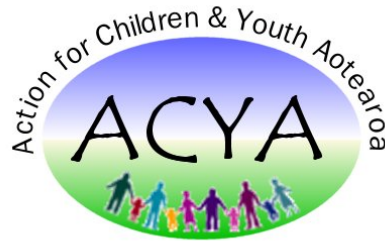


Human Rights Amendment Bill

Submission to the Justice and Electoral Committee

16 December 2013



Action for Children and Youth Aotearoa (ACYA) is a coalition of non-governmental organisations, families and individuals promoting the rights and wellbeing of our children and youth through education and advocacy based on evidence and New Zealand's human rights commitments.

Underpinned by the values encapsulated in the UN Convention on the Rights of the Child (UNCRC), Te Tiriti O Waitangi and the wider human rights framework, ACYA promotes:

- accountability by providing reports from NGOs in Aotearoa New Zealand on Aotearoa's compliance with UNCRC to the UN Committee on the Rights of the Child (UNCRC Committee)
- understanding and implementation of UNCR
- action on the recommendations of UNCRC Committee to Aotearoa New Zealand;
- opportunities for the participation of children and youth and for their voices to be heard

ACYA's principal work is the production and publication of Aotearoa New Zealand's Alternative NGO (non-governmental organization) Reports to the UNCRC Committee on Aotearoa's implementation of the UNCRC. Aotearoa ratified UNCRC 6 April 1993. The alternative reports are submitted as part of the formal periodic reporting process under Article 44 of UNCRC.

ACYA most recently produced and published *Children and Youth Aotearoa 2010*, the NGO sector's third and fourth periodic report on Aotearoa New Zealand's implementation of UNCRC. The report and its working papers were presented to the Committee in Geneva, 7 October 2010.

ACYA produced and published *Children and Youth in Aotearoa 2003*, the second periodic NGO report on Aotearoa New Zealand's implementation of UNCRC. ACYA supported children to develop a video called *Whakarongo Mai / Listen Up* which collated and presented the views of children and young people. Both the report and video were presented to the Committee in Geneva in June 2003.

ACYA has made numerous reports on New Zealand's compliance with other human rights treaties and on proposed legislation and policy that impact upon children. Between 2004 and 2009 ACYA was represented on the UNCROC Advisory Group to the Ministry of Social Development and most recently sits on the UNCROC Monitoring Group co-ordinated by the Office of the Children's Commissioner. All the work of ACYA is done by volunteers. ACYA receives no government funding.

General Comments on Purpose of the Bill

1. The explanatory note to the Human Rights Amendment Bill ('the Bill') refers to the purposes of the Bill as to enable the establishment of the position of a full-time Disability Rights Commissioner within the Human Rights Commission ('the Commission') and to make changes to the role and structure of the Commission to "strengthen its performance".
2. ACYA is concerned that the changes proposed by the Bill, far from strengthening the Commission's performance, fundamentally undermine its structural independence and may thereby alter the nature of the Commission as a national human rights institution pursuant to international standards. The Bill introduces a mandatory consultative role for the Minister of Justice in determining the Commission's priority work areas.¹ This proposed avenue for direct interference in the work of the Commission by the executive clearly breaches international standards of independence required of a national human rights institution and the current statutory duty that the Commission act independently. Rather than strengthen the performance of the Commission, this change may directly impede its ability to report and advise on the implications of legislation or Government policy, as well as undermining the overall legitimacy and credibility of the Commission as an independent human rights institution.
3. Another concerning change to the role of the Commission is the proposed limitation of the scope of what the Commission and its commissioners are able to comment on publicly, restricting the scope of comment to the amended Act or the New Zealand Bill of Rights Act.² This limitation excludes many international human rights instruments that are not referenced in the Bill. If a narrow reading of the Bill were to be applied, this limitation would unduly inhibit the important work done by the Commission in advancing and promoting the protection of international human rights standards in Aotearoa New Zealand.
4. The broader restructuring change proposed by the Bill is the abolition of the specific titles of the specialised Race Relations, Equal Employment, and Disabilities Commissioners. Although referred to in the explanatory note, the Bill does not in fact establish the position of full-time Disabilities Rights Commissioner. It removes all three designated specialist commissioners and their functions, and provides instead for the ability of the Chief Human Rights Commissioner to delegate all or part of these functions to one or more of the full-time commissioners.
5. ACYA is concerned that the proposed restructure risks diminishing the specialised character of the work done and the visibility of these specialist areas in the broader work of the Commission. ACYA notes that race relations, disabilities, and equal employment rights encompass some of the most significant factors currently impacting the human rights of children and young people in Aotearoa New Zealand. The diminished ability of the Commission to address these areas with sufficient expertise may detrimentally affect the protection and promotion of the rights of children and young people affected by one or more of these specialised areas.³

Independence of the Human Rights Commission

6. Independence is the attribute that most clearly underpins a national human rights institution's legitimacy and credibility, and hence its effectiveness.

