



Australian
Human Rights
Commission

Kolind v Commonwealth of Australia (DET)

[2015] AusHRC 102

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**Kolind v Commonwealth
of Australia (Department of
Education and Training)**

[2015] AusHRC 102

Report into the right of the child
to free primary education

Australian Human Rights Commission 2015



**Australian
Human Rights
Commission**

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**Australian
Human Rights
Commission**

December 2015

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr Christian Kolind on behalf of his children Emilie and Gustav Kolind. Mr Kolind complains that two of his children were not able to avail themselves of free primary education in a school in New South Wales.

I have found that the Commonwealth failed to take all appropriate administrative and other measures to make free primary education available to all children in Australia, including Mr Kolind's children Emilie and Gustav Kolind. I have found that the Commonwealth has acted inconsistently with the right to free primary education under article 28 of the *Convention on the Rights of the Child* (CRC). I have also found that the Commonwealth has acted inconsistently with the right to non-discrimination in articles 2 and 28 of the CRC.

The Department of Education and Training provided a response to my findings and recommendations by letter dated 23 October 2015. In its response the Department maintains its position that the Commission does not have jurisdiction to inquire into this matter as the Commonwealth is not responsible for a state's compliance with human rights obligations in this area. However, the Department indicated its agreement that 'a real issue had been raised' and, in recognition of the importance of this matter, it had written to the states and territories in relation to obligations under the CRC. I have set out the Department's response to my findings and recommendations in part 8 of my report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr Christian Kolind, on behalf of his children Emilie and Gustav Kolind, against the Commonwealth of Australia Department of Education and Training) (Department). Mr Kolind alleges a breach of human rights under the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. This inquiry has been undertaken pursuant to section 11(1)(f) of the AHRC Act.

2 Background

3. Mr Kolind, his wife and three children are Danish citizens. In March 2011, the Kolind family relocated from Denmark to Australia, having been granted a Business (Long Stay) visa (subclass 457). At the time, the Kolinds' youngest child was one and the two older children were five years old.
4. In April 2011, Mr Kolind enrolled the five-year old twins, Emilie and Gustav Kolind, in East Lindfield Public School, in a suburb of Sydney.
5. The school advised Mr Kolind that he would have to pay school fees of \$4,500 for each of his children.
6. The requirement to pay school fees arises as a result of the operation of section 31 and section 31A of the *Education Act 1990* (NSW) (Education Act). Section 31(1) of the Education Act provides that instruction in government schools is to be free of charge. However, pursuant to s 31(2) of the Education Act, that provision does not apply to 'overseas students'. The term 'overseas students' is defined in section 3 of the Education Act to mean:

a student who holds a visa under the *Migration Act 1958* of the Commonwealth that enables the student to study in New South Wales, but does not include the holder of a permanent visa or special category visa within the meaning of that Act.
7. Mr Kolind's children fall within that definition. Section 31A of the Education Act provides, among other things, that the Director-General may by order fix the fees to be paid by overseas students. On 5 March 2010, the Director-General of Education and Training (Director-General) made an order pursuant to s 31A of the Education Act fixing fees for classes of overseas students in the years 2010 and 2011. Relevantly, the Order fixed the fees for temporary resident visa holders at \$4,500 for 12 months tuition at level Kindergarten to Year 6, plus a \$110 administration fee (Order A). On 28 October 2011, the Director-General made an order pursuant to s 31A of the Education Act fixing fees for the years 2012 and 2013. The fees for temporary resident visa holders remained unchanged from the fees set down by Order A.
8. Sometime in 2012, Mr Kolind applied to the Temporary Visa Holder Unit, within the NSW Department of Education and Training, for a waiver of the school fees. However, he was advised that he did not qualify for a waiver due to his family circumstances and annual gross income.
9. On 6 September 2013, the Kolind family were granted an Australian permanent resident visa. From that point onwards, Emilie and Gustav Kolind were able to access public education for free.

