exercise these rights independently is influenced

by their evolving maturity. It also emphasises the rights and responsibilities of parents where applicable.

Some of the core principles in the CRC are:

- the right to survival and development;
- respect for the **best interests** of the child as a primary consideration;
- **the right of all children to express their views freely on all matters affecting them;** and
- the right of all children to enjoy all the rights of the CRC without discrimination of any kind.

Australia ratified the CRC in December 1990, but it has not yet been incorporated into Australian law. Nevertheless, the Commission has the role of monitoring Australia's compliance with the CRC.

http://www.hreoc.gov.au/human_rights/children/seen_and_heard.html

Seen and heard: priority for children in the legal process (1997)

Report of the National Inquiry into Children and the Legal Process

The Australian Human Rights Commission and the Australian Law Reform Commission jointly undertook a National Inquiry into Children and the Legal Process. The report of the inquiry is [*Seen and heard: priority for children in the legal process*](#) was tabled in Federal Parliament in November 1997. It remains the most comprehensive examination of young people and the legal system undertaken in Australia.

The inquiry received extensive evidence of the problems and failures of legal processes for children. This included evidence of:

- **discrimination against children;**
- **a consistent failure by the institutions of the legal process to consult with and listen to children in matters affecting them;**
- **a lack of co-ordination in the delivery of, and serious deficiencies in, much needed services to children, particularly to those who are already vulnerable;**
- the increasingly punitive approach to children in a number of juvenile justice systems;
- the over-representation of some groups, particularly Indigenous children, in the juvenile justice and care and protection systems;
- the concentration of specialist services and programs in metropolitan areas, disadvantaging rural and remote children in their access to services, the legal process and advocacy;
- court processes which are bewildering and intimidating for children; and
- school exclusion processes which deny young people basic rights of procedural fairness and natural justice and seriously diminish their life chances.

The recommendations of the report aim to give full effect to the right of children to be seen and heard in the legal process. They include the establishment of a federal Office for Children to co-ordinate the development of policies and programs affecting children. Priority areas include the development of national standards in the areas of school discipline, care and protection, investigative interviewing of children and juvenile justice.

Another extract from this report highlights our concerns:

The child's right to participate

Article 12 of the Convention sets out the child's right to participate in judicial and administrative proceedings. It requires that a child capable of forming his or her own views has the right to express those views freely in all matters affecting the child and that they be given due weight in accordance with the child's age and maturity. Furthermore, it requires that the child be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child - this being either directly or through a representative or appropriate body.

The general rule of advocacy is that the client sets the goals of representation. However, in many cases involving children this general obligation of a representative to act upon instructions is modified. The law presumes that a child cannot assert rights or form a judgment. Therefore, children traditionally lack the legal capacity to instruct. Article 12 speaks directly to the child's legal representative as responsible for representing the best interests of the child and being the voice of the child. To secure the child's right to participate effectively the legal representative must

1. determine, in the individual case, whether the child is capable of forming his or her own views
2. ensure the child is free and feels free to express those views and
3. take those views into account - with the weight to be given them dependent on the age and maturity of the child.

Justice for Children Australia would like to draw your attention to this article in The Age 24/01/12

<http://www.theage.com.au/victoria/kids-in-court-20120123-1qe04.html>

Extract:

Welfare agencies say the formal court processes that now operate fail to benefit the state's most vulnerable children.

"We need to recognise that those most in need of care have experienced significant levels of trauma and often have a complex array of needs. Such needs are better understood by multi-disciplinary experts skilled in a broad range of disciplines," the submission said.

Child Safety Commissioner Bernie Geary, the public servant who gives advice to Mary Wooldridge, Community Services minister and the person responsible for child protection, puts the argument more baldly.

"I think there are too many lawyers in the Children's Court," he says. "There should be a method of investigating in a way that takes into account the development of children, rather than the rights of parents. I can't see how lawyers can possibly have more expertise around issues to do with child development."

Anglicare Victoria chief Paul McDonald, formerly a highly ranked public servant in DHS, says the main court building in Little Lonsdale Street is a "melting pot of emotions and conflicts".