¹ Clause 6 new subsection (1B) of section 8

² Clause 5(3) amends section 5(2)

³ Action for Children and Youth Aotearoa, '2nd UPR Report on Aotearoa New Zealand's Human Rights Performance', 17 June 2013.

7. The internationally accepted Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights ('the Paris Principles') define the role, composition, status and functions of national human rights institutions ('NHRIs'). NHRIs must comply with the Paris Principles, which identify their human rights objectives and provide for their independence, broad human rights mandate, adequate funding, and an inclusive and transparent selection and appointment process. The Principles are broadly accepted as the test of an institution's legitimacy and credibility. The importance of ensuring independence of NHRIs has been repeatedly reaffirmed by resolutions of the United Nations General Assembly and Office of the High Commissioner for Human Rights.⁴
8. These international standards require that, like any public body, NHRIs should be accountable. However to ensure their effectiveness as independent institutions, they must not be answerable to the government of the day, but to an authority other than the executive. The creation of a human rights institution itself presumes that the executive is prepared to recognise a separation of powers between different public bodies. In Aotearoa New Zealand the need for this separation of powers is most clearly reflected in the Commission's functions, which include reporting to the Prime Minister on "the implications of any proposed legislation (including subordinate legislation) or proposed policy of the Government that the Commission considers may affect human rights".⁵ This may, of course include potential breaches of human rights standards by Government policy or legislation, which the Commission is best placed to critique pursuant to its statutory functions and political independence.
9. In addressing the methods of operation and, by implication, the powers of national institutions, the Paris Principles provide that NHRIs are entitled to consider any issue falling within their competence without authorisation from any higher authority.⁶ In compliance with this principle, s 7(1) of the Act currently provides that the Commission, in determining the general nature of its activities: "Subject to the role of the Minister in the process of setting and monitoring the strategic direction and targets of the Commission under ... the Crown Entities Act 2004, **the members of the Commission acting together determine** the strategic direction of the general nature of activities undertaken in performance of the Commission's functions." (emphasis added). The Act provides independent discretion to the commissioners to decide what the Commission's strategic priorities are, and what the issues are that it chooses to engage on. This is confirmed in s 19 of the present Act, which provides "the Commission must act independently in performing its statutory functions and duties".
10. Taking into account the international standards requiring independence of NHRIs and the Commission's statutory function in advising on Government compliance with human rights standards, the introduction of a ministerial role in setting its priorities may fundamentally change the character and effectiveness of the Commission. This change is provided for in clause 6 new subsection (1B) of section 8, which reads "A Commissioner must lead the work of the Commission in any other priority area that is designated by the Chief Commissioner, and the Chief Commissioner may designate an area of work as a priority area **only after consultation with the Minister** and the other Commissioners." (emphasis added)

⁴ See for example, GA resolution 48/134 endorsing the Paris Principles; a number of OHCHR resolutions, of which the latest is A/HRC/RES/20/14; A number of GA resolutions on the role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, of which the latest is A/RES/67/163; and a number of GA resolutions on national institutions for the promotion and protection of human rights, of which the latest is A/RES/66/169.

⁵ At clause 5 of the Bill, amending s 5 of the present Human Rights Act, in particular subsection (2)(k).

⁶ A/RES/48/134, p 6, 'Method of Operation' (a).

11. ACYA opposes the proposed involvement of the Minister in determining the Commission's priority work areas. This proposed provision goes far beyond setting the Commission's budget, and amounts to direct executive interference in substantive decisions, including decisions that may necessarily lead the Commission to challenge Government policy or legislation. Such ministerial involvement in institutional decision-making is more suited to a human rights department within a government ministry. It is fundamentally antipathetic to the role of an independent national human rights institution.
12. ACYA submits that in order to comply with the standards of independence provided for by the Paris Principle and reaffirmed by the current Human Rights Act, any law governing the Commission must clearly state that its members and staff will not receive instructions from government ministers or other public officials, directly or indirectly, and that public officials should not attempt to issue such instructions. In its present form, clause 6 of the Bill breaches international standards and threatens to undermine this fundamental safeguard. The result of enacting such a law would be to weaken the rights of the citizens of Aotearoa New Zealand, rather than to "strengthen the performance" of the Commission.

