



Human Rights Tribunal
1270 - 605 Robson Street
Vancouver, B.C. V6B 5J3
October 25, 2019

Attention: Katherine Hardie
Via email: Katherine.Hardie@gov.bc.ca

Katherine:

Thank you for the opportunity to provide a response to the *Report of the Working Group on Strengthening Tribunal Processes for Representative Complaints*.

On September 13, First Call: BC Child and Youth Advocacy Coalition convened a discussion for interested First Call members to discuss recommendations in the report.

Individuals in attendance represented Inclusion BC, Society for Children and Youth of BC, BC Teachers' Federation and Pacific Community Resources Society.

The following represents views, observations and concerns expressed at the meeting. This is not a position paper or a consensus-based response. Rather, it is a summary of a thoughtful discussion with individuals who work with children and youth, are familiar with the UN Declaration on the Rights of the Child, and who develop and support good public policy for children and youth.

First Call meeting participants agreed to three recommendations that address process rather than the substance of what the Working Group aims to achieve.

- 1) Law and administrative changes that invite self represented human rights complaints from minors must be carefully considered for unintended outcomes.
- 2) Broader consultation is needed to ensure changes both meaningfully assist minors to participate in Tribunal processes *and* protect minors from potential exploitation or harm.
- 3) In general, greater public education is needed about children's rights in B.C. We recognize this is not within the mandate of the Human Rights Tribunal and we look forward to learning more about initiatives from B.C.'s new Human Rights Commissioner.

The following feedback represents highlights from our discussion. We have not addressed operational and administrative recommendations except where those recommendations overlap with areas of discussion.

For additional clarity, this response does not necessarily reflect the official position of any of the organizations who participated in the discussion, but rather reflects the cumulative views expressed by participants.

General Observations

- 1) The children's rights framework includes both the rights of individual children and the rights of groups of children. In reviewing the goals, themes and recommendations in the Working Paper, it seems helpful to think about potential complaints from minors in both areas. The first are specific, situational complaints that may lead to a resolution for an individual minor. The second are complaints that address systemic discrimination where the best outcome may be policy change that would affect a group of children.
- 2) Across both the provincial and federal governments, we find numerous and inconsistent policies that set the minimum age at which a young person can fully participate in a variety of activities. While the minimum age to obtain a driver's licence is sixteen in B.C., the federal voting age is nineteen. The mandatory age to remain in school is sixteen but until very recently in B.C., children at twelve can work at virtually any occupation.

The patchwork of minimum ages we have established reflects society's inconsistent views on the decision-making capacities of minors. In areas related to health, like smoking and alcohol consumption for example, minimum ages reflect our views about safeguarding minors from harm or exploitation because we recognize their vulnerability to advertising and peer pressure, and decisions that may have long-term consequences that are not fully appreciated by children and youth.

- 3) The Working Group's recommendations prompted a discussion at both a philosophical level about our collective duty to care for minors; their evolving capacity to make decisions; decision-making that is independent from authority figures; and a reasonable approach to ensure the conceptual framework for minors to advance self-represented human rights claims minimizes the possibility of intimidation and harm while promoting agency and self actualization. As representatives from organizations that provide both services and policy advocacy, we appreciate that the Declaration on the Rights of the Child also includes the right to be protected from exploitation, injury and other harms.

Consultation

We are pleased to note the Working Group recommended

“the Tribunal or Human Rights Commission conduct further research and consultations with children and youth and youth advocacy organizations...”

We strongly agree with this recommendation and encourage the Tribunal to expand the number of organizations consulted. Specifically, we recommend consulting with the Public Guardian and Trustee of BC, Ministries of Government including the Ministry of Children and Family Development, the Ministry of Health and the Ministry of Education (if this has not yet occurred). In addition, one participant wondered to what extent Aboriginal youth, youth in care, LGBTQ2S2+ youth, and disabled youth have been consulted. While First Call is a large coalition of member groups, not all who were interested in participating were able to attend our meeting or to provide feedback on this response. Diverse views are important to minimize the potential for unintended consequences to specific groups of children and youth.

Some of the Working Group's recommended changes may need more input on potential implications to other laws related to minors. In particular, recommendations for amendments to the Infants Act that would

allow minors to enter into mediated settlement agreements prompted numerous questions in our discussions about whether this may invite pressure to lower minimum ages in other acts.

We understand that removing a minimum age in the Human Rights Code does not negate minimum ages set out in other Acts or regulations. We understand that this change would, however, permit human rights complaints to be brought *against* minors.

In our discussion on this point, some expressed concern that a human rights complaint brought against a minor may be a disproportionate response to a potential transgression. Society extends some special rights and protections to minors in other aspects of law – when accused of a crime for example. The formal, quasi-judicial process triggered by a human rights complaint aimed at an individual minor seems a heavy-handed response to what might better be addressed through education.

