THE UNITED NATIONS *CONVENTION ON THE RIGHTS OF THE CHILD* IN AUSTRALIA: ARE HUMAN RIGHTS PROTECTED IN THE DOMESTIC JUVENILE JUSTICE DOMAIN?

STEPHEN MONTEROSSO*

I INTRODUCTION

The United Nations Convention on the Rights of the Child *('UNCRC')* was ratified by Australia at the end of 1990, less than two months after the treaty came into force. Despite enthusiasm for the *UNCRC* and its protective measures, the treaty remains unincorporated in domestic law. This article will examine the influence of safeguards found in the UNCRC and the extent to which the lack of incorporation has compromised the promotion of human rights in the Australian juvenile justice domain. Firstly, the historical development of children's human rights will be discussed, including the development of stand-alone human rights instruments, legal responsibilities, case law and legislative developments. This will be followed by analysis of the impact the *UNCRC* and associated human rights instruments have made in Australian juvenile justice legislative frameworks in order to identify implementation gaps. The Australian Human Rights Commission *('Commission')* and the United Nations Committee on the Rights of the Child *('Committee')* have both reviewed Australia's performance and identified deficiencies in human rights protection within the juvenile justice system, which will also feature in the discussion. It will be suggested in this article that contemporary domestic child human rights protective frameworks are compromised, have limited influence and are uneven in the application of *UNCRC* safeguards, notwithstanding some areas of promise.

II HISTORICAL CONTEXT

A *Juvenile Justice*

Prior to the 19th century in the United Kingdom, there was scant differentiation between child[1] and adult offenders insofar as criminal justice systems were

*PhD. Lecturer, Curtin Law School, Curtin University, Perth, Western Australia.

concerned,[2] which was also the case in colonial Australia that was subject to English law. During this harsh period, deterrence was the primary aim of juvenile justice, often resulting in executions, floggings and incarceration of child offenders in Australia.[3] Similarly, in the United Kingdom during the Dickensian era, it was not uncommon for children as young as five years of age to be hanged for minor offences.[4] The notion of a criminal 'underworld' also gained traction in this period and was referenced in literary works by luminaries such as Charles Dickens, whose explorations into London low-life heavily influenced both contemporary and historical views of the period.[5] Within most Western legal systems, little progress had been made in distinguishing child from adult offenders prior to the mid-19th century,[6] which often resulted in harsh outcomes including custodial sentences for children as young as six years of age in Australian prisons,[7] although some magistrates made concessions for the immature age of offenders.[8] Moreover, as late as the early 20th century, children were also subjected to hard labour along with corporal and capital punishment.[9]

The development of a separate, stand-alone system for dealing with child offenders was gaining some traction in the second half of the 19th century, neatly coinciding with other landmark political, social and legal developments including expansion of state control and regulatory reform leading to

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[1] In this article the term 'child' will be used interchangeably with 'children', 'juvenile', 'youth', 'young' or 'minor.' These terms will be used to describe those persons aged less than 18 years which aligns with art 1 of the *UNCRC*. In particular, use of the term juvenile will occur more frequently when discussing Australian juvenile justice frameworks.

[2] Gelsthorpe L and V Kemp, 'Comparative Juvenile Justice: England and Wales' in J A Winterdyk (ed), *Juvenile Justice Systems: International Perspectives* (Canadian Scholars' Press, 2nd ed, 2002) 130.

[3] C Cunneen and R White, *Juvenile Justice Youth and Crime in Australia* (Oxford University Press, 4th ed, 2011), 10.

[4] Ibid. Note also that such minor offences included larceny, for example. Supposedly, one English judge of the period remarked harshly that it was more than acceptable for a convicted child to be executed and that they should suffer for their offences like adults.

[5] A juvenile offender being interviewed at the time was heard to remark that he had seen 'Oliver Twist' and that the 'Artful Dodger' was very much like some of the boys he knew. See H Shore, 'Cross Coves, Buzzers and General Sorts of Prigs. Juvenile Crime and the Criminal Underworld in the Early Nineteenth Century' (1999) 39(1) *British Journal of Criminology* 11.

[6] K Richards, 'What Makes Juvenile Offenders Different From Adult Offenders?' (Trends & Issues in Crime and Criminal Justice No 409, Australian Institute of Criminology, February 2011) 1 <http://aic.gov.au/media_library/publications/tandi_pdf/tandi409.pdf>.

[7] Australian Institute of Criminology, *Juvenile Justice* (11 November 2013) <http://www.aic.gov.au/crime_types/in_focus/juvenilejustice.html>.

[8] Cunneen and White, above n 3, 10. Examples of these concessions included frequent pardoning, the discharge of first offenders, and separation of juveniles from adult inmates in prisons, as well as juries that were reluctant to convict juveniles in capital punishment cases.

[9] Richards, 'What Makes Juvenile Offenders Different From Adult Offenders?' above n 6.

compulsory schooling and restrictions on child labour.[10] Reformatory or industrial schooling which aimed to provide discipline and self-awareness emerged in New South Wales from the late 1820s in order to transform delinquents who had either commenced a criminal career, or would do so in short order and also signalled the development of child offender identification and recognition.[11] These institutions also provided food, accommodation and basic education for children in need.[12] Although essentially educational or training oriented in philosophy, reformatories and industrial schools more often resulted in children destined to join the ranks of prosaic and malleable workforces, well suited to the most menial of employment tasks.[13] Other important developments in the Australian juvenile justice domain during this period included the extension of lower or inferior court jurisdiction to preside over summary or minor offences and removal of the requirement that children be remanded in adult prisons awaiting trial.[14] Juvenile delinquency began to emerge as a burgeoning social problem during the period, warranting attention by legislators and authorities alike.[15]

Fox[16] notes that the turn of the 19th century coincided with the emergence of stand-alone children's courts and adoption of the 'parens patriae'[17] doctrine that required states to intervene in the lives of children at risk of becoming vagrant or criminal, in addition to the adoption of more discretionary, informal and fostering juvenile justice administration. The parens patriae doctrine also championed the notion that child offenders should not be treated like criminals, in order to avoid branding them with a criminal persona that might be difficult to discard over time.[18] The discussion will now move to the development and status of human rights[19] for children, including historical context.

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[10] Cunneen and White, above n 3, 10.
[11] Ibid, 12, 13.
[12] S Bennett, S N Hart and K A Svevo-Cianci, 'The Need for a General Comment for Article 19 of the UN Convention on the Rights of the Child: Toward Enlightenment and Progress for Child Protection' (2009) 33(1) *Child Abuse & Neglect* 3.
[13] Cunneen and White, above n 3, 12-13, 17.
[14] Gelsthorpe and Kemp, above n 2.
[15] Ibid.
[16] S J Fox, 'Juvenile Justice Reform: An Historical Perspective' (1970) 22 *Stanford Law Review* 1191–1193.
[17] Developed by the English Court of Chancery, parens patriae refers to a court's ability to stand in the place of parents insofar as decision-making on behalf of a minor is concerned and is primarily protective in nature.
[18] Cunneen and White, above n 3, 18.
[19] Human rights are essential freedoms and protections that individuals are entitled to irrespective of race, gender, nationality, ethnicity or ability, and are both inherent through birth and universal to all. Human rights are internationally secured and focus on the dignity and equal worth of human beings,

B *The Children's Human Rights Movement*

The development of autonomous human rights for children has been unhurried. Whilst gaining traction in the last decades of the 20th century, prior to 1900[20] the notion that children possessed their own civil rights or liberties distinct from their parents or the state was in fact novel, as courts routinely preserved the social order that liberty is only to be extended to those of mature years, debarring those below adult age as required by the law.[21] Historically considered primarily as a form of parental possession rather than as persons in their own right, children were habitually denied liberty or autonomy.[22] Children have, in fact, been afforded negligible importance historically, including being reduced to objects of intervention or property rather than legal subjects.[23]

Further, according to Wald, states and authorities adopted an overarching protective position which required that parents protect and control children disadvantaged by their immaturity, leaving them incomplete physically and intellectually in addition to lacking necessary experience to conduct themselves capably in society.[24] This is because children have long been considered to have special needs,[25] yet many rights, including participation in political, legal and many social processes were withheld from them.[26] It is not unreasonable to suggest, therefore, that child rights are an inconvenience for adults who traditionally enjoy a more powerful status as decision-makers.[27] Indeed, children remain vulnerable and lack the necessary resources needed in times of adversity, including psychological, material and relational resources and while often

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protect individuals and on occasion groups, and are linked intrinsically to the relationship between state and individual.

[20] But see M K Parker-Jenkins, 'Children's Rights and Wrongs' (2011) 16(1) *International Journal of Law & Education* 88 for evidence of pre-20th century pursuits of children's rights. Essentially, Parker-Jenkins suggests that although couched more particularly in the 'best interests' and 'welfare' of children, early developments usefully provided a platform for the development of autonomous children's rights.

[21] G Monahan and L Young, *Children and the Law in Australia* (LexisNexis Butterworths, 2008) 25.

[22] S N Hart, 'From Property to Person Status: Historical Perspective on Children's Rights' (1991) 46(1) *American Psychologist* 53.

[23] M Freeman, 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law and the Family* 54.

[24] M S Wald, 'Children's Rights: A Framework for Analysis' (1979) 12(2) *University of California Law Review* 256. A recurring theme was protection of minors from the hazards of contemporary society so that they can develop into conscientious and accountable adults.

[25] C R Margolin, 'Salvation Versus Liberation: The Movement for Children's Rights in a Historical Context' (1978) 25(4) *Social Problems* 441.

[26] Wald, above n 24.

[27] M Freeman, 'Review Essay: What's Right With Rights for Children' review of Guggenheim M 'What's Wrong With Children's Rights' (Harvard University Press, 2005) (2006) 2(1) *International Journal of Law in Context* 89–90.

blameless, argues Freeman, are equally voiceless when they are the subject of dispute.[28] The rise in prominence of human rights first gained momentum in response to the rights abuse routinely experienced by members of vulnerable or oppressed populations including the poor, diseased, those in conflict, women and, notably for the purposes of this article, children.[29] Autonomous children's rights have emerged within the broader context of general human rights that are universal to all. Essentially, children, along with other minority groups, require a specific and specialised regime for protection and promotion of their human rights. The discussion will now turn to the development of important international legal instruments that advanced the cause of human rights for children.

C *Children's Rights Under International Human Rights Instruments*

1 *The United Nations Convention on the Rights of the Child*

The *UNCRC*[30] is fundamental in any discussion on the human rights of children[31] by promoting, in particular, the notion that children should be internationally recognised as rights bearers[32] in addition to legal citizens, and significantly espouses that their 'best interests' are upheld at all times. The *UNCRC* has also been significant by promoting the health and prosperity of children,[33] scholarly research and debate on the human rights of children.[34] The *UNCRC* is comprised of non-negotiable standards that aim to reinforce rights inherent to human dignity but with a particular focus on the rights of children

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[28] Ibid 95.
[29] L Hallgath and D Tarantola, 'A Rights-based Approach to the Assessment of Health Initiatives' (2008) 13(2) *Australian Journal of Human Rights* 159.
[30] The United Nations Convention on the Rights of the Child *(UNCRC)* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[31] Previous United Nations instruments relevant to children include the 1959 *Declaration on the Rights of the Child* and its identically titled predecessor, the 1924 *Declaration on the Rights of the Child*, adopted 26 September 1924, League of Nations. This declaration was also commonly referred to as the 'Declaration of Geneva' or 'Geneva Declaration on the Rights of the Child'. See UN Documents, *The Geneva Declaration of the Rights of the Child* <http://www.un-documents.net/gdrc1924.htm> for details of the child rights provisions of the declaration.
[32] Monahan and Young, above n 21, 26.
[33] Freeman suggests that this is in contrast to the charity found in the 1929 and 1959 predecessors that both lacked the pivotal recognition of autonomy for children, participatory rights and empowerment and were largely aspirational and protective in substance. See M Freeman, 'The Future of Children's Rights' (2000) 14 *Children & Society* 277.
[34] D Reynaert, M Bouverne-De Bie and S Vandevelde, 'A Review of Children's Rights Literature Since the Adoption of the United Nations Convention on the Rights of the Child' (2009) 16(4) *Childhood* 518.

who require specific and stand-alone rights protection, despite benefiting from broader human rights protection.[35] The *UNCRC* contains civil, political, economic, cultural and social rights, and upholds the obligation that governments bear definitive responsibility for the protection, fulfilment and promotion of the rights of children.[36] Of particular interest to this article, the second section of the *UNCRC* contains articles outlining the protection and participation rights of children.[37] The *UNCRC* addresses the specific human rights interests and needs of children as individuals, rather than as a consequence of their relationship with adult family or states, and are rights that state parties are to treat seriously.[38]

The *UNCRC* was ratified by Australia late in 1990[39] but remains only ostensibly part of Australian law, as the direct legal implementation of the convention into domestic law expected of member states upon ratification has yet to occur through incorporation.[40] Although Australia is a signatory to many international instruments and has agreed to be bound by the terms found within, obligations do not form part of domestic Australian law unless and until incorporated[41] through enactment of appropriate legislation.[42] However, notwithstanding a lack of implementation, states are still required to fulfil obligations by not violating rights in a direct fashion, ensuring protection against