Limitation of areas of comment by Human Rights Commission

13. In its present form the Bill removes the statutory function of the Commission "to make public statements in relation to any matter that may affect...human rights". Instead, clause 5(3), of the Bill amends section 5(2) of the Act, by inserting " to make public statements promoting an understanding of, and compliance with, this Act or the New Zealand Bill of Rights Act 1990".
14. This provision clearly limits the scope of human rights issues the commissioners are currently able to comment on to matters relating to the two specified Acts. ACYA is concerned that international human rights instruments and standards that are not specifically referred to by these Acts will now fall outside the legitimate scope of public comment by the Commission. An example of such an international instrument with direct application to the work of the Commission is the United Nations Convention on the Rights of Persons with Disabilities, which is not referenced in this Bill. If a narrow reading of this provision is adopted, the lead commissioner on disability issues may well be precluded from public comment on international standards arising from the Convention. This type of limitation detrimentally affects the ability of the Commission to promote compliance with and protection of human rights standards in Aotearoa New Zealand.

Abolition of Specialist part-time commissioners

15. The Bill proposes restructuring the Commission to reduce the number of its commissioners. It concentrates the role of commissioner under the Human Rights Act into up to four full-time roles, abolishing the current combination of full-time and part-time roles with specialist designations. The Bill proposes removal of the specialist designations of Equal Employment Opportunities Commissioner and Race Relations Commissioner from the Human Rights Act. Instead of creating a fulltime designated Disabilities Commissioner as indicated in the explanatory note, it proposes adding all three specialised human rights areas to the list of existing functions of the Commission.
16. The Regulatory Impact Statement for the Bill notes that a potential disadvantage of having the commissioners as generalist Human Rights Commissioners is that those with specialised skills and experience in certain areas such as disability or race relations may be deterred from applying for commissioner roles, and that only generalist human rights experts may be recruited.

As such, although this aspect of the proposed restructure may add to the efficiency of the Commission in terms of cutting costs, it is unlikely to enhance the effectiveness of the Commission's work currently done by specialist part-time commissioners. The effect of this shift from a mix of specialist and generalist commissioners to solely generalists will inevitably weaken the focus on the areas previously deemed significant enough to warrant specialist focus.

17. Article 4 of United Nations Convention on the Rights of the Child (UNCROC) requires New Zealand to “undertake all appropriate legislative, administrative, and other measures” for the implementation of the rights in UNCRC “to the maximum extent of...available resources”. The UNCROC Committee has specifically commented that where resources are limited, consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone's human rights, including children's. In this context, the UNCROC Committee regards the development of a broad-based national human rights institution that includes a specific focus on areas affecting the rights of children as the best approach.⁷ In this regard ACYA notes that the specialist focus of the work of all three designated specialist commissioners has been of great value in the protection and promotion of the special human rights of children in Aotearoa New Zealand. That work has complemented and supported the work of the Office of the Children's Commissioner ('OCC'). ACYA reminds the Justice and Electoral Committee that the OCC has a statutory function of monitoring services under the Children, Young Persons and Their Families Act 1989. That function necessarily means that the OCC must often focus its resources on promotion and review of the wellbeing of children and young people, rather than advocacy specifically in relation to their human rights.
18. ACYA refers to its 2013 submission to the United Nations Human Rights Council on New Zealand's Second Universal Periodic Review of human rights ('UPR'), where it outlined the greatest factors affecting the rights of children and young people. Of particular significance were factors such as child poverty, abuse and neglect, criminal offending, and employment rights. Māori and Pasifika children were identified as disproportionately affected by negative indicators such as poverty and institutional discrimination within the criminal justice system. Almost all matters raised as concerns by ACYA in the UPR process fall within the existing designations and would benefit from continued attention by specialist commissioners. The loss of these specialisations and the flexibility afforded by the mixed part-time and full-time commissioner model is likely to detract from the overall protection and promotion of human rights, including the rights of children and young people in Aotearoa New Zealand.
19. With respect to the role of the Disability Rights Commissioner, ACYA welcomes the formalisation of this specialisation within the work of the Commission. However, ACYA notes that the Commissioner responsible for leading the work on disabilities rights may not possess any specialist knowledge, experience, or connections within disabilities communities. As with race relations and equal employment issues, the disabilities rights portfolio will be assigned to a commissioner with more than one portfolio, and working only part time on disability rights. In this way, the Act fails to meet its first articulated purpose of creating a full-time Disability Rights Commissioner.
20. ACYA is concerned that this failure will detrimentally affect Aotearoa New Zealand's implementation and protection of the rights of children with disabilities. Aotearoa New Zealand ratified the Convention on the Rights of Persons with Disabilities on 26 September 2008. Article 7 (1) of the Disabilities Convention requires that States Parties “take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children”. ACYA welcomed the establishment of a

⁷ CRC/GC/2002/2 15 November 2002

designated specialist Disabilities Commissioner, with the requisite experience and connections within the disabilities community to better represent the nuanced challenges faced by that community – especially by children and young people affected by disability – in accessing their rights.

21. ACYA wishes to exercise its right to an audience with the select committee and to address the committee directly on the issues arising from its submission.

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