3 Complaint

10. On 1 March 2012, Mr Kolind lodged a written complaint with the Commission alleging that two of his children, Emilie and Gustav Kolind, were not able to avail themselves of free primary education in a public school in New South Wales. He claims that this is inconsistent with article 28(1)(a) of the *Convention on the Rights of the Child* (CRC), which provides:
 1. States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all; ...
11. Mr Kolind claims that the wording ‘free to all’ does not suggest that temporary resident students are to be excluded from protection under article 28. He states that no article of the CRC permits discrimination on the basis of residency.
12. The Commission attempted to conciliate the complaint during the course of 2013. However, the parties were unable to reach agreement on resolving the complaint.
13. This complaint is substantially similar to the matter of *Behme v Commonwealth of Australia* [2013] AusHRC 60. The Commonwealth has relied upon submissions it made to the Commission in the Behme matter, and I propose to rely on the reasons for the Commission’s decision in that matter.

4 Legislative framework

4.1 Functions of the Commission

14. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly, section 11(1)(f) gives the Commission the following functions:

to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:

 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
15. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in section 11(1)(f) when a complaint in writing is made to the Commission alleging that an act or practice is inconsistent with or contrary to any human right.
16. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.
17. Pursuant to section 3 of the AHRC Act, the rights and freedoms recognised in the CRC are ‘human rights’ for the purposes of the AHRC Act.¹

5 Is there an ‘act’ of the Commonwealth?

5.1 Consideration of the meaning of ‘failure to do an act’

18. A key issue in this complaint is whether there is an ‘act’ or a ‘practice’ within the meaning of section 11(1)(f) as defined in section 3 of the AHRC Act.
19. The Commonwealth submits that there is no ‘act’ or ‘practice’ by the Commonwealth into which the Commission has power to inquire under section 11(1)(f) of the AHRC Act. In this regard, it reiterates its submissions in the case of *Behme*, which are set out in the Appendix of that decision.
20. Section 3(3)(a) of the AHRC Act provides that a reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
21. For the reasons set out in *Behme* at [21]-[27], whether section 11(1)(f) of the AHRC Act empowers the Commission to inquire into a ‘failure to do an act’ depends, critically, upon whether the particular human right in issue imposes an affirmative obligation to act.

5.2 Does article 28 of the CRC positively require the Commonwealth to undertake an act?

22. Mr Kolind has referred the Commission to article 28(1)(a) of the CRC, which I have set out above. Article 28 declares or recognises a ‘right’ to education. It also imposes upon each state party certain obligations directed to ‘achieving that right progressively and on the basis of equal opportunity’, including, relevantly for current purposes, the affirmative obligation to ‘make primary education compulsory and available free to all’.
23. Article 2 of the CRC requires States to respect and ensure the rights in the CRC to all children without discrimination ‘of any kind’. I am therefore of the view that the right recognised by article 28 of the CRC extends to all children within the Commonwealth’s jurisdiction, including non-citizens.
24. The United Nations Children’s Fund (UNICEF) has commented in its 2008 Implementation Handbook for the CRC that free, compulsory primary education for all is the ‘core minimum’ required by the right to education in article 28.² Further, the nature of the requirement is unequivocal. UNICEF states:

The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization.³
25. I note also that UNICEF has commented that the ‘right to free compulsory education is so clearly stated in the Convention that any failure to meet this standard is a major source of concern’.⁴
26. Article 4 of the CRC specifies how the rights recognised or declared by the CRC are to be implemented and by whom. This has the effect of attenuating the content of those rights.

27. 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.

28. The word 'appropriate' qualifies the nature of the Commonwealth's obligations in the sense that its obligations do not extend to the taking of 'inappropriate' legislative, administrative and other measures. Further, I note that the right to education is an economic, social and cultural right.⁵ Accordingly, article 28, read together with article 4 of the CRC, recognises:

- a right, exercisable by each child within the Commonwealth's jurisdiction, to education;
- being a right which is to be achieved, in part, by discharge of the Commonwealth's affirmative obligation to make primary education available free to all;
- with the Commonwealth under a further or related affirmative obligation to take all appropriate legislative, administrative, and other measures to implement that right; provided that
- such measures are not required to exceed the extent of the Commonwealth's available resources.

29. Accordingly, an alleged failure to provide free education, or at least to take all appropriate administrative and other measures to implement the right to education, including by taking measures of that nature to make available to all primary education free of charge, engages section 11(1)(f) of the AHRC Act.