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[35] Australian Council for International Development, *Child Rights* <https://acfid.asn.au/sites/site.acfid/files/resource_document/Child-Rights-Info-Sheet.pdf>.
[36] Ibid.
[37] Ibid.
[38] D McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) (5) *International Journal of Law and the Family* 133; R Smith, 'Children's Rights and Youth Justice: 20 Years of no Progress' (2010) 16(1) *Child Care in Practice* 7.
[39] The *UNCRC* was ratified by Australia on 17 December 1990. See Australian Human Rights Commission, *Australia's Commitment to Children's Rights and Reporting to the UN* (October 2007) [1.1] <https://www.humanrights.gov.au/publications/australias-commitment-childrens-rights-and-reporting-un>.
[40] The process of incorporation can proceed directly by forming part of domestic law, indirectly whereby obligations encourage incorporation, fully in circumstances where the UNCRC is wholly incorporated into domestic law or finally in a partial sense where elements of the treaty have been incorporated in domestic law. See, eg, L Lundy, U Kilkelly and B Byrne, 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review' (2013) 21 *International Journal of Children's Rights* 443.
[41] C R Durham, 'International Human Rights Law: A Legitimate Influence or Constraint on Sovereign Jurisdiction' (1997) *Australian International Law Journal* 75.
[42] See *Kioa v West* (1985) 159 CLR 550 (Gibbs J). Note, however, that there has been some legislative support of human rights notions in Australia. For example, the *Disability Discrimination Act 1992* (Cth) displays many of the requirements of the *Convention on the Rights of Persons With Disabilities* ('*CRPD*'). See also Australian Human Rights Commission, *Australia and Human Rights Treaties. Fact Sheet 7* (2009) <https://www.humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS7_Australia.pdf>.

violation by non-state actors, and the promotion of and fulfilment[43] of relevant human rights.[44]

In fact, as Lundy, Kilkelly and Byrne note, art 4 of the *UNCRC* requires that state parties which have ratified the Convention undertake all legislative, administrative and other measures to at least give effect to the treaty in domestic law, although the process by which this is achieved is not specified.[45] Australia's reluctance to legislatively incorporate the *UNCRC* and other instruments following ratification has attracted some criticism internationally.[46] It should be noted, however, that the nature of Australian and English legal systems remains fundamentally different from so-called monistic nation states such as those of continental Europe and the United States, for example, where the ratification of an international instrument such as the *UNCRC* generates self-executing laws which establish legal rights and obligations without a Congressional legislative act.[47]

Nonetheless, several *UNCRC* elements have in fact been included into domestic law in Australia where state and territory legislation has attempted to uphold international human rights obligations.[48] Whilst unincorporated into domestic Australian law, the *UNCRC* was ratified prior to the introduction of much domestic juvenile justice legislation and as such the elements within were apparent to legislators. The juvenile justice legislation that emerged in Australia from 1992[49] onwards identified human rights safeguards including the important 'best interests' and 'participation' elements which have been given focus either overtly, or more obliquely through the promotion of youth justice and other

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[43] Hallgath and Tarantola, above n 29, 159.

[44] The monitoring of human rights standards has become increasingly sophisticated of late with fulfilment of human rights commitments by nation states monitored by treaty bodies or independent expert committees that also review compliance and general performance through important commentary and recommendations.

[45] Lundy, Kilkelly and Byrne, above n 40.

[46] Note that Australia is a party to several United Nations human rights treaties but is yet to legislatively implement these instruments, prompting some to suggest that whilst Australia is active as a member of the international community in accepting the obligations contained in international instruments including the *UNCRC*, the expected domestic implementation process remains more elusive. See, eg, H Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order (2003) 25(4) *Sydney Law Review* 436. See also above n 42 for an example of limited legislative activism in Australian human rights protection.

[47] J Cumming and R Mawdsley, 'Student Rights and Parent Rights in Education in Australia' (2005) 10(2) *Australia & New Zealand Journal of Law & Education* 49.

[48] See, eg, J O'Leary, 'Protecting Children From Harm in Juvenile Detention' 2016 41(4) *Alternative Law Journal* 239-243.

[49] Contemporary Australian juvenile justice legislation dates essentially from the early 1990's with the *Youth Justice Act 1992* (Qld) operative from 1992 with other states and territories following suit thereafter.

principles. The status of *UNCRC* safeguards within domestic juvenile justice legislative frameworks will be examined in Part IV of the article.

2 *Other International Instruments Relevant to the Treatment of Children*

Several United Nations human rights instruments and protocols also impact upon juvenile rights inasmuch as they are independently relevant and persuasive whilst providing substance to the *UNCRC*.[50] These include the *International Covenant on Civil and Political Rights ('ICCPR')*,[51] *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'),[52] *Convention on the Elimination of all Forms of Racial Discrimination* ('*ICERD*')[53] and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*').[54] Further, a number of United Nations rules and guidelines usefully acknowledge both the social milieu in which the juvenile justice system operates and the difficulty in translating human rights obligations to feasible and compliant juvenile justice practices.[55] As a state party to the *UNCRC*, Australia must refer to these rules and guidelines when interpreting the *UNCRC* in order to fully understand the requirements of the convention.[56]

The United Nations *Guidelines for the Prevention of Juvenile Delinquency 1990* ('*Riyadh Guidelines*')[57] seek to prevent juvenile delinquency through the introduction of laws and procedures to protect the rights and wellbeing of young

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[50] Australian Human Rights Commission, *Human Rights Brief No 2, Sentencing Juvenile Offenders* (1999) <https://www.humanrights.gov.au/publications/human-rights-brief-no-2>.

[51] *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The *ICCPR* was ratified by Australia on 13 August 1980.

[52] *International Covenant on Economic, Social and Cultural Rights ('ICESC')*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). The *ICESC* was ratified by Australia 10 March 1976.

[53] *International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD')*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). The *ICERD* was ratified by Australia on 30 September 1975.

[54] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*'), opened for signature 10 December 1984, 1465 UNTS (entered into force 26 June 1987). The *CAT* was ratified by Australia on 8 August 1989.

[55] U Kilkelly, 'Youth Justice and Children's Rights: Measuring Compliance with International Standards' (2008) 8(3) *Youth Justice* 188.

[56] Australian Human Rights Commission, *Human Rights Brief No 2*, above n 50.

[57] *United Nations Guidelines for the Prevention of Juvenile Delinquency* ('*The Riyadh Guidelines*'), GA Res 45/112, UN GAOR, 45th sess, Supp No 49A, UN Doc A/45/49 (14 December 1990) annex 201.

persons and other initiatives.[58] The *Standard Minimum Rules for the Administration of Juvenile Justice 1985* ('*Beijing Rules*')[59] also address appropriate treatment of child offenders.[60] Likewise, the *Standard Minimum Rules for Non-custodial Measures 1990* ('*Tokyo Rules*')[61] provide for alternatives to confinement and detention at all stages of criminal justice administration[62] and it is the intent of the *Rules for the Protection of Juveniles Deprived of Their Liberty 1990* ('*Havana Rules*')[63] that children are imprisoned only as a measure of last resort, and for minimum periods.[64] The *Guidelines for Action on Children in the Juvenile Justice System ('Vienna Guidelines')*[65] ensure that children whether victim, perpetrator or witness are dealt with in accordance with *UNCRC* rights.[66]

III CURRENT PROTECTION OF CHILDREN'S HUMAN RIGHTS IN AUSTRALIA

A *Legal Responsibility*

Legal responsibility for the protection of human rights in Australia rests with the Commonwealth Government as signatory to international instruments. Yet, as

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[58] The *Riyadh Guidelines* address juvenile delinquency through general prevention principles, socialisation processes, familial and education assistance programs, social policy, research and policy development, community and mass media initiatives.

[59] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('*The Beijing Rules*'), GA Res 40/33, UN GAOR, 40th sess, Supp No 53, UN Doc A/40/53 (29 November 1985) annex, 207.

[60] The *Beijing Rules* outline the appropriate conduct and behaviour of juvenile offenders in meeting their varying needs while upholding rights, and the fair and thorough application of rules while meeting societal needs, particularly in the areas of proportionality of sentencing, promotion of the wellbeing of the juvenile, procedural safeguards, privacy and diversion from punitive criminal justice processing.

[61] *United Nations Standard Minimum Rules for Non-custodial Measures* ('*The Tokyo Rules*'), GA Res 45/110, UN GAOR, 45th sess, Supp No 49A, UN Doc A/45/49 (14 December 1990) annex, 197.

[62] The *Tokyo Rules* are directed at the promotion of non-custodial measures and minimum safeguards of alternatives to incarceration including during pre-trial, trial and post-sentence stages. They include measures such as probation, conditional discharge, status penalties, community service orders and suspended or deferred sentencing while acknowledging offender rehabilitation, society protection and victim interests.

[63] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* ('*The Havana Rules*'), GA Res 45/113, UN GAOR, 45th sess, Supp No 49A, UN Doc A/45/49 (14 December 1990) annex, 205.

[64] The *Havana Rules* provide that juveniles are incarcerated as a last resort, for minimum periods and in exceptional cases, only while demonstrating respect for human rights in order to address the deleterious effect of detention and encourage reintegration.

[65] *United Nations Guidelines for Action on Children in the Criminal Justice System ('The Vienna Guidelines')*, Recommended by Economic and Social Council Resolution 1997/30 (21 July 1997).

[66] The *Vienna Guidelines* provide a framework for implementation of the goals of the *UNCRC* including assistance to state parties to achieve such goals.

Australia has a federal system of government, state and territory governments are often responsible for many issues that are intrinsically related to the exercise of human rights in significant areas such as health, land matters, education and, notably for this article, law and order.[67] Accordingly, state and territory governments can infringe upon the Commonwealth's human rights obligations, yet state and territory laws can, in fact, be overridden by the Commonwealth to protect against breach of human rights obligations[68] by operation of the 'external affairs' power[69] found in the Australian *Constitution.*[70]

B *Case Law Relevant to the* UNCRC *in Australia*

Irrespective of a lack of direct incorporation into Australia's domestic law and difficulties in enforcement of human rights standards that rely on, note Cunneen, Goldson and Russell,[71] significant state and federal political will, the tenor of the *UNCRC* and other instruments can, however, influence judicial interpretation by domestic courts. This interpretation can emerge, suggests Jones, wherever applicable statutes are to be interpreted with due deference to international obligations in circumstances where ambiguity exists, although not where there is clarity in legislation even if such a position is in opposition to the terms of an international instrument.[72]

Further, in the exercise of administrative discretion, the executive[73] is to act consistently with instruments ratified by Australia in the absence of express provision to the contrary and must extend the right for the affected party to seek

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[67] Australian Human Rights Commission, *Human Rights – What Do I need To Know?* (August 2008) 5 <https://www.humanrights.gov.au/publications/human-rights-what-do-i-need-know-2008>.
[68] Ibid.
[69] *Australian Constitution* s 51(xxix).
[70] See *Koowarta v Bjelke-Petersen* (1982) HCA 27 where the validity of the *Racial Discrimination Act 1975* (Cth) was called into question following a claim for leasehold crown land in remote locations. The High Court was of the opinion that the enactment of the *Racial Discrimination Act 1975* (Cth) was a valid exercise of the 'external affairs' power found in s 51(xxix) of the *Constitution.* This power allows the Commonwealth Parliament to legislate with respect to affairs physically external to Australia including extra territoriality and treaty implementation. Note also that in addition to the external affairs power under s 51(xxix) of the *Constitution*, the High Court of Australia has original jurisdiction with respect to 'all matters arising under any treaty' pursuant to s 75(i) of the *Constitution* although this power is seldom triggered.
[71] C Cunneen, B Goldson and S Russell, 'Juvenile Justice, Young People and Human Rights in Australia', (2016) 28(2) *Current Issues in Criminal Justice* 184.
[72] M Jones, 'Myths and Facts Concerning the Convention on the Rights of the Child in Australia' (1999) 5(2) *Australian Journal of Human Rights* 126 <http://www.austlii.edu.au/au/journals/AJHR/1999/28.html>.
[73] The *Australian Constitution* allows the Commonwealth government to enter treaties and engage in diplomacy through the operations of the executive branch.

redress grounded in a legitimate expectation that the government intends to comply with a ratified instrument.[74] Some Australian jurisdictions[75] have, in fact, enacted stand-alone human rights legislation which, along with human rights more broadly, has provided some scope for human rights protection of children, including deference to provisions found in the *UNCRC* and other international instruments.[76]

The issue of expectation following the ratification of an international instrument was raised in the controversial decision, *Minister of Immigration and Ethnic Affairs v Teoh*,[77] which was centred on the incorporation or otherwise of the *UNCRC* into Australian law. A Malaysian citizen, Teoh,[78] who was lawfully in the country pursuant to a temporary visa, was convicted and imprisoned for drug offences prior to his application for permanent resident status being finalised. This application was subsequently refused and the High Court dealt with the issue of whether the rights of Mr Teoh's child[79] were infringed by deporting the father and denying procedural fairness.[80]

Caution should be exercised, however, with respect to the utility of a legitimate expectation to comply with terms of the international instrument, as although the High Court in *Teoh* suggested that the message of ratification was such that an expectation of compliance could arise, it did not compel decision-makers to apply the treaty terms. Conversely, it confirmed that it remains within the remit of government officials to, in fact, act contrary to international law.[81] At the time, there was a hurried, (and ultimately unsuccessful) introduction of legislation[82] attempting to undo the *Teoh* principle.[83] In addition, High Court decisions

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[74] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [3.22]; The High Court has promoted the expectation that the *UNCRC's* provisions will be taken into account insofar as administrative decision making is undertaken in cases involving children. See Australian Human Rights Commission, *Human Rights Brief No 1*, below n 143.

