Juvenile Justice, Young People and Human Rights in Australia

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Abstract

This article identifies the key human rights issues that emerge for young people in juvenile justice in Australia. While there is a clear framework for respecting the human rights of children within juvenile justice, the article poses the question: To what extent does Australia actually operationalise and comply with these rights in law, policy and practice? In answering, it discusses various national and international reports, legislation, academic and other research and litigation on behalf of children. It identifies substantive and procedural human rights violations affecting young people in juvenile justice, many of which fall disproportionately on two over-represented groups: Indigenous young people, and those with mental health disorders and cognitive disability. While there are review and compliance mechanisms in place, respect for young people's rights within the broad area of juvenile justice remains problematic.

Keywords: juvenile justice – human rights – youth penality – comparative criminology

Introduction

In July 2016, Australian Prime Minister Malcolm Turnbull announced a Royal Commission into the Northern Territory ('NT') Child Protection and Youth Detention Systems. The announcement came following the wide publication of CCTV footage and images documenting routine abuse of children detained in youth detention centres in the NT. The terms of reference for the Royal Commission require, among other things, an examination of whether the treatment of detainees breached laws or the detainees' human rights (Attorney-General 2016). Within weeks of the announcement of the NT Royal Commission, the Queensland Government announced an independent review of its youth detention centres following allegations of the use of excessive force against detainees (D'Ath 2016) and the

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Tasmanian, New South Wales ('NSW') and Victorian Governments have announced inquiries into similar problems at their detention centres (ABC 2016; Gerathy 2015; Tomazin 2016).

We argue that the events in the NT, NSW, Queensland, Victoria and Tasmania are not isolated incidents, but are emblematic of systemic, widespread violations of the human rights of children in contact with the juvenile justice system.[1] Although the more egregious abuses may occur in detention centres, questions of human rights compliance extend throughout juvenile justice. In supporting this argument, we identify various national and international reports, legislation, academic and other research and evidence where human rights abuses have been raised. The article examines a number of substantive and procedural human rights violations affecting young people in juvenile justice. These violations have occurred despite a seemingly robust framework governing the protection of human rights for children and young people in juvenile justice (Australian Children's Commissioners and Guardians 2016:80–8). The fact that monitoring bodies use human rights standards to raise issues of substantive concern adds a level of complexity to the analysis. We do not suggest that knowledge of or compliance with human rights are absent in Australia. Rather, there are systemic problems that give rise to human rights abuses; further, there is a lack of political will to address these problems.

The United Nations *Convention on the Rights of the Child* ('CRC') has been described as the most ratified of all international human rights treaties, but also the most violated with apparent impunity (Goldson and Muncie 2015). The primary relevant conventions for juvenile justice in Australia are the CRC, the *International Covenant on Civil and Political Rights* ('ICCPR') and, to a lesser extent, the *Convention Against Torture* ('CAT') and the *Convention on the Rights of Persons with Disabilities* ('CRPD'). These conventions have been augmented by a number of guidelines and rules adopted by the United Nations.[2] While there is a clear framework for respecting the human rights of children within juvenile justice, we ask the question: To what extent does Australia actually operationalise and comply with these rights in law, policy and practice?

Before discussing specific rights violations, it is important to acknowledge the broader context of young people in conflict with the law. Research consistently shows juvenile justice systems are filled with the most vulnerable children in our community, those who come from backgrounds of entrenched disadvantage, have poorer education outcomes, drug and alcohol addiction, unstable living arrangements, as well as histories of trauma and abuse, and periods in out-of-home care (AIHW 2016; Fernandez et al 2014; Indig et al 2011; Kenny et al 2006; McFarlane 2010). Indigenous young people experience a number of these disadvantages at a higher rate (Indig et al 2011). This broader picture of disempowerment and profound social disadvantage provides the overarching context in which the abuse of children's rights occurs within juvenile justice. It raises the wider issue of the extent to which children's rights are

[1] Juvenile justice refers to the laws, policies and practices that define the interaction of young people in conflict with the (criminal) law. Some laws are specific to young people (for example, various young offender legislation); other laws are general in application but have either negative or discriminatory impacts on young people (for example, 'move-on' legislation). We take the juvenile justice system to include those justice agencies specifically dealing with young people: the police; government departments responsible for administering various supervision orders, delivering young offender programs and operating detention centres; and the courts responsible for sentencing young people. Discussion of a 'system' does not imply that there no competing or different interests among the agencies involved (Cunneen et al 2015:86–7).