30. Support for this approach can be drawn from *South Africa v Grootboom*,⁶ where the South African Constitutional Court considered a similar issue dealing with rights concerning access to adequate housing conferred by s 26 of the *Constitution of the Republic of South Africa, 1996*.⁷ Sections 26(1) and (2) provide:

- (1) Everyone has the right to have access to adequate housing
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

31. Read together, those provisions were said to impose upon the National Government various obligations, including:

- a requirement to devise a comprehensive and workable plan or program for the provision of adequate housing, being one which clearly allocated responsibilities and tasks to the different spheres of government;
- a requirement to allocate national revenue to the other tiers of government on an equitable basis for the purposes of achieving that plan; and
- a requirement for the reasonable implementation of that plan.

32. While such a national plan existed and was being implemented to provide housing in the medium and long term, no provision had been made (in the national plan or in the national budget) for the immediate needs of those requiring housing in the short term. The court concluded that that fell short of the requirements of section 26(2) and granted relevant declaratory relief.
33. The constitutional arrangements in South Africa differ from those in Australia. Nonetheless, the approach of the Constitutional Court provides useful guidance as to how I might approach this inquiry. Here, the short point is that free primary education has not been made available to Mr Kolind's children on the basis that they are temporary visa holders. That fact may not, in itself, disclose a contravention of article 28 (read with article 4 and 2) of the CRC. For example, the Commonwealth would not bear responsibility if the failure to make education available free of charge to Mr Kolind's children was the result of an administrative oversight or misfeasance by NSW.
34. In the current inquiry, it is necessary for me to consider the steps (if any) taken by the Commonwealth and to evaluate those steps against the positive obligation to take all appropriate administrative and other measures to implement the right to education, which is to be achieved, in part, by making primary education available free to all.

5.3 The relevance of Australia's federal structure

35. The Commonwealth submits that there can be no relevant 'act' under s 11(1)(f) of the AHRC Act, where a state, here the State of New South Wales, is ultimately responsible for the breach of human rights. I accept that it was the State of New South Wales, and not the Commonwealth, that sought to impose fees of \$4,500 per year, per student, for the primary school tuition of Mr Kolind's children.
36. The Commonwealth submits that the Commission's inquiry into these circumstances may amount to an 'inquiry into a failure by the Commonwealth to prevent a breach of human rights by another person'. The point made is that the legislature could not have intended this because it has specifically confined the Commission's inquiry powers to acts of the Commonwealth.
37. This submission, which has been considered by the Commission previously in *Behme*,⁸ misses the point. I reiterate what I stated in *Behme* at paragraphs [41]-[44]. As discussed therein, the articles of the CRC in issue are addressed to the Commonwealth. The right in article 28 of the CRC is tied to the reciprocal obligation of the Commonwealth to take certain measures. It is too broad a proposition to suggest that section 11(1)(f) cannot be engaged because the acts and omissions of another polity are also involved. Whether the Commonwealth has acted inconsistently or contrary to any human right will depend on the particular facts in each case.
38. Further, the United Nations Committee on the Rights of the Child (Committee) has specifically rejected the Commonwealth's suggested proposition. In General Comment No 5, it stated that:

where a State delegates powers to legislate to federated, regional or territorial governments, it must also require these subsidiary governments to legislate within the framework of the CRC and to ensure effective implementation.⁹

39. The Committee also said:

decentralization does not in any way reduce the direct responsibility of the State party's Government to fulfil its obligations to all children within its jurisdiction.¹⁰

40. While the term 'delegation' is inappropriate in the Australian constitutional context to describe the relationship between the Commonwealth and the states, the above comments of the Committee emphasise that 'direct responsibility' for the discharge of the obligations imposed by the CRC remains with the Commonwealth, regardless of the fact that responsibility for the discharge of the relevant governmental function lies with another polity.

6 Has the Commonwealth taken all appropriate measures to ensure that primary education is made available for free to Mr Kolind's children?

6.1 The nature of the positive obligation to take all appropriate administrative and other measures

41. The Committee has considered, in its General Comment No. 5, what entails 'all appropriate administrative and other measures' by States Parties, for the purposes of article 4 of the CRC. Its commentary on this issue is instructive in relation to this complaint.