[75] See Part IV C below for a discussion of recent human rights legislative developments in both the Australian Capital Territory and Victoria.

[76] Legal counsel and courts are also encouraged to engage with international human rights law with the long-term development of human rights compatible legislation being a desirable objective. See Monahan and Young, above n 21, 31.

[77] *Minister of Ethnic Affairs v Teoh* (1995) 128 ALR 353.

[78] The Malaysian citizen in question had married an Australian citizen. He was also unaware of the *UNCRC*.

[79] See Part IV D below for an explanation of the best interests principle.

[80] Jones, above n 72.

[81] Ibid.

[82] Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth), Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth) and the Administrative Decisions (Effect of International Instruments) Bill 1999 (Cth). All of the bills lapsed in Parliament.

[83] Charlesworth et al, above n 46, 437.

dating from 2000 such as *Re Minister of Immigration and Multicultural Affairs; Ex parte Lam*[84] have further questioned the validity of the legitimate expectation standard by suggesting that the standard is neither a freestanding administrative doctrine, nor a source of substantive rights.[85] Indeed, in *Lam,* four of the five member High Court bench had reservations regarding the legitimate expectations in *Teoh* and questioned the need for courts to accord meaning to, or interpret the ratification of international instruments, although it must be said that *Teoh* was not overruled.[86]

In *Re Woolley: Ex parte Applicants M276/2003 by their next friend GS*,[87] the High Court considered the constitutional validity of the *Migration Act 1958* (Cth) with respect to the lawfulness of forced detention of children. International human rights jurisprudence and its application to the detention of the children was also scrutinised in this case, although the High Court emphasised that the arbitrariness of the children's detention in contravention of international treaties and protocols (the applicants had relied upon the *UNCRC* and the *ICCPR* to buttress their claim), was not at issue. The unconstitutionality of the detention in accordance with Australian law was in question, instead of whether Australia was in breach of international obligations[88] although Kirby J emphasised that when interpreting domestic law, Australian courts should be mindful of international obligations in circumstances of ambiguity.[89] Moreover, within the Australian jurisdiction, several rights based issues relevant to children have also been examined by courts that have considered whether independent right holder status can be attached to children.[90]

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[84] *Re Minister of Immigration and Multicultural Affairs; Ex parte Lam* (2002) 195 ALR 502.

[85] R Lindsay, 'Natural Justice: Procedural Fairness: Now We see Through a Glass Darkly' (2010) 63 *Australian Institute for Administrative Law Forum* 72.

[86] M Groves, 'Treaties and Legitimate Expectations-The Rise and Fall of Teoh in Australia' (2010) 8 *Monash University Law Research Series* <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/UMonashLRS/2010/8.html?stem=0&synonyms=0&query=expectation%20following%20ratification%20of%20international%20instrument>; For a more recent examination of the legitimate expectation notion see *Minister for Immigration and Border Protection v WZARH* (2015) 326 ALR 1.

[87] *Re Woolley: Ex parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1 (Gummow J).

[88] Ibid [115] (McHugh J).

[89] Ibid [201] (Kirby J). Moreover, Kirby J suggested that assuming there had been a breach of international law following the detention due to failure or maladministration of the legislation, such an infraction does not, as a consequence, empower the court to overlook the provisions of a valid Australian law, although in any ambiguous circumstance the court must be mindful of Australia's international obligations insofar as is practicable when interpreting a domestic law.

[90] See, eg, *Secretary, Department of Health and Community Services (NT) v JWB and SMB (Re Marion No. 1)* (1992) 175 CLR 218 which examined the question of upholding the rights of an intellectually disabled juvenile female over parental rights in relation to sterilisation; *Re a Teenager*

C *The Role of the Australia Human Rights Commission*

The importance of the *UNCRC* is further endorsed through the auspices of the Australian Human Rights Commission *(Commission)*,[91] which was established pursuant to the *Australian Human Rights Commission Act 1986* (Cth).[92] The *Commission* maintains an active role in promoting and protecting the human rights of children under the provisions of the *Human Rights and Equal Opportunity Act 1986* (Cth). The *Commission* can actively consider claims of rights offences against children with reference to the *UNCRC* in addition to conducting public enquiries, providing policy advice and examining relevant domestic laws that impinge upon *UNCRC* provisions.[93] The *Commission* also has the ability to intervene in matters concerning children by providing submissions to courts.[94]

Whilst the *Commission* lacks power to enforce any of its recommendations or indeed those of the United Nations, it can encourage the implementation of provisions found in the *UNCRC*. This was seen in the *Commission's* enquiry into the mandatory detention of refugee status children, which resulted in the Commonwealth government amending immigration laws.[95] There is also an opportunity for claimants within Australia to seek suitable remedy for breach of human rights[96] through other Commonwealth legislation,[97] and includes rights

(1988) 94 FLR 181 and *Re Katie* (1995) FamCa 130 both dealt with parental rights over sterilisation of severely disabled children; *Re Alex: Hormonal Treatment for Gender Disphoria* [2004] FamCA 297 dealt with legalities of a juvenile obtaining gender reassignment and *Re the Child: 'Michael' Between John Britton Acting Public Advocate and G and E 'P' Respondents/Parents and Human Rights and Equal Opportunities Commission Intervener* [1994] FamCA 56 examined the issue of consent to surgical treatment by children.

[91] Pursuant to *Australian Human Rights Commission Act 1986* (Cth), the Commission is required amongst other functions to investigate complaints of unlawful discrimination and human rights complaints, research, related purposes, the promotion of human rights awareness and debate in Australia and to ensure compliance with human rights instruments.

[92] *Australian Human Rights Commission Act 1986* (Cth) s 3.

[93] Australian Human Rights Commission, *Australia's Commitment to Children's Rights and Reporting to the UN*, above n 39, [1.3].

[94] See eg, *Re the Child: 'Michael' Between John Britton Acting Public Advocate (Victoria) and G and E 'P' Respondents/Parents and Human Rights and Equal Opportunities Commission Intervener* [1994] FamCA 56; *Catholic Education Office v Clarke* [2004] FCAFC 197.

[95] Australian Human Rights Commission, *Australia's Commitment to Children's Rights and Reporting to the UN*, above n 39, [5.1].

[96] Australian Human Rights Commission, *Human Rights – What Do I Need To Know?* above n 67, 6–7.

[97] Other legislation that the Australian Human Rights Commission draws upon include the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Fair Work Act 2009* (Cth),

and freedoms contained in specific international instruments contained within or scheduled to the *AHRC Act*.[98] Various state and territory human rights agencies,[99] international bodies and other committees[100] can also address breach of human rights. The Commission can, however, refer to the *UNCRC* when investigating complaints from children who believe their rights have been breached, in addition to examining laws that appear to breach the *UNCRC*, publicly promote children's rights, establish public enquiries and provide policy advice regarding the *UNCRC*.[101]

However, unlike some treaties and protocols relevant to children,[102] such as the *ICCPR* and the *ICERD*, unless and until Australia ratifies the Third Optional Protocol to the *UNCRC* on a communications procedure,[103] no individual complaint under the *UNCRC* will be considered by the United Nations. If this were to occur, an avenue for children within Australia to seek legal remedy for breach of *UNCRC* rights would be provided[104] and would also encourage international law jurisprudence in the children's rights area.[105]

The *UNCRC* has also been seen as a major step forward in the protection of the human rights of children through the promotion of welfare through justice, rather than charity principles.[106] It is also operational in informing humanitarian

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Native Title Act 1993 (Cth), *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth).

[98] *Australian Human Rights Commission Act 1986* (Cth) s. 11.

[99] See, eg, Australian Capital Territory Human Rights Commission, Anti-Discrimination Board of New South Wales, Northern Territory Anti-Discrimination Commission, Anti-Discrimination Commission Queensland, Equal Opportunity Commission of South Australia, Office of the Anti-Discrimination Commissioner, Tasmania, Victorian Equal Opportunity and Human Rights Commission and the Equal Opportunity Commission Western Australia.

[100] Note that there are several United Nations Committees that aggrieved persons in Australia can access should all domestic avenues be exhausted, including the Human Rights Committee, Committee Against Torture, Committee on the Elimination of Discrimination Against Women and the Committee on the Elimination of Racial Discrimination. Whilst these committees can express an observation following investigation of a complaint regarding human rights violation, it will not be legally binding on the state. An example of this type of investigation can be seen in *Rogerson v Australia* (2002) Communication no 802/1998 where the Human Rights Committee established that a breach of art 14(3)(c) of the *ICCPR* had taken place because an Australian lawyer was denied the right to a fair hearing.

[101] Australian Human Rights Commission, *Australia's Commitment to Children's Rights and Reporting to the UN*, above n 39, [1.3].

[102] Ibid [6.1].

[103] The 3rd Optional Protocol to the *UNCRC* was opened for signature by the United Nations General Assembly on 19 December 2011 and entered into force on 14 April 2014.

[104] The 3rd Optional Protocol to the *UNCRC* will create a child specific complaints mechanism guided by the best interests notion.

[105] See Monash University, Castan Centre for Human Rights Law, *Optional Protocol (OP3) to the Convention on the Rights of the Child (CRC)* (April 2012) <*https://www.monash.edu/__data/assets/pdf_file/0004/138451/rights-of-the-child-sub.pdf*>.

[106] Freeman, 'The Future of Children's Rights', above n 33.

principles such as in areas of political emergency.[107] Nonetheless, with near-universal acceptance by over 190 member states, the *UNCRC* is the most ratified global human rights treaty, with only the United States a conspicuous absentee.[108] However, whilst human rights are most certainly inalienable and thus cannot be removed, they can, of course, be violated[109] which is an issue that has generated considerable recent focus in, for example, the Australian juvenile detention space.[110] Despite the wide ratification of the *UNCRC*, violations of its tenets are, unfortunately, commonplace.[111] The next part of the article will examine human rights for children in the Australian juvenile justice space.

IV CHILDREN'S HUMAN RIGHTS IN THE AUSTRALIAN JUVENILE JUSTICE SYSTEM

A *Introduction*

Juvenile justice is best described as the processes and practices for dealing with juveniles who have committed or been found guilty of committing an offence. It is regulated within the Australian jurisdiction by state and territory governments including criminal law and procedure.[112] Australian children are also subject to numerous stand-alone items of juvenile justice law that are typically facilitated through specific legislation and children's courts.[113] The Australian *Constitution* is identified as a federal system of governance with powers to make laws divided between states and the Commonwealth in addition to the establishment of territorial governments.[114] Essentially, the Commonwealth has exclusive[115]

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[107] Pupavac V, 'Misanthropy Without Borders: The International Children's Rights Regime' (2001) (25)2 *Disasters* 95.

[108] Australian Human Rights Commission, *About Children's Rights* <https://www.humanrights.gov.au/our-work/childrens-rights/about-childrens-rights>.

[109]Amnesty International Australia, *What Are Human Rights?* (3 February 2013) <http://www.amnesty.org.au/about/comments/21681/>.

[110] Part IV I below will outline recent high-profile juvenile rights abuse incidents in the Australian jurisdiction.

[111] T Hutchinson, G Parada and R Smandych, 'Show me a bad kid and I'll Show you a Lousy parent: Making Parents Responsible for Youth Crime in Canadian Contexts' 2009 26(2) *Australian Canadian Studies* 60.

[112] Australian Institute of Health and Welfare, 'Youth Justice in Australia 2016–2017 (Australian Institute for Health and Welfare, 2018) 1 <https://www.aihw.gov.au/getmedia/19707990-1719-4600-8fce-foaf9d61331c/aihw-juv-116.pdf.aspx?inline=true>.

[113] A Stewart, T Allard and S Dennison (eds), *Evidence Based Policy & Practice in Youth Justice* (The Federation Press, 2011) 11; see, eg, *Children and Young People Act 2008* (ACT).

[114] See Part III A above for further discussion on the constitutional basis of the division of lawmaking powers in the Australian jurisdiction.

[115] See, eg, *Australian Constitution* ss 52, 90.

lawmaking powers in addition to concurrent lawmaking powers[116] shared with states. The remaining powers are referred to as residual power or general powers, which allow states to exercise lawmaking power.[117] Law and order remains a residual or general power of states. States therefore, have full legislative authority to pass laws relating to juvenile justice.[118]

In spite of limited consistency between jurisdictions, juvenile justice legislation is concerned with definitional issues such as the age classification regime[119] of offenders for the purposes of criminal responsibility, which is critical given that age not only serves to classify which system an offender is subject to, but also the processes deployed within the system to manage the offender.[120] In addition, juvenile justice legislation determines children's court jurisdiction and procedures, mechanisms of appeal, sentencing, juvenile detention, bail and custody, police procedure, restitution, compensation, general principles relevant to juvenile offending and diversionary options.[121]

Diversion refers to the redirection of offenders away from formal punitive criminal justice processes.[122] As offending by children is quite often transitory with most offenders 'ageing out' of offending as they near the end of their teenage years, the use of diversionary options allow vulnerable child offenders are to be dealt with without resorting to traditional punitive criminal justice proceedings, so long as appropriate human rights and legal safeguards are respected.[123] Diversionary options form part of restorative justice which is instrumental in lessening the oppressive nature of traditional court processes in juvenile justice systems. The overarching aim of restorative justice is the concerted focus on the aftermath of the offence, engagement in a harm reparation process for victims, and acknowledgement of the various competencies and needs of offenders leading ultimately to a message of disapproval of the impact of the offence.[124]

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[116] See, eg, *Australian Constitution* s 51.