[2] These include the *Standard Minimum Rules for the Administration of Juvenile Justice* ('Beijing Rules'); *Guidelines for the Prevention of Juvenile Delinquency* ('Riyadh Guidelines'); *Rules for the Protection of Juveniles Deprived of their Liberty* ('Havana Rules'); *Standard Minimum Rules for Non-Custodial Measures* ('Tokyo Rules'); *Standard Minimum Rules for the Treatment of Prisoners* ('The Nelson Mandela Rules'); and the *Guidelines for Action on Children in the Criminal Justice System.*

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being met outside of their contact with juvenile justice. This important discussion is outside the scope of this article.

This article first considers two broad classes of children over-represented in juvenile justice: Indigenous young people, and young people with mental health disorders and cognitive disability. These groups have specific rights; in addition, because they are over-represented, other rights violations within juvenile justice will disproportionately impact on them. It then discusses the specific issue of the minimum age of criminal responsibility — which is fundamental to the jurisdiction of juvenile justice in the first instance. The article then moves onto concerns about policing and various public order legislation that has increased police discretion. It is widely recognised that police are the gate-keepers determining who enters, and how they enter juvenile justice systems. It outlines various matters relating to children's courts: the right to a fair trial, mandatory sentencing and rights involving publication and privacy. Finally, it details rights issues relating to detention, including treatment and the holding of juveniles in adult prisons.

This research is part of the Comparative Youth Penality Project ('CYPP') which is a larger comparative study of youth justice penality, law, theory, policy and practice in four select states in Australia (NSW, Queensland, Victoria and Western Australia ('WA')) and England and Wales in the United Kingdom. The authors of the present article have published a companion paper on human rights and youth justice reform in England and Wales (Cunneen, Goldson and Russell forthcoming).

Indigenous children

Noticeably missing from the NT Royal Commission's terms of reference is an acknowledgment of the significant over-representation of Indigenous children in NT youth detention centres, where they comprise up to 97 per cent of the juvenile justice population (Vita 2015). While the number of non-Indigenous young people in detention across Australia has steadily declined over the last three decades, in part due to the introduction of legislation aimed at diversion (including cautions and youth justice conferences), Indigenous young people have not benefitted in the same way as non-Indigenous young people. Nationally, Indigenous young people constitute over half (54 per cent) of the youth detention population, making them 24 times more likely to be incarcerated (AIHW 2015a). Human rights violations that affect all young people within juvenile justice have a particularly disproportionate impact on Indigenous young people due to their significant over-representation in all Australian states and territories. The over-representation of Indigenous children in juvenile justice has long captured the attention of governments, scholars, legal professionals, courts, and the international community. On multiple occasions, it has been raised by the Committee on the Rights of the Child as a significant human rights concern (UNCRC 1997, 2005, 2009, 2012). The UN Special Rapporteur on Indigenous Rights has similarly made recommendations regarding measures to address this over-representation, including adopting the many recommendations of the Royal Commission into Aboriginal Deaths in Custody in 1991 that have never been fully implemented (UNHCR 2010).

Juveniles with mental health disorders and cognitive disability

The prevalence of mental health disorders and cognitive disabilities among juvenile offenders is well recognised, with custody health surveys in NSW from 2003, 2009 and 2015 finding

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that between 83–88 per cent of young people in custody have a psychological disorder and 14–18 per cent have an intellectual disability (Allerton et al 2003; Indig et al 2011; NSW Health and NSW Juvenile Justice 2016). The most recent survey noted higher rates for Indigenous young people, with 24 per cent screening for intellectual disability (NSW Health and NSW Juvenile Justice). Juvenile justice populations also have high rates of borderline cognitive disabilities, including foetal alcohol spectrum disorder (Mutch et al 2013), traumatic brain injury (Kenny and Lennings 2007), and speech and language impairments (Anderson et al 2016).