42. In its General Comment No. 5, the Committee states that it:

cannot prescribe in detail the measures which each or every State party will find appropriate to ensure effective implementation of the Convention ... but from its first decade's experience ... it has distilled here some key advice for States.

The Committee believes that effective implementation of the Convention requires visible cross-sectoral coordination to recognize and realize children's rights across Government, between different levels of Government and between Government and civil society ... Invariably, many different government departments and other government or quasi-governmental bodies affect children's lives and children's enjoyment of their rights. ... Rigorous monitoring and implementation is required, which should be built into the process of government at all levels.¹¹

43. In particular, the Committee recommends the development of a comprehensive national strategy or plan to ensure effective implementation of the Convention rights. A national plan would contain targeted goals, specific implementation measures and the allocation of financial resources.

44. The Committee states that:

If Government as a whole and at all levels is to promote and respect the rights of the child, it needs to work on the basis of a unifying, comprehensive and rights-based national strategy, rooted in the Convention.

The Committee commends the development of a comprehensive national strategy or national plan of action for children, built on the framework of the Convention. ...

To give the strategy authority, it will need to be endorsed at the highest level of government. ...

The comprehensive national strategy may be elaborated in sectoral national plans of action – for example for education and health – setting out specific goals, targeted implementation measures and allocation of financial and human resources. ...

The strategy will need to include arrangements for monitoring and continuous review.¹²

6.2 Were there any avenues open to the Commonwealth?

45. The Commonwealth submits that it must have the power to prevent the breach of human rights for its failure to be inconsistent with human rights. It states:
- For a failure of the Commonwealth to be inconsistent with or contrary to human rights, it must be possible to say that if the Commonwealth had done that thing the infringement of the human right would not have occurred or at least probably would not have occurred.
46. It further submits that ‘no administrative action by the Commonwealth can override State legislation’. It also submits that any other avenues open to it would be purely ‘political’ and could not guarantee that the infringement would not have occurred.
47. Under international law, the specific obligation upon the Commonwealth is to take ‘all’ appropriate measures. In my view, article 28 (read with article 4) of the CRC obliges the Commonwealth to at least try to achieve the required outcome through the avenues available to it. In my view, the material issue is whether there were any administrative or other avenues available to the Commonwealth to ensure that primary education is made available free to all children in Australia, and in the context of this complaint, to Mr Kolind’s children.
48. The Commonwealth provides funding to the States for the purpose of education. I understand that since 1 April 2009, Commonwealth funding has been provided pursuant to the Inter-Agency Agreement on Education, being a schedule to the Intergovernmental Agreement on Financial Relations administered by Treasury. The latest iteration of this Agreement was entered into by the Commonwealth and each of the States and Territories in July 2011 (Agreement).
49. It is apparent from the Agreement that the Commonwealth sees itself as ‘jointly responsible’ with the States for developing and reviewing certain national objectives and outcomes in the area of education. Pursuant to the Agreement, the Commonwealth requires the States and Territories to do certain things. In this manner, the Commonwealth exercises considerable influence over the States and Territories in relation to their provision of education.
50. The national outcomes of the Agreement include:
- all children are engaged in and benefit from schooling;
 - young people are meeting basic literary and numeracy standards, and overall levels of literacy and numeracy are improving; and
 - schooling promotes the social inclusion and reduces the educational disadvantages of children, especially Indigenous children.
51. It therefore appears from the above analysis that there were avenues available to the Commonwealth to at least attempt to achieve the outcome required by article 28 of the CRC. The process of negotiation, formulation of objectives, outcomes and conditions, as well as the execution of the agreement, involved an exercise of the executive power conferred by section 61 of the Constitution.

6 Has the Commonwealth taken all appropriate measures to ensure that primary education is made available for free to Mr Kolind's children?

52. I acknowledge that the negotiation and finalisation of any outcomes with New South Wales and other States and Territories may be 'political', there being no guarantee that New South Wales would have accepted or complied with a condition or obligation imposed by the Commonwealth.¹³ However, the fact that these avenues might be described as 'political' does not excuse the Commonwealth from its obligation under article 28 (read with article 4) of the CRC to undertake 'all' appropriate measures.