[117] P Hanks, P Keyzer and J Clarke, *Australian Constitutional Law Materials and Commentary* (Butterworths, 7th ed, 2004) 8.

[118] See above n 70 for a discussion on the ability of the Commonwealth to legislate pursuant to international obligations.

[119] See below n 241 for a discussion on the concept of *doli incapax* and associated criminal responsibility issues within the Australian jurisdiction.

[120] Stewart, Allard and Dennison, above n 113.

[121] Cunneen and White, above n 3, 97–98.

[122] Australian Human Rights Commission, *Human Rights Brief No 5: Best Practice Principles for Diversion of Young Offenders* (2001) <https://www.humanrights.gov.au/publications/human-rights-brief-no5-best-practice-principles-diversion-juvenile-offenders-2001>.

[123] Ibid.

[124] Essentially, the restorative process involves parties like victims, offenders, family members, statutory agencies, supporters, and other parties with an interest in the offence to formalise a negotiated, collective resolution with creativity and flexibility to promote responsibility yet

One of the most common restorative justice vehicles is the victim-offender group conference used extensively throughout the Australian jurisdiction. Other diversionary options include cautioning, victim-offender mediation and conciliation programs. An important aspect of juvenile justice within Australia concerns the supervision of alleged juvenile offenders which remains of sizeable concern. 2016–17 data[125] reveals that more than five thousand juveniles are under daily juvenile justice supervision across the country, although thankfully this represents an altogether minuscule portion of the aggregate Australian youth demographic.

Despite some disagreement on juvenile justice legislation between Australian jurisdictions, there is consensus on a trio of staple principles that distinguish children from their adult counterparts within the criminal justice system. Essentially, there remains a need to treat child offenders differently from their adult counterparts, diversion and non-traditional court processes are to be promoted where possible, and detention of child offenders is to be considered only when other options are exhausted.[126] Legislation, policy and practice within the Australian jurisdiction acknowledges that children are more at risk and lack maturity compared to adult counterparts and typically are also more susceptible to peer pressure.[127]

B *Actors in the Juvenile Justice System*

The responsibility for meeting human rights obligations remains with state organs including parliaments, local government authorities, the judiciary, law enforcement and education.[128] In particular, police agencies, courts and various government agencies comprise the three main stakeholders that play a significant role in the administration of juvenile justice within Australia.[129] Government agencies include accommodation, health, child protection, family and community services. As gatekeepers in the juvenile justice model, the police are pivotal in determining whether the suspect enters and progresses throughout the juvenile justice system initially, and the specific management of the offender

simultaneously repair the harm caused by the offence. See, eg, R White and F Haines, *Crime and Criminology* (Oxford University Press, 4th ed, 2008) 170.

[125] Australian Institute of Health and Welfare, above n 112, 4.

[126] Stewart, Allard and Dennison, above n 113, 9–10.

[127] Australian Institute of Criminology, *Juvenile Justice*, above n 7.

[128] Danish Institute for Human Rights, *Applying a Rights-based Approach. An Inspirational Guide for Civil Society* (2007) 11.

[129] Stewart, Allard and Dennison, above n 113, 18.

whilst in the system.[130] Offender management includes bail determination, detention of those offenders refused bail, escort to detention centres and prosecutions in the children's court.[131] Further, according to Stewart, Allard and Dennison, the police play a decisive role in the allocation of child offenders to diversionary, non-punitive restorative pathways such as youth conferencing and cautioning.[132] Other interested parties include political and governmental interests, community lobby groups and media bodies.[133]

C *Introduction to Human Rights Safeguards in Australian Juvenile Justice Legislative Frameworks*

The notion that human rights safeguards ought to be implicit within the criminal justice process, should, notes Farmer, generate little controversy.[134] As discussed in Part II C above, notwithstanding the lack of legislative incorporation of the *UNCRC,* state parties are obligated to fulfil rights obligations of ratified instruments. This being the case, the various legislative approaches taken by Australian states and territories to juvenile justice will now be examined in order to identify key safeguards of the *UNCRC, ICCPR* and other relevant instruments such as the *Beijing Rules, Tokyo Rules, Riyadh Guidelines* and *Vienna Guidelines.* Given that each jurisdiction is responsible for juvenile justice and enactment of laws, the following discussion will be presented in a thematic fashion as each jurisdiction has comprehensive legislation. For the sake of clarity, only the salient principles and key themes will be identified, most particularly, the notions of the best interests and participation of the child in addition to natural justice, due process, procedural fairness, juvenile justice, proportionality and diversion.

Various imports of human rights safeguards are, in fact, evident in Australian law, notably in the anti-disability[135] and anti-discrimination[136] areas. However, only two Australian jurisdictions boast stand-alone human rights legislation. In 2004 the parliament of the Australian Capital Territory enacted the *Human*

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[130] Ibid.
[131] Cunneen and White, above n 3, 106.
[132] Stewart, Allard and Dennison, above n 113, 18.
[133] Cunneen and White, above n 3, 93.
[134] C Farmer, 'Is a 24-hour Ban Such a Bad Thing? Police Imposed Banning Notices: Compatible With Human Rights or a Diminution of Due Process' (2014) 20(2) *Australian Journal of Human Rights* 41.
[135] Note the *Disability Services Act 1993* (WA) sch 1 cl 2 makes specific mention of affording the same basic human rights to disabled and non-disabled persons.
[136] See eg, *Northern Territory Anti-Discrimination Act* (1992) s 100 which protects the anonymity of individuals.

Rights Act 2004 (ACT) whilst the State of Victoria followed suit in 2006 with the introduction of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[137] Both statutes promote the best interests of the child through the support of the family unit and entitlement to protection,[138] separation of accused children from their adult counterparts, expeditious processing, age appropriate treatment that promotes offender rehabilitation and quarantine on publication of judgements in certain circumstances.[139] The human rights specific legislative action in these two jurisdictions offers some cause for optimism in the Australian human rights space albeit with some restriction in practice.[140] Public authorities in these jurisdictions must act in a manner that is compatible with human rights. In Victoria, for example, judicial interpretation of legislation must comply with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and parliament must consider human rights when developing legislation and in decision making in matters affecting the public.[141] Also encouraging was the announcement in late 2018 that Queensland has also committed to a Human Rights Act, ostensibly based on the Victorian model.[142]

D *Best Interests Principle*

Under art 3 of the *UNCRC*, the best interests of the child are at all times, and in all actions concerning children,[143] to be of primary consideration by courts, legislators, administrative bodies and social welfare institutions.[144] This article of the *UNCRC* is not without controversy, as although the best interests of the child are to be of primary or paramount consideration, other considerations are not,

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[137] *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[138] *Human Rights Act 2004* (ACT) ss 11(1)–(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 17(1)–(2).
[139] *Human Rights Act 2004* (ACT) ss 19, 20, 21(3), 22(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 23, 24(3), 25(3).
[140] See, eg, B Naylor, 'Protecting Human Rights in Detention' 2016 41(3) *Alternative Law Journal.* Naylor, for example, identifies restrictions in commencing actions for breach in both the ACT and Victoria. It should also be noted that both acts are selective and do not intend to be complete statements of individual human rights.
[141] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s (1).
[142] See F Caldwell, 'Human Rights Bill to be Introduced in Queensland This Week', *Brisbane Times* (online), 29 October 2018 < https://www.brisbanetimes.com.au/politics/queensland/human-rights-bill-set-to-be-introduced-in-queensland-this-week-20181029-p50cq4.html>; see also Anti-Discrimination Commission Queensland, *Human Rights Act for Queensland* (31 October 2016) <https://www.adcq.qld.gov.au/about-us/media/media-releases/2016/human-rights-act-for-qld>.
[143] Australian Human Rights Commission, *Human Rights Brief No 1* (7 December 2009) 2 <http://www.humanrights.gov.au/publications/human-rights-brief-no-1>; see *UNCRC* art 3.
[144] Ibid 1.

necessarily excluded unlike circumstances where primary or paramount consideration is unfettered, as is the case in some child welfare legislation.[145]

McGoldrick suggests that difficulty in applying the best interests principle can be attributed in part to the multitude of personal, social and economic factors that combine to inform what is in the best interests of a particular child or juvenile.[146] Cultural and social issues also contribute to obfuscation of the best interests standard, with historical context an added difficulty.[147] However, criticism of the principle's ambiguity is often the result of reading the *UNCRC*'s articles independently rather than holistically, and, more to the point, without necessary acknowledgement that the principle is in fact restricted and guided by the *UNCRC*.[148] As an example, the *UNCRC* guarantee to protect physical integrity of children and juveniles can be associated with art 6 which acknowledges right to life, art 24 which ensures highest attainable standards in health, art 34 which promotes protection from exploitation and sexual abuse and art 37 which prohibits cruel, tortuous, degrading, inhumane or capital punishment of children.[149]

Factors such as these provide useful guidance in better understanding the *UNCRC's* best interests principle. In particular, the statements found in *UNCRC* arts 5, 12, 14, 18, 32, 33 and 34 that children and juveniles remain vulnerable and are in various stages of maturation are significant and can also provide context[150] in assessing the best interests of children and juveniles as per the requirements of *UNCRC* art 3. Similarly, art 24(1) of the *ICCPR* requires that minors are provided with protection with respect to family, society and state as a consequence of their immaturity.[151] Respect for the views of the child is also promoted under art 13 of the *UNCRC* which is of particular relevance to the juvenile justice system, as is the requirement that views freely formed by children in their own best interests are to be taken into account at all times under art 12.[152]

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[145] M Freeman, 'Children's Rights Ten Years After Ratification' in B Franklin (ed), *The New Handbook of Children's Rights Comparative Policy and Practice* (Routledge, 2002) 98; see, eg, *Children Act 1989* (UK) s 1(1) which requires that courts must uphold the welfare of a child as *the* paramount consideration in matters concerning them; see *UNCRC* art 3.

[146] McGoldrick, above n 38, 136; see *UNCRC* art 3.

[147] G Lansdown, 'Implementing Children's Rights and Health' (2000) 83 *Archives of Disease in Childhood* 288; see *UNCRC* art 3.

[148] Monahan and Young, above n 21, 44; see *UNCRC* art 3.

[149] H Blagg and M Wilkie, 'Young People and Policing in Australia: The Relevance of the UN Convention on the Rights of the Child' (1997) 3(2) *Australian Journal of Human Rights* 134-156; see *UNCRC* arts 6, 24, 34 and 37.

[150] Blagg and Wilkie, above n 149; see *UNCRC* arts 5, 12, 14, 18, 32, 33 and 34.

[151] See *ICCPR* art 21(4).

[152] Australian Human Rights Commission, *Human Rights Brief No 1*, above n 143, 3; see *UNCRC* arts 12 and 29.

Further, if parents as primary decision makers for children under arts 5 and 18 fail to uphold the best interests principle on their behalf, states can intervene to ensure the principle is upheld under art 9. However, as Jones suggests, dilution of parental control over children is not the intent of the *UNCRC* which is largely supportive, rather than anti-parent or anti-family in substance.[153]

It is also in the best interests of Indigenous children to be raised in Indigenous communities under arts 5, 8 and 30.[154] Indeed, Indigenous family upbringing is significant in the preservation and enhancement of cultural identity, practice, awareness and values as Indigenous parents are aware of what can keep their children safe and actively encourage participation in community life, which is useful in addressing Indigenous disadvantage.[155]

Although not unrestricted, the best interests requirement places a substantial burden on states to justify actions contrary to the best interests of children. However, it is not the sole or supreme consideration in relevant decision-making[156] and can be overridden on occasion by other interests under the *UNCRC*.[157] Of concern, however, is the tendency of the best interest principle to be used to justify the prejudices and agendas of individuals and agencies as was seen in amendments to Australian family law,[158] in addition to forced removal of Indigenous children.[159] In meeting aims under the *UNCRC*, due deference to Australia's general human rights obligations under the *ICERD* and *ICCPR* must take place including the presumption of innocence, the right to silence, access to legal assistance, equal treatment before the law, access to interpreter services and the presence of parents or guardians.[160]

Prolific in child human rights investigation, the notion of upholding a perspective consistently aligned with the notion of the best interests of the child

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[153] Jones, above n 72.

[154] Australian Human Rights Commission, *Human Rights Brief No 1*, above n 143; see *UNCRC* arts 9 and 30.

[155] See, eg, Australian Institute of Family Studies, *Strengths of Australian Aboriginal Cultural Practices in Family Life and Child Rearing* CFCA No 25, (September 2014) <https://aifs.gov.au/cfca/publications/strengths-australian-aboriginal-cultural-practices-fam/introduction>.

[156] Monahan and Young, above n 21, 45.

[157] Such circumstances include situations where other parties or communities have higher interests including those of an economic or religious nature. See Australian Human Rights Commission, *Human Rights Brief No 1*, above n 143, 3.

[158] Amendments related to shared parenting presumption were made to the legislation in the mid-2000s. See *Family Law Act 1975* (Cth) s 65DAA.

[159] Controversially, children were forcibly removed from Northern Territory Indigenous communities from 2007 during under the guise of promoting the best interests of children. See Monohan and Young, above n 21, 45, 373.