Children with mental health disorders and cognitive disabilities not only have the same rights as all children in detention, but also have specific rights under the CRPD (arts 12, 13, 14 and 15) and under the UN *Principles for the Protection of Persons with Mental Illness*. However, these blanket protections seem to have had little impact on the increasing over-representation of young people with mental health disorders and cognitive disabilities in juvenile justice. The matter of Corey Brough (*Corey Brough v Australia*; UNHCR CCPR/C/86/D/1184/2003) highlights the significant human rights implications regarding the treatment of this vulnerable group. Brough, who is Indigenous and suffers from a mild intellectual disability and Attention Deficit Disorder, was placed in solitary confinement in a NSW adult prison at the age of 16. In 2006, the UN Human Rights Committee found that Brough's treatment constituted violations of arts 10 and 24(1) of the ICCPR, the right of prisoners to be treated with inherent dignity and the right of a child to have protections required by his status as a minor without discrimination, respectively (UNHRC 2006).

The imprisonment of young people with mental and cognitive disabilities is an ongoing issue in Australia. In WA, children who are sentenced under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24 are to be detained in an authorised hospital, a declared place, or a juvenile detention centre. However, there are no 'declared places' for juveniles and, as a result, no alternative accommodations for young people with acute mental health disorders or cognitive disability. In one case, an intellectually disabled Indigenous man has spent more than 11 years in prison after being found unfit to stand trial for an offence committed when aged 14 (WAAMH 2016).

Age of criminal responsibility

Current Australian legislation establishes 10 as the minimum age of criminal responsibility, although a presumption against responsibility exists until the age of 14 through the principle of *doli incapax*. While there is no international standard regarding the minimum age of criminal responsibility, art 40(3)(i) of the CRC requires the implementation of a 'minimum age below which children shall be presumed not to have the capacity to infringe the penal law'. The CRC does not identify a specific appropriate age; however, 12 years has been recommended as the absolute minimum age for states to implement (UNCRC 2007:[32]). The Committee has argued that a higher minimum age of criminal responsibility of 14 or 16 years' contributes to a juvenile justice system which, in accordance with art 40(3)(b) of the CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected' (UNCRC 2007:[33]). As such, the Committee on the Rights of the Child has been critical of the low age of criminal responsibility in Australia (UNCRC 2005:[73]).

It is well recognised that criminal justice systems are themselves criminogenic, with contact being one of the key predictors of future juvenile offending (Payne 2007; Chen et al 2005). Studies have found that children first supervised between the ages of 10–14 are

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significantly more likely to experience all types of supervision — and particularly sentenced supervision — in their later teens when compared with children first supervised at 15–17 years (AIHW 2013). There is therefore evidence to suggest that raising the age of criminal responsibility (particularly to 14 years) has the potential to reduce the likelihood of life-course interaction with the criminal justice system. While 10- to 11-year-olds constitute just 0.6 per cent of all children under custodial and community supervision, Indigenous children make up 87 per cent of this group (AIHW 2014). As Crofts (2015:123) has commented: '[A]longside police practice and use of diversionary measures, the age of criminal responsibility is the main legal barrier to the criminal justice system; it is therefore a primary point at which the Indigenous youth can be kept out of the system.'

Policing

Police are a fundamental part of juvenile justice, particularly given the level of discretion available in responding to juvenile offenders (Cunneen et al 2015:222–8). The Beijing Rules provide that contact between law enforcement agencies and juvenile offenders shall be managed in such a way as to respect the legal status of the juvenile, promote their wellbeing and avoid harm (r 10.3). The Rules also call for special training of police officers involved with juveniles (r 12.1). Statistical and anecdotal evidence shows that young people, especially Indigenous young people, are excessively and inappropriately policed (Cunneen 2001; Law Reform Commission of Western Australia 2006; NSW Ombudsman 2013). Much of this policing revolves around their use of public space, which often makes young people more likely to be subject to stop and searches, name and address checks, move-on orders, as well as invasive strip searches. Evidence suggests that these powers are often used illegitimately and arbitrarily against young people (see NSW Ombudsman 2013; and Cunneen et al 2015:232–3 for discussion of the *Haile-Michael* case). Such policing practices interfere with a child's right to freedom of association and to be free from arbitrary arrest and detention, as well as the right to privacy and to be treated with dignity and respect. The apparent targeting of children from certain racial groups, particularly Indigenous children, contravenes the principle of non-discrimination and violates the *Convention on the Elimination of All Forms of Racial Discrimination*. Overpolicing of public space impinges a child's right to rest and leisure, as public space is most often the central point for recreational and social activities. Policing practices must be contextualised by legislative changes that have increased police powers.