6.3 Did the Commonwealth take any measures to ensure that primary education is made available for free to Mr Kolind's children?

53. On 5 April 2012, the Commission wrote to the Commonwealth seeking 'details of all legislative, administrative and other measures taken by the Commonwealth to ensure the right to free primary education for all [children].'

54. On 8 August 2012, the Commonwealth responded to the Commission's correspondence but refused to provide these details, on the basis that it disputed that the Commission had jurisdiction to inquire into the matter.

55. Subsequently, on 29 November 2012, in response to the Commission's findings and recommendations in *Behme*, the Commonwealth wrote to the Commission stating that:

...[t]he Commission has raised a real issue involving a State seeking to impose school fees on a child of a temporary visa holder and Australia's human rights obligations under the CRC. The Commonwealth is not responsible for ensuring that state and territory governments comply with Australia's human rights obligations in areas of state and territory responsibility such as the provision of primary school education. However, in recognition of the importance of this matter, the Commonwealth intends to raise this issue with the relevant state or territory education ministers for their consideration.

56. In my preliminary view of this complaint, I invited the Commonwealth to provide details of all legislative, administrative and other measures that it had taken to ensure the right to free primary education for all children.

57. In response to this request, the Commonwealth stated that:

In accordance with this undertaking [set out in paragraph 56], the Commonwealth has written to education ministers in states and territories in relation to this issue. This correspondence, dated 29 January 2014, is attached for your information.

58. The correspondence in question is from the then federal Minister for Education, Christopher Pyne MP, to respective state and territory Ministers for Education. It states (in its entirety):

Dear Minister

The Australian Human Rights Commission (AHRC) has received a number of complaints from temporary visa holders concerning fees being charged for their primary school aged children to attend public schools while they are in Australia.

The AHRC finalised a report to the Commonwealth Attorney-General concerning the human rights of a child of a temporary visa holder who was required to pay fees in relation to their enrolment in a government school. In its findings, the President of the Commission concluded that the human rights of the complainants had been infringed as a result of their children not being offered free education at a government school in the state they were residing.

In response to the AHRC, my department agreed that the Commonwealth would raise this matter with state and territory education ministers for consideration.

Australia is obliged to make primary education compulsory and freely available. This is set out in Article 28(1)(a) of the Convention on the Rights of the Child. As party to this Convention, Australia has a legal obligation to provide free primary school education.

The Coalition Government respects that the ownership and operation of government schools is the constitutional responsibility of state and territory governments. Therefore, I encourage you to consider the issues surrounding the provision of free primary school education at a government school for children who have accompanied their parents and are residing in Australia on a temporary visa.

59. Based on the Commonwealth's response, I understand that other than this correspondence, it has not taken any further administrative or other measures to make free primary education available to all children in Australia.
60. I note that the Commonwealth has not provided any information to the Commission regarding whether the taking of appropriate measures would exceed the extent of the Commonwealth's available resources.

6.4 Assessment

61. I have set out at paragraphs 42-44 above, the Committee's consideration of what entails 'all appropriate ...administrative, and other measures' for the purposes of article 4 of the CRC.
62. I have set out at paragraphs 48-51 above, the avenues that I considered were available to the Commonwealth, including seeking to attach appropriate conditions to the funding agreements entered into with New South Wales, to ensure that primary education is provided free to all children in New South Wales.
63. I welcome the correspondence from the federal Minister for Education to the States in relation to this issue. However, I do not consider that transmitting the relevant provisions of the Convention to the States and encouraging States to consider the issues surrounding the provision of free primary education to children on temporary visas satisfies the Commonwealth's positive obligation to take all appropriate administrative and other measures to make free primary education available to all children in Australia. I conclude that the Commonwealth has failed to do an act contrary to its positive obligation under article 28 (read with article 4) of the CRC.
64. For the reasons set out above, I find that the Commonwealth has acted inconsistently with Emilie and Gustav's right to free primary education under article 28 of the CRC. In the circumstances of this complaint, the Commonwealth has also acted inconsistently with Emilie and Gustav's right to non-discrimination in article 2 (in conjunction with article 28) of the CRC, which requires the Commonwealth to respect and ensure the rights in the CRC to all children without discrimination of any kind.