[160] Australian Human Rights Commission, *Human Rights Brief No 5*, above n 122.

is visible within Australian juvenile justice legislation to some extent. Some states and territories overtly safeguard the principle,[161] whereas others refer to it more obliquely, often in the promotion of various youth justice or other wholesale principles designed to manage child offenders in a manner that is respectful and protective. Likewise, the intent of the best interests principle is often promoted through the opportunity for offenders to develop in socially responsible ways through guidance, care and correction, the provision of guidelines regarding parental or familial environments[162] and the encouragement of reintegration into society.[163]

In Australia, the best interests of the child principle can be found, at least in intent, in the Australian Capital Territory and in New South Wales where the right to counsel, to participate in proceedings and enjoy legal rights and freedoms is protected in juvenile justice legislation.[164] In Queensland, children's rights, safety, physical and mental wellbeing are protected in juvenile justice legislation which requires that children are treated with respect and dignity when in custody,[165] including acknowledgement of their vulnerability when dealing with authority[166] in addition to having matters explained in a way that they understand.[167] Moreover, decisions should be made and carried out in a timeframe meaningful to the child and allow for age, cultural and religious beliefs.[168]

South Australian juvenile justice legislation makes provision for the transformation and reintegration of child offenders into valued community members through guidance, care and correction which, it could be said, reflects the best interests philosophy[169] as does the development of child offenders into socially responsible, acceptable and beneficial ways in Tasmanian juvenile justice legislation including in circumstances where a juvenile offender is to be removed

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[161] *Children and Young People Act 2008* (ACT) s 8; *Youth Justice Act 1994* (NT) s 140(b)(1); *Children, Youth and Families Act 2005* (Vic) s 10(1).
[162] See eg, *Young Offenders Act (*WA) 1994 s 7 (b), (k), (m)(i)(ii)(iii).
[163] See eg, *Young Offenders Act 1997* (NSW) s 7(e).
[164] *Children (Criminal Proceedings) Act 1987* (NSW) s 6(a); *Young Offenders Act 1997* (NSW) s 7(b).
[165] *Youth Justice Act 1992* (Qld) sch 1 cl 2, 3 sub-cl (a).
[166] *Youth Justice Act 1992* (Qld) sch 1 cl 4.
[167] *Youth Justice Act 1992* (Qld) sch 1 cl 6.
[168] *Youth Justice Act 1992* (Qld) sch 1 cl 11, 12.
[169] *Young Offenders Act 1993* (SA) s 3(1). Note also that 'best interests' are to be considered when assessing the interstate transfer of young offenders in South Australia. See *Young Offenders Act 1993* (SA) s 44(c). Further, a child protection bill recently passed the South Australian Parliament which will extend protection to vulnerable children and juveniles. See also Government of South Australia, Attorney Generals Department, *Stronger Child Protection Laws Pass Parliament* (July 6 2017) <https://www.agd.sa.gov.au/newsroom/stronger-child-protection-laws-pass-parliament>.

to a mental health facility and court determination of protection matters.[170] Similarly, the best interests of young offenders are a significant feature of Victorian juvenile justice legislation[171] in addition to that of the Australian Capital Territory,[172] whilst in Western Australia, young offender legislation actively encourages decision-makers to be aware of the need to help young offenders develop in a beneficial, responsible and acceptable fashion.[173]

Identification of the best interests of the child in domestic Australian juvenile justice law is not without some difficulty, however, due to the inconsistent incorporation of the safeguard into prevailing frameworks. This is unfortunate as the principle is of fundamental importance in human rights analysis, with much of the protection provided by the *UNCRC* centred on this imperative. For example, whilst common ground as to the best interests of the child in juvenile justice legislation can be found across jurisdictions, it should be conceded that it is more often the intent of the principle[174] that emerges, rather than wholesale adoption. However, it is comforting that at least the intent of the principle is upheld to some extent.[175]

E *Participation*

Art 12 of the *UNCRC* gives children the right to participate in all matters concerning them and have their views given suitable credibility. This includes the opportunity to be heard in all proceedings against them including those of judicial, familial or administrative nature. Any proceeding that involves children must provide the opportunity for the accused to participate and express themselves freely, either directly, through representation, or through an appropriate body in accordance with the procedural rules of the state, as recommended by *UNCRC* art 12 and *Beijing Rule* 14.[176] Art 12 is potentially one of the most important provisions in the *UNCRC,* although clarity regarding

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[170] *Youth Justice Act 1997* (Tas) s 5(1)(h), s 134A 2(a)(i), s 104(2)(b).
[171] *Children, Youth and Families Act 2005* (Vic) s 10(1).
[172] *Children and Young People Act 2008* (ACT) s 94(1).
[173] *Young Offenders Act 1994* (WA) s 7(j).
[174] See, eg, *Young Offenders Act (*WA) 1994 s 7 (b), (k), (m)(i)(ii)(iii) for examples of general juvenile justice principles that promote the best interests indirectly.
[175] The best interests of the child principle has been more visible in the areas of medicine, disability and anti-discrimination. See J Cumming, R Mawdsley and E De Waal, 'The Best Interests of the Child, Parents Rights and Educational Decision-Making for Children: A Comparative Analysis of Interpretations in the United States of America, South Africa and Australia' (2006) 11(2) *Australia & New Zealand Journal of Law & Education* 53.
[176] Australian Human Rights Commission, *Human Rights Brief No 2*, above n 50; see *UNCRC* art 12 and *Beijing* Rule 14.

separate representation for the child would be useful as no distinction between representation by parents, which presumably satisfies the article, or legal counsel is apparent.[177]

Varnham, Booth and Evers note that children should be encouraged to make a meaningful contribution to social, community, legal and political debate in democratic society[178] by enabling them to provide useful input in circumstances where decisions that affect them are determined.[179] Children are often excluded from information sharing and decision making. Although due deference to maturity must be shown, it has been established that children can, in fact, absorb and digest difficult information they are so often denied by adults. [180] Although often for protective purposes, denial can have the effect of contributing to distress and anxiety levels in children.[181] However, as Lansdown argues, the right to be heard under *UNCRC* art 12 does not guarantee that their views will necessarily prevail.[182] Further, Federle[183] suggests that questioning the ability of children to contribute meaningfully in legal proceedings due to immature age may, at any rate, be misplaced as the child is only a participant, rather than final arbitrator in proceedings which remains the preserve of courts or other bodies.[184]

Participation by child offenders in judicial process is a notion that has support yet cannot be considered holistic in its coverage by the various domestic juvenile justice legislative structures. Participation in decision-making is encouraged in the Australian Capital Territory,[185] New South Wales[186] and Queensland,[187] with

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[177] Freeman, 'The Future of Children's Rights', above n 33, 288.
[178] S Varnham, T Booth and M Evers, 'Let's ask the Kids – Practicing Citizenship and Democracy in Schools' (2011) 16(2) *International Journal of Law & Education* 77; see *UNCRC* art 12.
[179] Varnham, Booth and Evers, above n 178, 77, 78; see *UNCRC* art 12. Although not dismissive of the rights and responsibilities of parents in expressing their views in matters involving their children, *UNCRC* art 12 actively encourages adults to involve children in decision-making and make allowance for their views and opinions which is also of great importance in the development of citizenship among children.
[180] Lansdown, above n 147, 286.
[181] Ibid.
[182] Ibid; see *UNCRC* art 12.
[183] K H Federle, 'Children's Rights and the Need for Protection' (2000–2001) 34(3) *Family Law Quarterly* 440.
[184] Equally, the *UNCRC* has provided a much-needed challenge to the notion of the incompetent, vulnerable child that has so long been a staple of the child protection movement, where children were largely invisible and discriminated against on the basis of age, seen as little more than adults in waiting, and consequently accorded marginal autonomy and importance. See Reynaert, Bouverne-De Bie and Vandervelde, above n 34, 521–522; On the right of children to be heard in judicial proceedings, see, generally, A Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (Routledge, 2015)
[185] *Children and Young People Act 2008* (ACT) s 94(1)(c).
[186] *Children (Criminal Proceedings) Act 1987* (NSW) s 6(a).
[187] *Youth Justice Act 1992* (Qld) sch 1 cl 7 sub-cl (b).

the participation of victims in juvenile justice processes advocated in both the Northern Territory[188] and Tasmania.[189] South Australia, Victoria and Western Australia remain largely silent on the participation of child offenders, although indirect participation of offenders is promoted through restorative justice processes including juvenile conferencing in South Australia,[190] Victoria[191] and other diversionary options in Western Australia.[192]

Conferencing logically requires offender participation as the conference itself encourages the input of offenders and other stakeholders including victims in an attempt to deal with the aftermath of a criminal offence. Victim-offender group conferences allow offenders, for example, to have a voice in the resolution of the offence in a less formal and structured forum rather than as passive observers in traditional criminal justice systems. Restorative justice initiatives are available across all Australian jurisdictions. Once again, there appears to be much room for improvement in the adoption and expansion of the important participation human rights safeguard in domestic juvenile justice legislative structures.

F *Juvenile Justice, Due Process, Proportionality and Diversion*

With respect to youth justice, the *UNCRC* under art 40 and *Beijing* Rule 14 require age appropriate and child focussed justice system treatment of children in conflict with the law, incorporating due process principles.[193] Art 40 and *Beijing* Rule 14 require respect for the child's worth and reinforcement of the child's rights, along with appropriate consideration of the minimum age for criminal responsibility, expeditious processing of judicial or alternative determinations, and ultimately a desire to reintegrate the child into society.[194]

Proportionality of sentence is to be undertaken with due deference to *UNCRC* art 40, including consideration of both the offence and the individual circumstances of the offender such as age, family and socio-economic background, educational level and physical and mental health. This is further supported by *Beijing* Rule 5 which requires that proportionality of sentence be

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[188] *Youth Justice Act* (NT) s 4(k).
[189] *Youth Justice Act 1997* (Tas) s 5(1)(d).
[190] *Young Offenders Act 1993* (SA) s 10.
[191] *Children, Youth & Families Act 2005* (Vic) ss 415(4), (6), (7).
[192] See *Young Offenders Act 1994* (WA) pt 5.
[193] Due process, procedural fairness and natural justice refer to essentially common law rules and expectations which necessitate unbiased and equitable judicial and administrative decision-making and include the right to be heard and to receive notice of the hearing whether personally or through legal representation.
[194] Kilkelly, above n 55, 189; see *UNCRC* art 40 and *Beijing* Rule 14.

an instrument for curbing punitiveness by allowing for factors including the offender's willingness to indemnify victims or lead productive lives.[195] Further, under art 3 of the *UNCRC*, the best interest principle is as applicable as any juvenile justice issue in the sentencing of child offenders which provides additional context.[196] Similarly, under *Beijing* Rule 17, detention is only considered appropriate in extraordinary circumstances and, under the provisions of *Beijing* Rule 19, for minimum periods. This includes cases where children have committed serious violent acts as per *UNCRC* art 37 and *Havana* Rule 1, including situations where there is also no practicable alternative.[197] Proportionality of sentence should not allow an increase in penalty beyond the gravity of offences solely for the protection of society from offender recidivism.[198]

Kilkelly argues that diversion under the *UNCRC* must only occur in situations where the accused child freely accepts responsibility for the offence and provides his or her consent.[199] There is also a requirement preventing the child's acknowledgement of guilt being used against them in any subsequent judicial proceeding. Moreover, access to any diversionary option is not to be arbitrary under *Tokyo* Rule 3, with agencies required to follow established legal guidelines when exercising the power to divert children from traditional formalised juvenile justice proceedings.[200]

Age-appropriate responses[201] to juvenile justice and the imposition of custodial sentencing as a last resort measure only,[202] is a feature of juvenile justice legislation in the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Western Australia along with proportionality in sentencing[203] in the Australian Capital Territory.[204] South Australia and Victoria also champion young offender development by accounting for immaturity, age[205] and sentence

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[195] Australian Human Rights Commission, *Human Rights Brief No 2*, above n 50; see *UNCRC* art 40 and *Beijing* Rule 5.
[196] Australian Human Rights Commission, *Human Rights Brief No 2*, above n 50; see *UNCRC* art 3.
[197] Kilkelly, above n 55, 190; see *Beijing Rules* 17 and 19.
[198] Australian Human Rights Commission, *Human Rights Brief No 2*, above n 50.
[199] Kilkelly, above n 55, 190.
[200] Australian Human Rights Commission, *Human Rights Brief No 5*, above n 122; see *Tokyo* Rule 3.
[201] *Children and Young People Act 2008* (ACT) s 94(1)(g); *Youth Justice Act* (NT) s 4(d); *Youth Justice Act 1992* (Qld) sch 1 cl 12; *Youth Justice Act 1997* (Tas) s 5(1)(i); *Young Offenders Act 1994* (WA) s 7(l).
[202] *Children and Young People Act 2008* (ACT) s 94(1)(f); *Youth Justice Act* (NT) s 4(c); *Youth Justice Act 1992* (Qld) schs 1 cls 17–18; *Youth Justice Act 1997* (Tas) s 5(1)(g); *Young Offenders Act 1994* (WA) s 7(h).
[203] Proportionality in sentencing refers to the notion that the sentence imposed ought to match the gravity of the offence in question.
[204] *Crimes (Sentencing) Act 2005* (ACT) s 133D(1).
[205] *Criminal Law (Sentencing) Act 1988* (SA) s 3(A); *Children, Youth and Families Act 2005* (Vic) s 10(2).

suitability following an offence.[206] In New South Wales, least restrictive sanctions are to be applied to children in breach of criminal laws[207] in light of their limited maturity, in addition to providing support to the child.[208] Equity and fairness in dealing with children by embracing due process, procedural fairness and natural justice,[209] remain safeguards that are largely absent, at least overtly, from juvenile justice legislation except in the Australian Capital Territory[210] and Victoria,[211] while in Western Australia, natural justice and procedural fairness are excluded from the operations of youth justice legislation in certain circumstances.[212] This is concerning because, as Blagg and Wilkie argue, age and capacity levels should be considered to ensure that children can effectively assert and exercise due process rights such as in circumstances where a child may rely on the conduct of a police officer to respect their rights, yet alternately, could have their rights violated.[213]