Police detention and NT paperless arrest laws

Paperless arrest laws were introduced in 2014 in the NT by way of amendments to the *Police Administration Act 2014* (NT). The laws allow police to arrest and detain people for up to four hours for committing, or being about to commit, minor offences (such as loitering, or playing musical instruments annoyingly), all of which were previously dealt with by infringement notices. Many of the offences covered are likely to disproportionately affect young people due to the nature of their offending and use of public space.

Detaining a person without charge undermines the presumption of innocence, and puts children and adults at risk of arbitrary detention without monitoring or oversight mechanisms, thus undermining the CRC principle that detention be used as a last resort. In 2015, the High Court, while dismissing a constitutional challenge to the laws, found that the powers covered a wide class of offences, most of which were relatively minor. The High Court also noted that

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the vast majority of people detained under the legislation were Indigenous *(North Australian Aboriginal Justice Agency Limited v Northern Territory*).

Freedom of movement and association

The right to freedom of association and movement are safeguarded in UN conventions, treaties and rules, including the ICCPR (art 22) and the CRC (art 15), which states that governments must 'recognize the rights of the child to freedom of association and to freedom of peaceful assembly'. The capacity of children to exercise this human right has been impeded by the substantial growth in police discretionary summary justice in recent years, via the rise of penalty infringement notices, banning and exclusion orders and move-on powers. These are often laws of general application. However, there is significant concern over their potentially discriminatory use against young people, for example, with the use of move-on powers that target young people and Indigenous young people in particular (Cunneen et al 2015; Law Reform Commission of Western Australia 2006). Heightened concern over alcohol-related violence in entertainment precincts has led to the introduction of banning and prohibition orders in states and territories. These orders are often imposed without judicial oversight and deny recipients the right to conduct a defence, thereby undermining the presumption of innocence (Farmer 2015).

Australian states and territories have introduced legislation restricting freedom of association through anti-consorting provisions that can disproportionately affect children and young people. Anti-consorting measures were originally introduced in response to heightened public concern over escalating gun violence and criminal gang activity. Like banning and prohibition orders, consorting provisions give police significant discretionary powers. Since its operation, the *Crimes (Consorting and Other Organised Crime) Act 2012* (NSW) has been criticised, among other things, for its potential to: target people with no link to organised criminal activity; disproportionately affect disadvantaged groups including children and Indigenous people; and operate as a 'street-sweeping' mechanism (NSW Ombudsman 2013). In the first year of operation, 1260 people were subject to the provisions, including 83 young people between the ages of 13–17. Some 40 per cent of all people and 65 per cent of children subject to the provisions were Indigenous (NSW Ombudsman 2013:9). In some cases, police officers had wrongly issued official warnings to young people and, in one case, a 16-year-old male was detained in custody due to breaching bail conditions in place from an incorrect consorting charge (NSW Ombudsman 2013).

Anti-consorting measures have been criticised for their ability to criminalise normal social contact, undermine the right to freedom of association, and adversely impact vulnerable groups (NSW Ombudsman 2013; AHRC 2015). Curtailing children's rights to freedom of movement and association has the potential to isolate often vulnerable children and young people from their already limited support networks, as well as unfairly target young people who have limited control over their circumstances (NSW Ombudsman 2013:35). Thus, while these laws are of general application, it is their use against young people that raises human rights concerns and reflects a broader problem that the criminal justice system is being reshaped in a way that particularly targets young people without consideration of whether such legislation is appropriate to their age or circumstance.

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Right to a fair trial

The rights of children during judicial proceedings are protected in the CRC (arts 9, 12, 31 and 40), the Beijing Rules (r 11), and the ICCPR (art 14). Article 12 of the CRC provides the most direct support for the principle that children be given opportunities to participate in decisions that affect them, requiring children 'be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child'. While the right to a fair trial is a cornerstone of the criminal justice system, failure to adequately adapt formal court processes to the needs of juvenile offenders may undermine this fundamental principle (ALRC 1997). Most children and their families struggle to understand court processes, decisions and implications (Sheehan and Borowski 2013). This can be partly attributed to complicated court procedures and legal jargon, as well as insufficient time for meetings between children and their lawyers (Sheehan and Borowski 2013). While a renewed focus on explaining processes and decisions in developmentally and age-appropriate ways could help to ameliorate this issue, understanding and engaging with court processes is also hindered by poor education, limited English proficiency, fear and anxiety, and mental health disorders and cognitive disabilities. The problems are systemic and have been identified in the literature for decades (see, for example, O'Connor and Sweetapple 1988). In addition, recent changes with the increased use of audio visual links ('AVL') in Children's Courts may be exacerbating the problem by reducing the ability of young people to effectively engage with the court process and thereby exercise their right to a fair trial. Young people with intellectual disabilities and Indigenous young people from rural and remote areas who may experience language and cross-cultural barriers during the court process are particularly affected.