Children’s Rights Education

Greater education about children’s rights is needed in B.C. Research has shown that greater public awareness about children’s rights leads to greater compliance and an increase in children and youth voicing their rights informally at school and in community.

We are aware that educational campaigns are outside the mandate of the Human Rights Tribunal. As the new Human Rights Commissioner begins her mandate, we recommend that she considers a comprehensive, public education initiative, with a special focus on children’s rights.

Increased public awareness about children’s rights, over the long-term, may be a more effective way to ensure compliance rather than through individual, complaint-driven litigation.

The Best Interest of the Child

International agreements, domestic law and policy, and professional standards, generally agree that the best-interest of the child is always the priority in decision-making. And we fully support the principle that the evolving capacity of children and youth should be considered in that decision-making.

Simultaneously, we recognize that even adults who are experts in various disciplines may differ on what ‘best-interest of the child’ means and what it means in different circumstances.

Participants in our discussion shared a variety of stories illustrating that a child’s emotional attachments, fears and desires are powerful motivators in decision-making. The child’s best interest is not always obvious to either the child or adult caregiver and over time, as child’s capacity matures and a situation evolves, the question must be continuously revisited.

Capacity of a Minor

In reviewing the goals, themes and recommendations in the Working Paper, it seemed helpful to think about potential complaints from minors in two distinct areas.

The first area is specific, situational complaints that may lead to a resolution for *an individual minor*. The second is a complaint that identifies systemic discrimination where the best outcome would be policy change that benefits *a group of children*.

Individual Children

The evolving capacity of a child to make decisions and the child's best interest are interconnected. A recurring question that arose during our discussion was who would decide on a child's capacity for decision-making, readiness to advance a complaint, and by what measure.

The capacity of a minor to make independent decisions after considering both positive and negative outcomes, and that may have long-term implications, is based in large part on that individual's cognitive and social development and also levels of ability. Further, a child's capacity to make decisions evolves not only with development but also with practice.

Teaching pedagogy and curriculum recognizes the need for children to practice decision making in situations where the potential risk is proportionate to the potential outcomes. Schools provide these opportunities through activities like mock trials and debates. Families provide these opportunities through greater autonomy and providing age-appropriate choices.

B.C.'s current graduated driver's license system reflects a version of 'practicing' with greater privileges added as one progresses through stages. This system also reflects data on what we know about who (based on average age-related development) is most at risk. While it's possible to say that setting a minimum age for driving is discriminatory, we also consider it part of our duty to care for and protect children and youth.

Children and youth are uniquely vulnerable. This point needs more than passing consideration in designing institutional pathways for minors to exercise their rights. And it provokes a discussion about how circumstances like poverty, pressure from adults or peers and the inclination of children and adolescents to need and seek-out approval adds an additional layer of vulnerability.

Concern was expressed about how the Tribunal would ensure that minors are not inappropriately or unduly influenced by adults or peers to pursue a complaint – particularly one that may involve a financial settlement.

Groups of Children

First Call has advocated for better employment standards to protect children from exploitation and injury in the workplace for over fifteen years. We know that cognitive development (in addition to physical strength) is a primary consideration in determining safe tasks and work environments for minors. It is well established that children and young workers are far less likely to identify unsafe work or conditions; challenge authority figures about their concerns; and speak up or report their concerns to an external authority. These are universal characteristics that inform state and international laws against child labour – and the rationale for establishing minimum ages that benefit the greatest number of children rather than the impossible task of evaluating each individual child's capacity.

As it relates to the rights of groups of children, evolving capacity is informed by what we know about the average cognitive and physical development related to age.

We recognize there is an inherent contradiction in applying the principle of 'evolving capacity' to individual minors in self represented human rights complaints, and the minimum ages set in other Acts that determine when all minors can engage in that activity (e.g.: obtaining a drivers licence, purchasing alcohol, etc.)

Some concern was expressed that a complaint that successfully challenged a standard, regulation or rule (for example a minimum age set out in another act) for the benefit of one minor, may not be in the best interest of a group of minors.

Some participants expressed concern that the Working Group's recommendation to repeal the definition of age in the Code opens the door to age-based complaints related to other Acts (notwithstanding the exclusion of those under the Code).

The rights of groups of children (to housing, clean water, food security for example) should be pursued by good public policy. Again, this prompts a larger discussion about how we, as a society, honour the rights of our youngest members.

Children's Rights and Systemic Change

We are aware that, in some instances families are turning to the Human Rights Tribunal to resolve, for their own child, what appears to be a chronic lack of resources in the public school system.

We understand these complaints are often settled through mediations that can result in a remedy for an individual child at their school or within a district. We have heard that some families view this as a last-resort advocacy strategy – one that is entirely understandable – but appears to do little to advance positive system-change that would address the rights of an entire group of children.