Diversionary[214] measures, including restorative justice and non-punitive principles are evident in the juvenile justice legislation of the Australian Capital Territory,[215] New South Wales[216] (including for Aboriginal and Torres Strait Islander offenders),[217] Queensland,[218] South Australia,[219] Tasmania,[220] Victoria[221] and Western Australia.[222] These diversionary measures include conferencing which requires the participation of victims, parents, offenders and conveners.[223] The notion that, in sentencing juveniles, a measured approach is to be maintained is a feature that appears generally well supported across Australian jurisdictions juvenile justice legislative safeguards for sentence proportionality

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[206] *Children, Youth and Families Act 2005* (Vic) s 362(1)(e).
[207] *Young Offenders Act 1997* (NSW) s 7(a).
[208] *Children (Criminal Proceedings) Act 1987* (NSW) ss 6(b), (g).
[209] See above n 193 for definitions of due process, procedural fairness and natural justice.
[210] *Children and Young People Act 2008* ACT s 323(2)(a).
[211] *Children, Youth and Families Act 2005* (Vic) s 116(1)(d).
[212] The rules of natural justice and procedural fairness are excluded in circumstances where board members or the secretary of the Supervised Release Review Board commit any act or omission pursuant to the Act. See *Young Offenders Act 1994* (WA) s 163.
[213] Blagg and Wilkie, above n 149.
[214] See Part IV A above for a discussion on diversion of offenders from traditional punitive justice regime practices to restorative justice programs including family group conferencing.
[215] *Crimes (Restorative Justice) Act 2004* (ACT) ss 6(a)–(c).
[216] *Young Offenders Act 1997* (NSW) ss 34(1)(a)(i–vi).
[217] Ibid s 7(h).
[218] *Youth Justice Act 1992* (Qld) sch 1 cl 5.
[219] *Young Offenders Act 1993* (SA) s 10.
[220] *Youth Justice Act 1997* (Tas) ss 16(1)(a)–(g).
[221] *Children, Youth & Families Act 2005* (Vic) ss 415(4), (6), (7).
[222] *Young Offenders Act 1994* (WA) pt 5.
[223] See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) s 7.

and other rights based notions such as recognition and maintenance of familial bonds.[224] Likewise, acknowledgement of the cultural identity of child which is of particular relevance to Indigenous and Torres Strait Islander juveniles, has widespread, but not complete, support across the domestic Australian legal landscape as New South Wales and the Australian Capital Territory remain silent on the issue although some cultural based concessions are available in those jurisdictions.[225]

G *Freedom From Degrading and Cruel Treatment*

Art 37 of the *UNCRC* and *Beijing* Rule 17, along with *Havana* Rule 67 prohibit treatment or punishment of children considered degrading, inhumane or cruel, be it physical or mental in nature,[226] whilst art 19 of the *UNCRC* and *Beijing* Rule 17 prohibit corporal punishment of a child under any circumstance.[227] In the Australian Capital Territory,[228] New South Wales[229] and South Australia child[230] detainees are not to be treated in cruel, inhumane, tortuous or degrading manner which is also the case in Victoria under Human Rights legislation,[231] for all persons. In Western Australia, the Inspector of Custodial Services can take action

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[224] These include the maintenance and recognition of the importance of maintaining familial bonds which is evident across all state and territory juvenile justice legislation. See *Crimes (Sentencing) Act 2005* (ACT) s 133D(1); *Young Offenders Act 1997* (NSW) s 7(e); *Children (Criminal Proceedings) Act 1987* (NSW) s 6(f); *Youth Justice Act* (NT) s 4(i); *Youth Justice Act 1992* (Qld) sch 1 cl 8 sub-cls (b)–(c); *Young Offenders Act 1993* (SA) ss 3(3)(b)–(c); *Youth Justice Act 1997* (Tas) ss 2(b)–(c); *Children, Youth and Families Act 2005* (Vic) s 362(1)(a); *Young Offenders Act 1994* (WA) s 7(m)(i). In addition self-responsibility and social development for juvenile offenders is also promoted in domestic juvenile justice legislation. See, eg, *Children and Young People Act 2008* (ACT) s 94(1)(a); *Children and Young People Act 2008* (ACT) s 94(1)(b); *Children (Criminal Proceedings) Act 1987* (NSW) ss 6(b), (g); *Youth Justice Act* (NT) s 4(a); *Youth Justice Act* (NT) ss 4(b), (e); *Youth Justice Act 1992* (Qld) sch 1 cl 8 sub-cl (a); *Youth Justice Act 1992* (Qld) sch 1 cl 8 sub-cls (b)–(c); *Young Offenders Act 1993* (SA) ss 3(2)(a)–(b); *Youth Justice Act 1997* (Tas) s 5(1)(h); *Children, Youth & Families Act 2005* (Vic) s 10(2); *Children, Youth and Families Act 2005* (Vic) s 362(1)(f); *Young Offenders Act 1994* (WA) ss7(b), (j).

[225] *Youth Justice Act* (NT) s 4(j); *Youth Justice Act 1992* (Qld) sch 1 cl 12; *Young Offenders Act 1993* (SA) s 3(3)(e); *Youth Justice Act 1997* (Tas) s 5(2)(e); *Children, Youth and Families Act 2005* (Vic) s 10(3)(l); *Young Offenders Act 1994* (WA) s 7(l). Note however that the Australian Capital Territory and New South Wales are silent on the issue except for the encouragement of Aboriginal and Torres Strait Islander community participation in the juvenile justice process. See *Children and Young People Act 2008* (ACT) s 94(1)(d); *Young Offenders Act 1997* (NSW) s 7(h).

[226] Australian Human Rights Commission, *Human Rights Brief No 2*, above n 50; see art 37 of the *UNCRC*, *Beijing* Rule 17 and *Havana* Rule 67.

[227] Australian Human Rights Commission, *Human Rights Brief No 2*, above n 50; see art 19 of the *UNCRC* and *Beijing* Rule 17.

[228] *Children and Young People Act 2008* (ACT) s 138(c), (d).

[229] *Children (Detention Centres Act 1987* (NSW) s 22(1)(g).

[230] *Youth Justice Administration Act 2016* (SA) s 3(b), 29(h)

[231] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s. 10(b).

against a detention centre if cruel, inhumane or degrading treatment of detainees is suspected.[232] Corporal punishment is also prohibited in South Australia,[233] Tasmania[234] and Victoria[235] as is psychological pressure or other forms of emotional abuse in South Australia,[236] Victoria[237] and Tasmania.[238]

H *Appropriate Minimum Age Requirements*

The general substantive rights available under the *UNCRC* are restricted to human beings under the age of 18 years of age under art 1 unless majority is realised earlier, which is fundamental as the *UNCRC* is restricted in its application to children.[239] In addition, the provisions of art 40 of the *UNCRC* require that state parties establish an appropriate minimum age of criminal responsibility. This is supported by *Beijing* Rule 3 which acknowledges salient factors including the emotional, intellectual and mental maturity of the juvenile, with an age span of 14–16 considered an acceptable minimum age, although the full application of juvenile justice procedures to those aged 18 years or less is recommended.[240] Under the *doli incapax* provisions in Australian states and territories a graduated onset of criminal responsibility linked to the maturity levels of the accused child is applied, which is in turn dependent on the child's comprehension of the wrongfulness of the act.[241]

Fundamental legal safeguards such as best interests and participation of the child in addition to natural justice, due process, procedural fairness, juvenile

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[232] *Inspector of Custodial Services Act 2003* (WA) s 33A.
[233] *Youth Justice Administration Act 2016* (SA) s 29(h).
[234] *Youth Justice Act 1997* (Tas) s 132(c).
[235] *Children, Youth and Families Act 2005* (Vic) s 487(c).
[236] *Youth Justice Administration Act 2016* (SA) s 29(c).
[237] *Children, Youth and Families Act 2005* (Vic) s 487(e).
[238] *Youth Justice Act 1997* (Tas) s 132(e).
[239] McGoldrick, above n 38; see *UNCRC* Article 1.
[240] Kilkelly, above n 55, 190; see *Beijing* Rule 3.
[241] Over the last two decades there has been a concerted attempt to standardise the age limit for criminal responsibility across Australian jurisdictions with all states and territories in agreement that no criminal liability can be attributed to a child under the age of 10, in addition to a rebuttable presumption available between the ages of 10 and 14. In order to trigger this rebuttal or reversal of presumption, prosecutors are required to demonstrate that the accused child or juvenile was capable at the time the offence was committed of adequately discerning right from wrong such that they were fully aware of the implications of the offence. Further, the maximum age that a child or juvenile can appear in a Children's Court is consistent at under the age of 18 across all Australian jurisdictions, although Queensland until recently had a statutory ceiling of 17 years of age. See below n 311 regarding Queensland's move to remove children from the adult justice system; see generally Australian Institute of Criminology, *Legal Definition of a Juvenile* (2009) <http://www.aic.gov.au/crime_community/demographicgroup/youngpeople/definition.html>; see *UNCRC* art 40.

justice, proportionality and diversion can be said to provide important scaffolding for juvenile justice frameworks that uphold human rights safeguards. The above discussion has identified that human rights safeguards are evident in Australian juvenile justice legislation although coverage can be considered uneven, leaving leave room for improvement.

I *Recent Incidents in the Australian Juvenile Justice Domain Related to the* UNCRC

Several high-profile incidents that feature cruel or inhumane treatment have emerged in the Australian juvenile justice domain in recent years which have, unfortunately, highlighted interference with child human rights. These incidents have attracted criticism from human rights advocates and have also generated public enquiries and reviews into treatment of incarcerated children along with civil action. Although the following discussion will focus on human rights violation in the juvenile detention space, Cunneen, Goldson and Russell, for example, suggest that violation of child human rights remain a systemic concern in Australian juvenile justice systems.[242]

1 *Northern Territory*

During 2016, the question of *UNCRC* protective measures along with other protocols relevant to children was particularly topical due to mistreatment of child offenders in the Northern Territory. Punitive treatment of juvenile detainees at the Don Dale Youth Detention Centre including use of tear gas, so-called 'spit-hoods', excessive solitary confinement and unwarranted force and mistreatment more generally, prompted a report by the Northern Territory Children's Commissioner in 2016.[243]A royal commission was initiated as a result of the disturbing incidents at the Don Dale facility. The royal commission determined that there was a failure to follow procedural and legislative requirements and an inadequacy of treatment which was described as unfit for purpose, punitive, harsh, bleak and not rehabilitative in addition to not meeting basic human rights and *UNCRC* safeguards, ultimately recommending closure while further rioting and unrest in late 2018 increased demands for immediate

[242] Cunneen, Goldson and Russell, above n 71, 174.
[243] Office of the Children's Commissioner Northern Territory, *Own Initiative Investigation Report Services Provided by the Don Dale Youth Detention Centre* (August 2016) <https://occ.nt.gov.au/__data/assets/pdf_file/0003/440832/pdf-final-investigation-report.pdf>.

retirement of the facility which has been supported by the Australian Human Rights Commission.[244]

Civil action by juvenile detainees was also commenced in the Northern Territory as a result of treatment received whilst in confinement.[245] In early 2017, a damages claim by four detainees for cruel and inhumane treatment at the Don Dale Detention centre including being targeted with tear gas and subjected to excessive solitary confinement, was successful. Damages were awarded to all of the plaintiffs for battery as a result of being placed in spit hoods and leg shackles, although other civil claims against Don Dale Officers including restraint by police attack dogs and exposure to tear gas were unsuccessful.[246] Further civil action was heard by the Northern Territory Supreme Court in late 2017 when the juvenile offender at the centre of the mistreatment episode that generated the media exposure and subsequent royal commission and another former detainee were awarded damages for exposure to tear gas and oppression by officers at the Don Dale Detention centre.[247]

2 *Victoria*

The confinement of juveniles in adult correctional facilities in Victoria during 2016 also highlighted infringement of juvenile human rights in Australia, due to the placement of juvenile detainees in the Barwon adult prison after rioting in

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[244] See Commonwealth, Royal Commission Into the Protection and Detention of Children in the Northern Territory (November 2017) <https://childdetentionnt.royalcommission.gov.au/Pages/Report.aspx>; T Maddocks, 'Don Dale Replacement's 2021 Completion Date 'Extraordinary', Says Former Royal Commissioner, *ABC News* (online) October 27 2018 <https://www.abc.net.au/news/2018-10-27/don-dale-replacements-2021-due-date-extraordinary/10437398>; L Allam and H Davidson, 'Fresh Calls to Close Don Dale After Latest Violent Incident', *The Guardian* (online), November 8 2018 < https://www.theguardian.com/australia-news/2018/nov/08/fresh-calls-to-close-don-dale-after-latest-violent-incident>; 'Don Dale Youth Detention Centre Detainees try to Escape Using Power Tools, Police use Tear gas', *ABC News* (online), November 7 2018 <https://www.abc.net.au/news/2018-11-07/don-dale-youth-detention-riot-tear-gas-police/10471776>; Australian Human Rights Commission, *Urgent Action Needed Over Don Dale Youth Detention Centre* (November 2018) < https://www.humanrights.gov.au/news/stories/urgent-action-needed-over-don-dale-youth-detention-centre>.