Publication and privacy concerns

Australian jurisdictions have adopted varying approaches to issues of privacy and publication for young people in the criminal justice system (Cunneen et al 2015), many of which do not adhere to international standards and are susceptible to political expediency. For example, as part of a broader punitive approach to juvenile justice, amendments to the *Youth Justice Act 1992* (Qld) in 2014 allowed for the public identification of young people appearing in courts for a second offence. These changes were subsequently reversed in 2016 by a new Queensland Government. In the NT, there is no legislative or common law presumption of non-publication. Publication can only be restricted by a specific court order made under s 50 of the *Youth Justice Act* (NT). Western Australia has restrictions on the reporting of proceedings in the Children's Court under the *Children's Court Act 1988* (WA) s 35. However, the *Prohibited Behaviour Orders Act 2010* (WA) raises concerns regarding a right to privacy, as it requires the publication of identifying characteristics such as home suburb and photographs of individuals subject to a Prohibited Behaviour Order ('PBO'), including children over the age of 16 (s 34(2)) (see Western Australia Department of Attorney General and Justice website for publication of Prohibited Behaviour Orders, <http://www.pbo.wa.gov.au/PBOWebSite/Home/Index>).

Both the CRC and the Beijing Rules refer specifically to a young person's right to privacy at all stages of juvenile justice proceedings. The Beijing Rules (r 8.1) states this protection is necessary 'in order to avoid harm being caused to him or her by undue publicity or by the process of labelling'. The idea of naming and shaming young offenders is widely considered controversial and a violation of privacy rights, and has been specifically noted as a breach of the CRC by the Committee on the Rights of the Child (UNCRC 2012:[41], [42]).

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This approach reflects a punitive model to juvenile justice, with an expectation that public condemnation or shaming will act as a deterrent for young people. However, research has found that such processes have no deterrent effect, and can in fact increase recidivism rates among young people through their stigmatising potential (Hosser et al 2008; Chappell and Lincoln 2009). The NSW Privacy Commissioner has stated:

> To allow the public naming of children convicted of mid-level crimes will deprive children of their human dignity, and damage their chances of rehabilitation. Publication of a child offender's name will effectively add to the sentence imposed by the court, doubly punishing child offenders with lifelong stigmatisation — a constant fear that one day a future employer, or neighbour, a friend or colleague will trawl the internet or newspaper archives and find out about the mistakes they made as a 15-year-old. Their chances of rehabilitation will be substantially reduced as a result (Johnston 2002:2–3).

Detention as a last resort

Central to a human rights approach to juvenile justice is the principle that detention should be considered a last resort under art 37(b) of the CRC and r 19 of the Beijing Rules. This principle recognises the inherent harm that can be caused to children spending extended periods in detention and reflects the rehabilitative, rather than punitive, focus of human rights law in this area. However, Australian jurisdictions fail to observe the principle, either through explicit legislative exclusion (as in WA) or via the more widespread problem of failure to implement effective alternatives to detention.

Mandatory sentencing

Currently, WA is the only jurisdiction in Australia with mandatory sentencing laws directed towards children, after the NT repealed similar provisions. Earlier WA legislation was expanded with the passage of the *Criminal Law Amendment (Home Burglary and Other Offences*) *Act 2014* (WA), which requires courts to impose custodial sentences on young people who have committed three or more home burglary offences (s 279(6a)). The expansion of these laws incorporates multiple offences committed within the same incident, meaning young people can receive a mandatory 12-month sentence during their first court experience. The Committee on the Rights of the Child (UNCRC 2012:[84]) and the Committee against Torture (UNCAT 2014) have recommended the abolition of WA mandatory sentencing provisions. Their recent expansion has been criticised by various organisations, including Amnesty International (2015) and the Law Council of Australia (2014), the latter arguing that the laws do not give primacy to the best interests of the child, offend principles of proportionality and are a direct violation of Australia's international rights obligations, in particular removing the principle of detention as a sanction of last resort. Most jurisdictions formally adhere to this principle; WA is at odds with the rest of Australia.