"What we are looking for in complex circumstances is that for a child's welfare to be at the heart of it, not just running the rights of all the different stakeholders ... the adversarial culture does not serve well for good outcomes for children."

At present, the family division of the Children's Court, which is separate from the part of the court that holds criminal trials and sets sentences for juveniles, becomes involved in the life of a Victorian child when the Department of Human Services initiates a court action.

Aside from the better-known Family Court, this is the only state-sanctioned means to separate a child from the care of its biological parents. This system for managing the crisis end of child protection is used in all other states and territories.

Another recent UK review's findings:

<http://www.familylaw.co.uk/articles/PGChildrenEvidence09012012>

Justice for Children Australia wants to improve the situation for children so that they are treated fairly and allowed to participate in a meaningful way in all processes involving them, as far as possible – and certainly very much more than they are now.

We believe that all participants, especially children, in processes such as Family Law should be treated with respect, given correct and relevant information and listened to with care and compassion.

We do not believe it is possible to do this for children under the current adversarial legal system which prevails not only in Family Law but also to a large extent in child protection.

In the UK children as young as three have been accepted as witnesses

<http://www.independent.co.uk/news/uk/crime/threeyearold-becomes-youngest-trial-witness-6261012.html>

It is hard to believe that anyone who has had children or dealt with them extensively thinks that they are not capable of holding and expressing their views quite consistently, given the right circumstances.

All children should be assessed by a process involving non-legal experts who are well versed in child development and psychology and who are not tainted by prejudice or bias. The assessment must take place over a reasonable period, seeing the child with family members, at school, and play and in other 'natural habitats'.

The assessment of what's good for a child should not take place during a 45 minute interview in an unfamiliar place. This is what happens repeatedly in Family Law cases. In 45 minutes – sometimes even less – a child's whole life can be destroyed and they have no redress, no right of reply to any court decisions made on the advice of a 'single expert', and no review of their situation. Convicted criminals have more rights.

Family breakup can be very traumatic for all concerned but when courts are involved children are often re-traumatised by being separated from their loving protective parent and sent to live in an abusive household. They can be and often are denied counselling or any follow-up to see how they are faring. Nobody listens to their cries of distress.

What kind of system takes a child away from their loving primary carer who has looked after them since birth (and has done them no harm) and forbids them to see this parent except under inhumane circumstances? What kind of system ignores or discounts the grief and loss suffered by this child and refuses to listen to them?

A system of cruelty and carelessness which sacrifices children to capricious and uneducated (in children's issues) judges, bad laws (eg shared parenting) and a wall of silence where not only the children's voices are stifled but the voice of anyone who would expose these abuses is suppressed by other bad laws such as Section 121.

Please end discrimination against children on the grounds of age.

What else is preventing children's voices and choices from being part of any process affecting them?

Justice for Children knows how important it is for children's voices to be heard. If they are not, their whole lives can be ruined by ill-informed decisions which shape – we would say distort – their future.

What are Human Rights and Anti-Discrimination laws for except to protect the vulnerable?

Many people realise that they themselves could suffer discrimination – if for example, they were suddenly disabled from spinal injuries in a car accident.

So why don't they understand the mental, emotional psychological and often physical injuries being done to so many children because of harmful Family Law and child protection decisions? Has Australia got so many resources that we can afford to repair all this damage?

We can provide details of many cases where children who were previously happy, healthy and developing well have gone backwards because of decisions made by those systems which are supposed to protect them.

My apologies for not having done a more a comprehensive job or answered all the questions in your discussion paper but I hope you will be able to understand some of what's written here.

Children are suffering severe discrimination in the areas outlined above. Is this because of their age? Whatever the reason, many laws and practices must be changed to improve their lives.

Co-ordination and co-operation between governments and agencies at all levels must be improved radically and Anti-discrimination laws must include reference to children in the legal process, not only employment and education etc as is now apparently the case.

We are not the children – we are only trying to get the point across that it is the children's voices we all must listen to and the children's views we all must **respect – protect and fulfil**.

We would be glad to give further details of children's stories if you require them.

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