[245] S Schubert, 'Four Corners; Dylan Voller, Former NT Juvenile Detention Centre Inmates sue Government Over Mistreatment', *ABC News* (online), July 26 2016 <http://www.abc.net.au/news/2016-07-26/dylan-voller-former-nt-juvenile-detention-centre-inmates-sue/7661408>.

[246] *LO v Northern Territory of Australia; EA v Northern Territory of Australia; and LB (as litigation Guardian for KW) v Northern Territory of Australia; and LB (as Litigation Guardian for JB) v Northern Territory of Australia* [2017] NTSC 22.

[247] 'Don Dale Inmates Paid 100k for Abuse', *SBS News* (online), February 9 2018 <http://www.sbs.com.au/news/don-dale-inmates-paid-100k-for-abuse>.

several Victorian youth justice centres. Within Victoria, courts and tribunals remain fundamental in the human rights protection framework[248] provided by the human rights legislation in that jurisdiction.[249] In *Certain Children v Minister for Families and Children & Ors (No 2)*,[250] the Supreme Court of Victoria ruled that the juveniles had been unlawfully detained in a youth justice centre within the maximum security Barwon Prison adult facility.[251]

Dixon J found that the housing of juveniles in a special wing of an adult facility was unlawful and incompatible with human rights safeguards,[252] including the best interests of the child,[253] which ought to be paramount in any decision relating to the administration of youth justice required by Victorian legislation,[254] the *UNCRC* and the *Beijing Rules*.[255] Dixon J also determined that while the right for protection against cruel, inhumane or degrading treatment[256] was not engaged, the right to be treated humanely when deprived of liberty had been.[257] Essentially, the Orders in Council in late December 2016 to establish the juvenile detainment centre within the Barwon Adult facility was unlawful, as was the decision to transfer two child offenders to the detainment centre in addition to the use of capsicum spray by prison officers.[258] Following a spate of incidents in detention centres, a parliamentary enquiry into Victorian youth justice centres released during March 2018 identified human rights shortcomings in the

[248] Farmer, above n 134, 54.
[249] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[250] *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251.
[251] Ibid Dixon J at 588.
[252] The detainment of the children was found to be unlawful under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). See also Supreme Court of Victoria, Media Release, *Detention of Children in Youth Justice Facility Within Barwon Prison Found Unlawful Under the Victorian Charter of Human Rights and Responsibilities Act* (May 2017) < https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/2d/efa445019/scvmediarelease certainchildrenjusticedixon11may2017.pdf>.
[253] *Charter of Human Rights 2006* (Vic) s 17(2).
[254] Ibid.
[255] *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 Dixon J at 262, 264.
[256] *Charter of Human Rights 2006* (Vic) s 22(1).
[257] *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 Dixon J at 258.
[258] Supreme Court of Victoria, Media Release, *Detention of Children in Youth Justice Facility Within Barwon Prison Found Unlawful Under the Victorian Charter of Human Rights and Responsibilities Act* (May 2017) < https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/2d/efa445019/scvmediarelease certainchildrenjusticedixon11may2017.pdf>.

treatment of juveniles in detention particularly in sentencing, use of lockdowns, isolation, separation and remand of juvenile offenders.[259]

3 *Western Australia*

In Western Australia, a damning 2017 report by the Custodial Inspector identified major concerns with behaviour control management at the Banksia Hill Juvenile Detention Centre although the final report of early 2018 found room, at least, for some optimism in positive change at the facility.[260] The concerning issues raised in the 2017 report included the training of shotgun laser sights on inmates, discharge of a chemical agents[261] and the use of spit hoods which was likened to the regime at the Don Dale facility in the Northern Territory.[262] This incident also generated civil action in the Western Australian Supreme Court in *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia (Wilson.)*[263] In this case, the legal guardian of one of the child detainees, challenged the legality of the orders to move the offenders to the adult facility which offended the Youth Justice principles of the *Young Offenders Act 1994* (WA),[264] including suitability for child detainees.

It should be noted, however, that Australia retains a reservation to the *UNCRC* art 37c allowing juvenile and adult detainees to be housed together for

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[259] See Parliament of Victoria, Legal and Social Issues Committee, *Inquiry Into Youth Justice Centres in Victoria* (March 2018) <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Youth_Justice_System/Reports/LSIC_Inquiry_into_Youth_Justice_Centres_report_WEB.pdf>.

[260] See Government of Western Australia, Office of the Inspector of Custodial Services, *Behaviour Management Practices at Banksia Hill Detention Centre* (June 2017) <http: http://www.oics.wa.gov.au/wp-content/uploads/2017/07/Full-report.pdf>; Government of Western Australia, Office of the Inspector of Custodial Services, *2017 Inspection of Banksia Hill Detention Centre* (February 2018) < http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/4011265a60417dfd92b148a44825828700 2e16b0/$file/1265.pdf>; 'Abuse Claim at Banksia Hill Detention Centre Jail Rejected', *PerthNow* (online), August 14 2018 <https://www.perthnow.com.au/news/wa/abuse-claim-at-banksia-hill-detention-centre-jail-rejected-ng-b88928171z>.

[261] J Kagi, 'Juvenile Justice Report Calls for Volatile Banksia Hill Centre to be Repurposed', *ABC News* (online), 17 July 2017 <http://www.abc.net.au/news/2017-07-17/was-juvenile-detention-system-unstable,-failing/8715638>.

[262] J Kagi, 'Banksia Hill: Counting the Cost of Juvenile Justice in WA and Looking for Answers', *ABC News* (online), 18 July 2017 <http://www.abc.net.au/news/2017-07-18/banksia-hill-juvenile-justice-future-cloud/8716740>.

[263] *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* [2013] WASC 157.

[264] *Young Offenders Act 1994* (WA) s. 7.

geographic or practical reasons.[265] In *Wilson*, Martin CJ remarked that international law does not form part of Western Australian law, but instead, can assist only in overcoming ambiguity of legislation.[266] A further review into young persons in the Western Australian juvenile justice system is also ongoing while detention at the Banksia Hill facility has been described more recently by Amnesty International as akin to torture prompting a review of the allegations by the Director of Custodial Services.[267]

4 *Australian Capital Territory, New South Wales, Queensland, South Australia and Tasmania*

In the Australian Capital Territory concern over incidents in recent years at the Bimberi Youth Detention centre also generated an enquiry and allegations of human rights abuse have continued in 2018.[268] In New South Wales, an enquiry into behaviour management at juvenile detention centres was announced during 2016, while a review into the use of force against detainees was released by the Inspector of Custodial Services in 2018.[269] Behaviour management practices in the Queensland Juvenile detention system have also generated controversy

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[265] *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* [2013] WASC 157 Martin CJ at [5]. The reservation has been criticised by the United Nations Committee on the Rights of the Child and seen as unnecessary. See below n 302; Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child*, below n 276, 3; See also Cunneen, Goldson and Russell, above n 71, 182-183.

[266] Ibid [131]; see also Cunneen, Goldson and Russell, above n 71, 183.

[267] See Government of Western Australia, Department of Corrective Services, *Young People in the Justice System, A Review of the Young Offenders Act 1994* (December 2016) <https://www.correctiveservices.wa.gov.au/_files/youth-justice/young-people-justice-system-review-yoa.pdf>; Amnesty International, *Concerns of Torture in W.A Youth Prison: 'I Felt Like a Dog'* (January 2018) <https://www.amnesty.org.au/concerns-torture-wa-youth-prison-felt-like-dog/>; Government of Western Australia, Office of the Inspector of Custodial Services, *Directed Review of Allegations Made by Amnesty International Australia About Ill-treatment at Banksia Hill Detention Centre* (June 2018) <https://www.oics.wa.gov.au/wp-content/uploads/2018/07/Amnesty-Review.pdf>.

[268] See <http://www.hrc.act.gov.au/res/ANZSOG%20Bimberi%20Human%20Rights%20Audit.pdf>; S Trask, 'I got Home and Nearly Broke Down: Bimberi Youth Worker Speaks out', *The Canberra Times* (online), 15 April 2018 < https://www.canberratimes.com.au/national/act/i-got-home-and-nearly-broke-down-bimberi-youth-worker-speaks-out-20180411-p4z8ye.html >.

[269] S Gerathy, 'Juvenile Justice: NSW to Review Youth Detention Amid Detainee Isolation Claims', *ABC News* (online), 27 October 2016 <http://www.abc.net.au/news/2016-10-27/nsw-to-review-juvenile-detention-centres/7970194>; see New South Wales Government, Department of Justice, Inspector of Custodial Services, *Use of Force, Separation, Segregation and Confinement in NSW Juvenile Justice Centres* (November 2018) <http://www.custodialinspector.justice.nsw.gov.au/Documents/use-of-force-seperation-segregation-confinement-nsw-juvenile-justice-centre.pdf>; 'NSW Government Ignores Report About Children in Solitary Confinement', *NITV* (online), September 5 2018 < https://www.sbs.com.au/nitv/nitv-news/article/2018/09/05/nsw-government-ignores-report-about-children-solitary-confinement >.

recently. Media reporting of disturbing detainee treatment during 2016 highlighted the use of excessive force on detainees at the Cleveland and Brisbane Youth Detention Centres reminiscent of the Don Dale incident in the Northern Territory. The incidents have since prompted an independent report on youth detention in Queensland ordered by the Attorney General in 2016 which was completed in 2017 and found that systemic mistreatment of juvenile detainees could not be excluded in addition to recommending that Queensland create an independent inspectorate of detention facilities.[270] In South Australia during 2016 excessive reliance on lock downs and understaffing endangered detainee lives[271] while an independent enquiry into the Ashley Youth Detention Centre in Tasmania completed during 2015 recommended the facility be closed but during 2018 the Tasmanian Government committed to maintaining the facility.[272]

V THE INFLUENCE OF THE *CONVENTION ON THE RIGHTS OF THE CHILD* AND INTERNATIONAL SAFEGUARDS IN AUSTRALIA'S JUVENILE JUSTICE DOMAIN

Despite enthusiasm for the adoption of the *UNCRC*, the wholesale incorporation of its safeguards into domestic law has remained elusive since ratification of the Convention by Australia, which has, in turn, compromised the influence of this important international instrument. As a consequence, the non-negotiable human rights standards of the *UNCRC* that are targeted at the specific stand-alone interests and needs of children are to date, only of peripheral force until such time as the *UNCRC* is contained in domestic law. Cunneen, Goldson and

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[270] M Atkin and S Whyte, 'Images Emerge of Mistreatment at Townsville's Cleveland Youth Detention Centre', *ABC News* (online), 18 August 2016 <http://www.abc.net.au/news/2016-08-18/images-of-alleged-mistreatment-cleveland-youth-detention-centre/7758204>; Queensland Government, The Queensland Cabinet and Ministerial Directory, *Attorney-General Orders Independent Review of Queensland Youth Detention Centres* (19 August 2016) <http://statements.qld.gov.au/Statement/2016/8/19/attorneygeneral-orders-independent-review-of-queensland-youth-detention-centres>; Queensland Government, *Independent Review of Youth Detention* (June 2017) <http://www.youthdetentionreview.qld.gov.au/review-of-youth-detention-centres-report-updated-28-June-2017.pdf>; J Robertson, 'Queensland Youth Prison Review Unable to Rule Out Systemic Mistreatment', *The Guardian* (online), April 26 2017 <https://www.theguardian.com/australia-news/2017/apr/26/queensland-youth-prison-review-unable-to-rule-out-systemic-mistreatment>.

[271] See 'Cavan Youth Detention Centre Staff Shortages Force Industrial Action, Union Calls for 20 More Positions', *ABC News* (online), June 6 2016 <https://www.abc.net.au/news/2016-06-06/adelaide-youth-training-centre-forced-into-lockdown-union-says/7483322>.

[272] See H Harker, *Independent Review of Ashley Youth Detention Centre, Tasmania* (June 2015) <https://www.dhhs.tas.gov.au/__data/assets/pdf_file/0013/227110/Independent_Review_of_AYDC_Report_June_2015_-_REDACTED.pdf >; Tasmanian Liberals, *Investing in Ashley Youth Detention Centre* (June 2018) <https://www.tas.liberal.org.au/news/investing-ashley-youth-detention-centre>.

Russell also note that superficial observance of human rights protection for children entangled in Australian criminal justice may, in fact, conceal a more profound inadequacy of human rights protection throughout juvenile justice systems.[273] Moreover, significant political will is needed to advance the human rights agenda in a competitive political landscape seemingly dominated by punitive law and order agendas.[274]

Nonetheless, some promise has emerged as important *UNCRC* safeguards including the best interests and participation along with juvenile justice, diversion, freedom from degrading or cruel treatment and appropriate minimum age requirements have been given some focus in juvenile justice legislation, although the safeguards remain uneven and sporadic in nature. For example, while the best interests principle is overtly promoted in some jurisdictions, it is, however, the intent of the principle that is more commonly identified in various juvenile justice measures such as youth justice, protection, guidance, respectful treatment and the like.

Participation in the juvenile justice system is encouraged in some Australian jurisdictions although others remain silent on the matter. However, participation through diversionary options including restorative justice programs and procedures is, in fact, common ground in domestic juvenile justice systems. Age appropriate responses and custodial sentencing as a measure of last resort are well supported across Australian jurisdictions, although the notions of due process, procedural fairness and natural justice are not. Freedom from cruel and inhumane treatment in the Australian juvenile justice system is a notion that is identified in legislation, although recent incidents in juvenile detention are a major cause for concern in this area. Stand-alone human rights legislative provisions have, however, been enacted in some domestic jurisdictions, whilst judicial activism has seen interpretation of domestic legislation with deference to international obligations such as those found in the *UNCRC* and other instruments useful in deciphering statutory ambiguity, although not where there is apparent clarity in legislative provisions.