Alternatives to detention

While sentencing legislation reflects explicit abandonment of the principle of detention as a last resort, other aspects of the juvenile justice system also inhibit the extent to which this principle can be applied. A logical extension of the principle is a requirement of viable alternatives to detention, including community and diversionary programs. However, sufficient resources are frequently unavailable for such programs, particularly in rural and remote areas, leaving detention as one of the few sentencing options available to courts contrary to the notion of detention being a sanction of last resort. For example, national figures suggest a divide between outcomes for young people in metropolitan and rural areas. Young

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people from 'remote' areas were five times more likely to be under supervision than those from major cities. Young people in 'very remote' areas were over seven times more likely to be supervised (AIHW 2015b). Availability of pre-court diversionary options may also be affected by locality (Snowball 2008). The availability of alternative options reflects the requirement for holistic policy approaches to the protection of human rights, rather than simply enacting statutory protections.

The CRC and the Beijing Rules require a range of sentencing options for young people. Article 40(4) of the CRC requires that:

> A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Beijing Rule 18.1 also requires the availability of 'a large variety of disposition measures'.

Bail and remand

Specific provisions regarding the use of remand for juveniles are found in the Beijing Rules (r 13) and the Havana Rules (r 17), which stipulate that children awaiting trial are presumed innocent and should be treated as such. Rule 13 of the Beijing Rules states detention should be limited to exceptional circumstances and all efforts should be made to apply alternative measures, such as supervision, intensive care or placement with family or in an educational setting. Both rules reinforce that detention pending trial should be a last resort and for the shortest possible time. The high proportion of young people on custodial remand is further indication that Australia is falling short of its obligations to uphold the right of detention as a last resort: some 55 per cent of young people in custody across Australia in 2015 were unsentenced (AIHW 2015a). Homelessness and housing instability are often cited as key drivers of increasing juvenile remand populations, where a lack of alternative accommodation results in young people being remanded into custody 'for their own good' (Richards and Renshaw 2013; Boyle 2009). Other reasons include an increase in the time spent on remand, and increasing rates of bail refusal and bail revocations, particularly where those conditions are overly onerous (NSWLRC 2012). While bail may be used to avoid imposing periods of detention, the use of stringent bail conditions and zero tolerance policing of young people mean bail is frequently used as tools to further criminalise young people.

Treatment in detention

There is a significant body of research showing that juvenile populations are a highly marginalised and vulnerable group. For young people in detention, the most important human rights principles require respectful and humane treatment, and prohibit cruel, inhuman or degrading treatment (CRC arts 37c, 16.1; CRPD art 15.2; ICCPR art 10.1; CAT). Despite this, evidence shows that children in detention in all states and territories in Australia have been subject to: solitary confinement; segregation; excessive force; the use of mechanical restraints; and, in the most extreme cases, physical abuse (NSW Ombudsman 2011; Victorian Ombudsman 2010; Vita 2015; Children's Commissioner 2015; Amnesty International 2016; Harker 2015; Office of the Inspector of Custodial Services 2013). Other examples of concern include: high levels of self-harm and severely stretched mental health facilities; strip-searches; poor visiting facilities; inadequate quantities of food; and under-resourced education facilities and programs as reported of the Banksia Hill Detention Centre (see WA Office of the Inspector of Custodial Services 2013). An independent report into the Ashley Youth

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Detention Centre in Tasmania similarly found 'wholly unacceptable' visiting facilities, excessive use of restraint and physical force, and a lack of programs and recreational activities leading to extreme boredom amongst detainees, often resulting in confrontations with staff (Harker 2015). In NSW, the Kariong Juvenile Justice Centre was the subject of widespread criticism over a number of years, in part for its lack of case management and rehabilitation programs, as well as poor program oversight, reporting and evaluation (see NSW Ombudsman 2011). An Ombudsman's investigation into the Parkville Youth Detention Centre in Victoria uncovered staff inciting fights between detainees, assaulting and restraining detainees with excessive force, and supplying contraband, including tobacco, marijuana and lighters (Victorian Ombudsman 2010). It was also revealed that a large percentage (36 per cent) of the staff working at the Centre did not have a Working with Children Check on file. The Ombudsman found the facility was overcrowded and unhygienic, and failed to meet the needs of children with serious mental illness, and determined it to be inappropriate for custodial purposes and in clear breach of the Havana Rules, as well as a number of domestic safeguards (Victorian Ombudsman 2010). Most recently, the Children and Young People Commissioner for Victoria led an inquiry into the use of isolation, separation and lockdowns in juvenile detention in Victoria (Tomazin 2016). The use of segregation and isolation for up to 22 and 23 hours per day for extended periods in NSW juvenile detention has been the subject of criticism, litigation and an inquiry by the Inspector of Prisons (Maley and Begley 2016; NSW Ombudsman 2016).