We know that it is often informed and well-resourced families who have the capacity to pursue fairness and remedies on behalf of their children. This is true broadly when families engage with institutions of government. Evidence, over decades, shows better outcomes related to things like health and education for children who grow up in comparatively advantaged families. Over reliance on a complaint driven human rights approach runs the risk of hearing disproportionately from minors whose socio-economic status supports their participation in the process. It runs the risk that access to justice is available only to those who can afford legal and other supports.

Many children's advocates were pleased when the Supreme Court of Canada upheld the Moore decision in 2012 and determined that students with disabilities are "entitled to receive the accommodation measures they need to access and benefit from the service of public education".

Children's advocates were optimistic this decision would have lasting and positive effects that would benefit all public school students and their families. Unfortunately, the number of families currently reporting that their child cannot be accommodated at school - for a day, a week or longer - is higher than ever. Disappointingly, the Moore decision has not ensured long-term, consistent inclusion for many students in 2019.

Some participants in our discussion expressed concern that an expanded, low barrier process that invites complaints from minors (in this area), may simply establish the human rights tribunal as the preferred means for institutions of government to address individual situations.

As this represents, potentially thousands of complainants, there is a hazard here of turning human rights complaints into an arbiter of reoccurring, similar cases where a political, policy response would benefit and uphold the rights of a larger group of affected minors.

Legal Representation, Appeals and Processes

On the topic of legal representation, the report notes:

There are reasons why a minor may be restricted from initiating or participating in court proceedings, particularly without legal counsel, that are not as compelling in the administrative context. In particular, within the court context, there are substantial cost consequences and complicated rules of procedure and evidence. Further, minors are generally entitled to a postponement of the limitation period for commencing a suit until they reach the age of majority and therefore there is reduced urgency in terms of commencing a lawsuit while under legal disability.

The Working Group also considered how extending the right to file a complaint to minors could present some complex issues for the Tribunal process. For example, the Tribunal may need to deal with a respondent's challenge to a minor's capacity to proceed in their own name with or without legal representation. These concerns, in our view, are outweighed by the considerations favouring minors' ability to advance their own human rights complaints.

Finally, to facilitate a minor's equal access to the Tribunal, and given that a minor may encounter challenges in accessing legal assistance, the Tribunal should coordinate with legal service providers to ensure that there is a framework in place for minors who wish to consult a lawyer directly to assist them in the Tribunal process.

To this end, the Working Group also recommends an amendment to the Code to include a right to counsel for a minor or an adult who may require representation to advance their own complaint.

There was general agreement in our discussions that, even though filing a human rights complaint with the Tribunal may be comparatively straight-forward, the processes involved once a complaint is accepted are complex and intimidating.

Beyond challenging a minor's capacity to bring a complaint, the respondent also has the right to a meaningful defense. This necessarily means the minor would need to provide evidence; participate in mediation and/or participate in a hearing; be cross-examined; offer and defend an argument, make a series of decisions both on the spot and for the long-term; and comprehend potential outcomes of the Tribunal's decisions or in a mediated settlement.

The power differential between adults and minors in our society is specific (within families for example) and systemic (within institutions, and across legislation and regulation). A more accessible complaint process that encourages and facilitates self represented (or peer represented) minor complainants will not compensate for that power differential. Competent adults are regularly advised by courts to seek legal representation to ensure their interests are represented.

We strongly agree with the recommendation that minors need legal representation in Human Rights Tribunal processes in order to mitigate the power imbalance present in the relationships between the minor, institutions of government, private interests and the interests of (likely) adult respondents and their (potential) lawyer or team of lawyers. And for minors with disabilities, greater supports and accommodations would be needed in order to facilitate their participation.

Conclusion

Our discussion generated a few potential scenarios that may call for more consideration:

- How will a minor be supported if they are overly disappointed to have a complaint dismissed?
- How will a minor be supported if they are overly disappointed with a mediated settlement agreement?
- How will a minor be supported to adhere to conditions set out in a mediated settlement agreement in the long term?
- How will a minor be supported if a complaint is appealed the matter moves to other, more formal court proceedings?
- What support will be available for a minor if a self represented complaint causes conflict within the minor's family or community?
- Will parents or guardians be informed if a minor's complaint is accepted and proceeds?
- Who will support the minor in the event a financial award is granted? What protections would be in place to ensure the minor is not targeted in the event of a financial award?

In closing, First Call member groups whole-heartedly support the advancement of children's rights. We know there can be a tension between the rights that protect children and those that assure their participation and decision-making.

There are a variety of ways to strengthen a culture of compliance with the Convention including greater public education and awareness, good public policy, and of course, access to justice.

We hope this is the beginning of a fulsome discussion about strengthening children's rights in B.C.

Sincerely,



Adrienne Montani
Provincial Coordinator