The ability to address violation and denial of rights is germane to child human rights, which are of importance given Australia's deficient performance in the implementation and promotion of child human rights found in international instruments, particularly the pivotal *UNCRC* since ratification. Australia's human rights performance pursuant to the *UNCRC* was investigated in the 2018

[273] Cunneen, Goldson and Russell, above n 71, 184.
[274] Ibid.

submission to the Committee on the Rights of the Child *('Committee')* by the *Commission* in its 5th and 6th periodic report. In its findings, the *Commission* reiterated the need for Australia to improve the legal protective mechanisms for child rights. In particular, there is a need to increase the number of *UNCRC* rights enshrined in Australian law, reduce the so-called 'implementation gap' whereby many *UNCRC* rights remain unincorporated into domestic law,[275] and to provide effective remedies in circumstances where the human rights of children are violated.[276]

The *Commission* also recommended the ratification of the Third Optional Protocol to the *UNCRC*[277] which would allow new protective measures for children and additional accountability for children's rights.[278] Central to the *Commission's* recommendations was the implementation of Commonwealth human rights legislation which fully incorporates those human rights obligations to children into domestic law not currently addressed by the *Constitution* or common law.[279] With respect to juvenile detention practices, the *Commission* expressly recommended the abolition of isolation and force as a form of punishment,[280] and review of existing monitoring and inspection of detention facilities.[281]

In response to the 5th and 6th periodic report by Australia, the *Committee*[282] reiterated the need for comprehensive and compatible national legislation to uphold the tenets of the *UNCRC* in its 2019 report although was not without

[275] See Part IV C-H above for a discussion on the status of *UNCRC* rights in the Australian juvenile justice system.

[276] Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child. Information Relating to Australia's Joint Fifth and Sixth Report Under the Convention on the Rights of the Child, Second Report on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and Second Report on the Optional Protocol on the Involvement of Children in Armed Conflict* (November 2018) 4 <https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRC_Report2018.pdf>. See also Law Council of Australia, *Alternative Report to the United Nations Committee on the Rights of the Child* (November 2018) < file:///C:/Users/180690D/Downloads/S%20-%202018%2011%2001%20Law%20Council%20Report%20to%20CRC.pdf >.

[277] See Part III C above.

[278] Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child*, above n 276, 7.

[279] Ibid 4.

[280] Ibid 58.

[281] Ibid 57-60.

[282] See D Weissbrodt, J C Hansen and N H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24, *Harvard Human Rights Journal* 115-153 for a discussion on the role of the committee.

commendation[283] for Australia's human rights activities.[284] Under the *UNCRC,* the best interests principle espoused by art 3 is to be upheld in all actions undertaken by private or public social welfare institutions, courts, legislative bodies or administrative authorities that impact upon children, although sole or absolute status is not essential. In the earlier 2012[285] report, the *Committee* felt that the best interests of the child was inadequately supported in Australia and again recommended that procedures and criteria guiding relevant persons in authority when determining the best interests of the child are afforded due weight as a primary consideration and are consistently applied across Australia.[286] In Victoria, however, human rights legislation proved useful in determination of a breach of the best interests safeguard in recent civil action[287] as discussed in Part IV I 2 above. Further, in the opinion of the *Committee,* state parties are to be actively encouraged to make publicly available judicial and administrative judgements and decisions regarding juveniles in addition to specifying criteria to be used in individual assessment of the best interests of children.[288]

More broadly, the *Committee* also encouraged state parties to develop comprehensive strategies and the introduction of explicit national legal bans on all forms of violence against children in all settings.[289] In the area of juvenile justice administration, the *Committee* recommended that Australia bring the juvenile justice system fully in line with the *UNCRC*[290] arts 37, 39, 40 and the *Beijing Rules, Riyadh Guidelines, Havana Rules and Vienna Guidelines* which are to be utilised in order to adequately protect *UNCRC* rights.[291] In particular, the *Committee* was critical of Australia's inaction[292] in raising the age of criminal responsibility and the continued use of mandatory sentencing laws in Western

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[283] Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia* UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) [1], [7]. The Committee commended Australia for the creation of the Assistant Minister for Children and Families in 2018 and the National Children's Commission and the Royal Commission into the Detention and Protection of Children in the Northern Territory in 2016.

[284] Ibid [3]. More generally, the *Committee* appreciated the constructive dialogue with Australia in regard to the *UNCRC.*

[285] Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention,* 60th sess, UN Doc UNCRC/C/AUS/CO/4 (28 August 2012) [32].

[286] Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/5-6, above n 283, [20].

[287] *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251.

[288] Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/5-6, above n 283, [20].

[289] Ibid [4].

[290] Ibid [84].

[291] See Weissbrodt, Hansen and Nesbitt above n 282, 148-49.

[292] Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/5-6, above n 283, [48].

Australia and the Northern Territory.[293] The age of criminal responsibility was also a matter debated by the Attorneys-General in July 2020 who chose to defer any decision on raising the age level until 2021 to allow for more consideration.[294]

The *Committee's* 2019 criticism of mandatory sentencing is of particular concern as a more severe mandatory sentencing regime was introduced in Western Australia during 2015. Originally introduced in 1996, the legislation was recently expanded such that courts are compelled to impose a minimum incarceration period of 12 months on repeat offender juveniles convicted of a third home burglary offence, irrespective of seriousness.[295] Cunneen, Goldson and Russell argue that Western Australia's regime of mandatory sentencing of juveniles is unique in the Australian jurisdiction and has attracted criticism by not upholding Australia's human rights obligations including the best interests of the child.[296] Mandatory sentencing diminishes judicial discretion and independence by removing a court's ability to impose a sentence based upon the individual circumstances of cases,[297] although other legislative provisions may ameliorate this requirement.[298] This sentencing regime also disproportionally effects vulnerable populations which includes children, particularly Indigenous children, who are detained at rates far in excess of non-Indigenous children particularly in Western Australia and the Northern Territory.[299] The overrepresentation of Indigenous children in Western Australian juvenile detention is at chronic levels[300] and further, has been described as a cause of national shame.[301]

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[293] Ibid. See above n 241 for a discussion on the age of criminal responsibility or *Doli Incapax* standards in Australia. The Australian Human Rights Commission has also been critical of these laws in the Northern Territory and Western Australia; see Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child*, above n 276, 60.

[294] See <https://www.smh.com.au/national/age-of-criminal-responsibility-to-remain-at-10-until-at-least-2021-20200727-p55fy6.html>.

[295] *Criminal Code Compilation Act 1913* (WA) s 401(A), (B).

[296] Cunneen, Goldson and Russell, above n 71, 180.

[297] See The Law Society of Western Australia, *Briefing Paper Mandatory Sentencing* (December 2016) <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/Law-Society-Briefing-Papers-Mandatory-Sentencing.pdf>.

[298] *Young Offenders Act 1994* (WA) s. 46(5)(a).

[299] Australian Children's Commissioners and Guardians, *Human Rights Standards in Youth Detention Facilities in Australia: The Use of Restraint, Disciplinary Regimes and Other Specified Practices* (April 2016) 7 <http://www.childcomm.tas.gov.au/wp-content/uploads/2016/10/report-accg-human-rights-the-use-of-restraint-disciplinary-regimes-and-other-specified-practices.pdf>.

[300] Australian Institute of Health and Welfare 2017, Youth Detention Population in Australia 2017, Bulletin 143, <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2017/contents/table-of-contents >.

[301] H Blagg, T Tulich and Z Bush, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia. Decolonising Alternatives' 2015 40(4) *Alternative Law Journal* 257.

The withdrawal of the UNCRC art 37c reservation regarding the housing of adult and juvenile offenders together was strongly recommended by the *Committee*[302] as was ratification of the Optional Protocol to the convention on a communications procedure.[303] In addition, a number of rights based recommendations for the juvenile justice system were made by the *Committee* including comprehensive policy and strategy on juveniles that adequately encompass all areas of the convention and active promotion of diversionary options and non-custodial sentencing.[304]

The *Committee* also recommended that in circumstances where juvenile detention including that of pre-trial confinement is unavoidable, regular and judicial review is required.[305] In a pointed reference to the well-publicised abuse and mistreatment of juveniles in Australian detention facilities, the *Committee* recommended that the use of force, coercion and isolation against juvenile offenders including physical restraints be explicitly prohibited and that all instances of abuse and mistreatment be investigated in addition to adequate sanction of perpetrators.[306]

The maximum age that a child can appear in a Children's Court is consistent at below the age of 18 across all Australian jurisdictions although it should be noted that Queensland, which until recently had a statutory ceiling of 17 years of age, detained 17 year old child offenders in adult detention facilities.[307] This has previously attracted criticism from the *Committee*,[308] as the *UNCRC* relates to those persons under the age of 18 years.[309] During 2016 following decades of controversy,[310] the Queensland Parliament announced legislative change

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[302] Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/5-6, above n 283, [6]; Withdrawal of the reservation to art 37(c) of the *UNCRC* has also been recommended by the Australian Human Rights Commission. See Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child,* above n 276, 3; see also Part IV I above.

[303] Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/5-6, above n 283, [52]. Ratification of the Optional Protocol had been previously recommended by the *Committee* in the 2012 report. See Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/4, above n 285, [85]; see also Part III C above.

[304] Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/5-6, above n 283, [8], [48].

[305] Ibid [48].

[306] Ibid.

[307] Australian Institute of Criminology, *Legal Definition of a Juvenile,* above n 241.

[308] Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/4, above n 285, [84]. Withdrawal of the reservation to art 37(c) of the *UNCRC* has also been recommended by the Australian Human Rights Commission. See Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child,* above n 276, 3.

[309] See *UNCRC* art 1.

[310] See Queensland Government, The Queensland Cabinet and Ministerial Directory, *17 Year Olds to be Moved to Youth Justice* (2016) <http://statements.qld.gov.au/Statement/2016/9/7/17yearolds-to-be-moved-to-youth-justice>. Information was also provided to the United Nations Committee on the

effective from February 2018[311] to juvenile justice laws that will bring Queensland into alignment with the remaining Australian jurisdictions and remove children from the adult justice system. Notwithstanding the sobering violations of juvenile rights in Australian detention centres,[312] the ratification of the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ('OPCAT')*[313] by Australia in December 2017 will facilitate useful independent monitoring of juvenile detention practices. This development will be significant in addressing concerning juvenile rights violations such as was seen at the Don Dale facility and other Australian juvenile detention centres of late[314] and was welcomed by the *Committee*.[315]

VI Conclusion

Despite Australia's prompt ratification of the *UNCRC*, the preferred direct and unequivocal incorporation of the *UNCRC* into domestic law in accordance with recommendations of both the *Commission* and the *Committee*, remains elusive. Despite this drawback in formally underpinning domestic law and policy with human rights safeguards, this article has demonstrated that the main canons of

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Rights of the Child by the Australian Human Rights Commission in 2012 concerning the issue of children in the adult justice system in Queensland. See also Human Rights Commission, *Information Concerning Australia and the Convention on the Rights of the Child. Additional Information Supplied to the Committee on the Rights of the Child by the Australian Human Rights Commission* (May 2012) <https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2012/20120509_childRights.pdf>.

[311] *Youth Justice and Other Legislation (Inclusion of 17-Year-Old Persons) Amendment Act 2016* (Qld); see, eg, Queensland Government, Department of Justice and Attorney-General, *Inclusion of 17- Year- Olds in the Youth Justice System* (May 16 2017) <http://www.justice.qld.gov.au/corporate/business-areas/youth-justice/inclusion-of-17-year-old-persons>; see also Queensland Courts, *Changes for 17 Year Olds* (May 2018) <http://www.courts.qld.gov.au/courts/childrens-court/changes-for-17-year-olds>; Queensland Government, Queensland Cabinet and Ministerial Directory, *Media Statements, Historic Youth Justice Reforms Commence Today* (February 2018) <http://statements.qld.gov.au/Statement/2018/2/12/historic-youth-justice-reforms-commence-today>.

[312] See Part IV I above for a discussion of recent rights violations in Australian juvenile detention.

[313] *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ('OPCAT")*, opened for signature 4 February, 2003, 2375 UNTS 237 (entered into force 22 June 2006). Australia ratified the OPCAT 21 December 2017. See Australian Human Rights Commission, *OPCAT: Optional Protocol to the Convention Against Torture* (June 2018) <http://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/opcat-optional-protocol-convention-against-torture>.

[314] Australian Human Rights Commission, *Australia Ratifies Major Anti-Torture Treaty OPCAT* (December 2017) <https://www.humanrights.gov.au/news/stories/australia-ratifies-major-anti-torture-treaty-opcat>.

[315] Committee on the Rights of the Child, UN Doc UNCRC/C/AUS/CO/5-6, above n 283, [3].

the *UNCRC* are identified in the Australian juvenile justice system although better and more overt appropriation of the *UNCRC* safeguards into general law and policy is needed. This position, however, remains inferior to more formalised, legislative incorporation of the *UNCRC* into Australian law.

Although the guiding *UNCRC* tenets remain visible in the Australian juvenile justice system, the influence of the tenets is limited and uneven in impact across jurisdictions, notwithstanding some areas of promise. It is likely that the lack of direct incorporation of the *UNCRC* and other international legal safeguards into Australian law will prevail for the foreseeable future which will, in turn, justify further research and investigation into rights protection for children and juveniles who remain amongst the most vulnerable members of society.