The most extreme cases relating to the treatment of detainees have become public recently. In Queensland, a Freedom of Information ('FOI') request revealed the use of dogs, mechanical restraints, excessive force and intimidation by guards against detainees, as well as invasive search procedures and high levels of self-harm at the Brisbane and Cleveland Youth Detention Centres (Amnesty International 2016). The Attorney General has since announced an independent review of youth detention in Queensland (D'Ath 2016).

In July 2016, ABC's *Four Corners* documented routine excessive force, tear-gassing and hooding of detainees at the Don Dale youth detention centre. The footage showed a young detainee ('DV') stripped naked (to be placed in a suicide gown) and left in a cell. DV had been previously assaulted in 2010 in Alice Springs Detention Centre. A youth worker was charged with assault in relation to the incident, but was found not guilty (*Police v Tasker*). In 2014, DV was strapped to a restraint chair with a spit hood placed over his head for almost two hours. On the evening he was restrained, DV had been moved from youth detention to the Adult Correctional Centre. These incidents were documented in a review of the NT youth justice system (Vita 2015) and in a report from the NT Children's Commissioner (2015), the latter including an assessment that the training of prison officials was inadequate to ensure appropriate treatment and respect for human rights. The Children's Commissioner found this manifested in many ways, including inability to de-escalate the situation, poor security awareness and monitoring allowing for escalation, and uncertainty as to what actions taken by staff were authorised by the *Youth Justice Act 2005* (NT) (NT Children's Commissioner 2015). It was not until the *Four Corners* program, however, that these events gained widespread attention and political action through the announcement of a Royal Commission.

Juveniles in adult prisons

The separation of adult and juvenile justice systems is mandated in several articles in the CRC (arts 5, 37, 40) and in the Beijing Rules (Commentary 2.3). Australia maintains a reservation to art 37(c), allowing it to keep juveniles in adult prisons where necessitated for geographic or practical reasons. On review, international bodies have recommended the removal of this reservation on multiple occasions (UNCRC 1997, 2005, 2012), as practical considerations are

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already inherent within s 37(c), and the reservation has the potential to lead to the justification of more serious abuses of confining juveniles with adults.

Generally in Australia, children under the age of 18 are detained in juvenile justice centres, which are separate from adult prisons. However, provisions regulating this separation vary across jurisdictions. For example, in NSW young people convicted of an offence committed under the age of 18 can serve all or part of their sentence in a juvenile detention centre. However, in Queensland, under the *Youth Justice Act 1992* (Qld), a 'child' is defined as someone between the ages of 10–16 years, allowing 17-year-olds to be treated as adults, contrary to the CRC. In 2014, the former Queensland Government amended the Act, allowing for the automatic transfer of detained children to adult correctional facilities as soon as they reach the age of 17 years. The Act was amended again in 2016 under the new Labor Government, with the new provisions requiring transfer to adult correctional facilities only once the child reaches the age of 18 years *and* if he or she has more than six months left to serve. Despite those amendments, as at 1 August 2016, there were 49 children aged 17 years in adult correctional facilities in Queensland (Queensland Government 2016). Following criticism regarding the continued holding of 17-year-olds in adult prisons, the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld) was introduced, requiring all 17-year-olds to be removed from adult prisons and included in the youth justice system (Palaszczuk, D'Ath and Byrne 2016).