7 Recommendations

7.1 Power to make recommendations

65. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.¹⁴ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁵
66. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.¹⁶

7.2 Consideration of individual recommendations

67. Mr Kolind states that he paid \$21,595 in school fees for his children, Emilie and Gustav Kolind, in the period April 2011 to September 2013. He sought this amount in compensation in bringing the complaint on behalf of his children.
68. In considering this submission, I have taken into account the nature of the failure to act found in respect of the Commonwealth and the respective responsibilities of the Commonwealth and New South Wales in relation to the subject matter of this complaint.
69. In the circumstances of this complaint, I have found that the Commonwealth failed to take all appropriate administrative and other measures to make free primary education available to all children in Australia. However, it is not clear what the outcome would have been for Mr Kolind's children had the Commonwealth taken all appropriate measures to make free education available. In reaching this conclusion, I recognise that it is the States which have primary responsibility for the provision of education.
70. Given the failure by the Commonwealth in this matter is in relation to the systemic issue of whether the Commonwealth is taking all appropriate measures in line with its positive obligation under article 28 of the CRC, I consider that the most appropriate recommendations are those which are directed to this systemic issue.

7.3 Systemic recommendations

71. The Commission makes the following systemic recommendations to address the breach of the CRC by the Commonwealth, which is inconsistent with the human rights of Emilie and Gustav Kolind and other children in a similar position.

Recommendation 1

72. That the Commonwealth take all appropriate measures to make primary education free to all children in Australia, regardless of the immigration status of their parents. These measures may include:
- seeking to attach appropriate conditions to the funding agreements entered into with the States for educational purposes to ensure that primary education is provided free to all children in Australia; and
 - incorporating appropriate conditions to ensure that primary education is provided free to all children in Australia in any new national school funding model.

Recommendation 2

73. That the Commonwealth place information alerting migrants to the right of all children in Australia to access free primary education on appropriate Government websites, including those of the Department of Education and Training and the Department of Immigration and Border Protection.

8 Department's response

74. The Department provided a written response to my findings and recommendations on 23 October 2015. The Department stated:

The Commonwealth remains of the view that the AHRC does not have jurisdiction to inquire into this matter under section 11(1)(f) of the AHRC Act.

The Commonwealth also maintains the position that it is not responsible for ensuring that a State complies with Australia's human rights obligations in areas of State constitutional responsibility, such as the provision of primary school education. However, and as with the Behme matter, we do agree that a real issue has been raised by the AHRC involving a State imposing school fees on the child of a temporary visa holder and in recognition of the importance of that matter we have written to the States and Territories to remind them of obligations under the Convention on the Rights of the Child, as noted in our response of 3 August 2015.

Given the responsibility for setting school fees rests with the State, the Commonwealth considers that there is no further action it can take to ensure State compliance and accordingly, will not be taking any further action in response to your recommendations.

75. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission
December 2015

-
- 1 On 22 October 1992, the Attorney-General made a declaration under section 47 of the AHRC Act that the CRC is an international instrument relating to human rights and freedoms for the purposes of the AHRC Act: *Human Rights and Equal Opportunity Commission Act 1986 – Declaration of the United Nations Convention on the Rights of the Child*.
 - 2 UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2008), 421.
 - 3 UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2008), 421.
 - 4 UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2008), 422.
 - 5 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), article 13.
 - 6 (2001) 1 SA 46 (CC).
 - 7 *Constitution of the Republic of South Africa Act 1996* (South Africa).
 - 8 At [41]-[44].
 - 9 UN Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (2003), [20].
 - 10 UN Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (2003), [40]-[41].
 - 11 UN Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (2003), [26]-[27].
 - 12 UN Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (2003), [28]-[33].
 - 13 I note however that the jurisprudence concerning s 96 of the Constitution contains many examples of conditions that might equally be regarded as unpalatable to the States, where the financial assistance has nevertheless been accepted. Further, the Commonwealth appears to have had no difficulty seeking to use these measures to pursue other policy outcomes in the field of education which might be said to relate to human rights, such as the reduction of educational disadvantage of indigenous children consistent with article 2 of the CRC.
 - 14 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(a).
 - 15 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(b).
 - 16 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(c).

Further Information

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