Detention of young people in adult prisons in Australia is not uncommon. An investigation by the Victorian Ombudsman found 24 instances of children transferred to adult prisons between 2007 and 2013. The report found children were held in effectively solitary, locked in their cells for 23 hours a day, and handcuffed during one hour of exercise time (Victoria Ombudsman 2013). On five occasions children were mistakenly remanded into adult custody. One 14-year-old reported being threatened by adult detainees and subsequent trauma, causing ongoing nightmares, depression and substance misuse (Victoria Ombudsman 2013). In the NT, juveniles from the Don Dale Youth Detention Centre were transferred to an adult prison after an emergency transfer was approved under the *Youth Justice Act 2005* (NT), which allows for the transfer of juveniles over the age of 15 years (s 154(6)). However, one 14-year-old was mistakenly transferred in contravention of the Act. In 2013, 73 children were transferred from the Banksia Hill Detention Centre in WA to Hakea Prison following an inmate disturbance. At Hakea Prison the children were subject to long periods of lockdown (23 hours per day), extensive use of physical restraints, strip-searching, and limited access to education and rehabilitation programs (Office of the Inspector of Custodial Service 2013). Staff at Hakea prison were found to hold no training or experience in dealing with young people and, although contact with adult prisoners was minimised, the environment was determined to be 'oppressive and intimidating' (Office of the Inspector of Custodial Services 2013:6). Legal action was brought against the Department of Corrective Services, but the case was dismissed when Martin CJ determined that, while the conditions within Hakea were 'acknowledged by all to be less than optimal' (*Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* at [10]), the Department had no other choice but to move the young people following the incident at Banksia Hill. Martin noted the limited role of international human rights law in deciding such cases: '[T]he international instruments do not form part of the law of Western Australia and can only be of assistance if and to the extent that they assist in the resolution of an ambiguity in the law of Western Australia' (*Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* at [131]). Following riots at the Melbourne Youth Justice Centre in late 2016, approximately 15 children were moved to a segregated wing of the maximum security Barwon adult prison. The decision to move the children is being challenged in the Supreme

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Court on the grounds that the government: acted unlawfully in moving the children; has failed to act in the best interests of the children; and has breached Victoria's Human Rights Charter (Human Rights Law Centre 2016).

Conclusion

Recurrent and systemic human rights issues arise for young people in contact with juvenile justice. Some of these, such as treatment in detention, periodically re-emerge in jurisdictions across Australia and are consistently identified as the use of excessive force and other mistreatment, the use of isolation, the lack of programs, inadequate case management, poor staff training in working with young people and poor conditions of confinement. Governments may respond positively from time to time — for example, the Victorian Government's response to the Ombudsman's report into Parkville. Or governments may be very slow to react — it took a decade and a half of complaints of treatment of young people in Kariong Detention Centre before it was closed. Or governments may simply ignore the reports — as happened in the NT until media pressure and federal intervention forced the current Royal Commission.

In interpreting and understanding the current situation, a number of questions arise. Are human rights principles nothing more than an ideology that hides the profound power imbalances which allow abuses in juvenile justice to continue unabated? Is the superficial observance of children's rights disguising a more profound lack of embeddedness in daily practices throughout the system from lawmakers to custodial staff? To be clear, we are not suggesting there is an absence of a human rights discourse in Australia. Monitoring bodies including Ombudsmen's Offices and Children's Commissioners use human rights standards to evaluate policies and practices, and regularly raise the issue of human rights abuses. More generally there has been a growth in the human rights perspective as a critical perspective by which to evaluate policing practices, the operation of courts and diversionary schemes, and the conditions under which young people are sentenced and imprisoned (Cunneen et al 2015). However, a human rights discourse competes with other political priorities, especially discourses of punitiveness and law and order. This problem is evident when we look at children's rights violations that have arisen in the context of relatively recent legislative change. In many of these instances, particularly with the extension of police powers, laws of general application fall disproportionately on young people without consideration of their age, maturity, vulnerabilities or circumstances, and often negatively impact predominantly on Indigenous youth and those with mental health disorders and cognitive disabilities.

One underlying factor is the difficulty in enforcing human rights standards. As a result, significant political will needs to be developed for governments at state and federal levels to respond comprehensively to recommendations on human rights — a political will that is often undermined by political expedience (Arzey and McNamara 2011). Added to this are unresolved tensions within juvenile justice between a preference for rehabilitation and special considerations of care and guidance for young people, and an approach that sees young people as fully capable individuals who can be held to a similar level of responsibility as adults. From our perspective, while there are various limitations to human rights discourses, they provide both an important strategic political tool and set of standards through which arguments can be mounted to change the operation of juvenile justice institutions.

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