

Submission by
YOUTH ADVOCACY CENTRE INC
to the
National Children's Commissioner
regarding
Australia's progress in implementing
the United Nations Convention on the Rights of the Child



MAY 2018

The Youth Advocacy Centre Inc (YAC) is a community legal and social welfare agency for young people generally aged 10-18 in the greater Brisbane area who are involved in, or at risk of involvement in, the youth justice and/or child protection systems and/or are homeless or at risk of homelessness. YAC has been operating for over 35 years and uses the Convention on the Rights of the Child as a key part of its framework for working with young people.

Please find below observations on the implementation of the Convention on the Rights of the Child based on our daily experiences working with young people.

General comments

It is YAC's view that when it comes to children's rights, there is still more rhetoric than reality. While there is increasingly recognition (without denying that there is still much work to be done) around issues such as race, gender and sexual orientation and the rights of people so affected, little has changed culturally in terms of the way children are viewed in the 35 years that YAC has worked with vulnerable and disadvantaged children.

Australia and Queensland still do not have child-friendly, and certainly not child-focussed cultures. The media reported on 10 May 2018 that Brisbane City Council had dug up a newly laid concrete slab after residents complained about noisy children playing on it. It was reported that:

The park, located in the Kelvin Grove Urban Village in Brisbane's north, is popular with primary school-aged children who live in nearby high-rise apartments, and the smooth concrete surface has been a welcome addition to their playtime [they were using it to play handball].

A number of adults in the area were supportive of the children playing there and noted that they had not been consulted: they were as surprised as the children that it was being ripped up after only 3 months.

"It takes your breath away to believe in this society nowadays a grumbler has more power than happy children. I can't believe it.

"Someone's taken away some of their joy and happiness and it's not fair or reasonable."

It is disappointing that the local authority would act on complaints of children playing in a park clearly designed for such a purpose – there is a set of playground equipment immediately next to where the slab was. While the slab is to be re-laid in a park close by, there is no reason to acquiesce to such intolerance.

Children are often not considered as people in their own right. For example:

*"The Office for Women is a division of the Australian Government Department of the Prime Minister and Cabinet that works across government to deliver policies and program to advance gender equality and improve the lives of **Australian women and children**. [Our emphasis]*

Probably of greatest concern is the apparent lack of commitment, and therefore leadership, by the Australian Government to the Convention on the Rights of the Child (the CRC).

In reading the Concluding Observations from the Committee on the Convention on the Rights of the Child (CRC Committee) in 2012 following Australia's fourth periodic report, and then reviewing Australia's joint fifth and sixth reports (the Government Report), it would seem that Australia has not acted on the majority of the observations. It simply reiterates its assertions of compliance from previous reports and so, in our submission, continues to not only fail to attain the standards set by the CRC but also appears reluctant to do so.

The Government Report states that "Australia considered that its legislation, policies and practices complied with and gave effect to the CRC's obligations before its ratification in December 1990". How Australia came to this view is unclear as it is still possible to assault a child in the name of "discipline"; children as young as 10 years of age continue to be subjected to an only minimally modified criminal justice system (and in 1990 more than one

jurisdiction included children in its adult criminal justice system); our immigration laws take a heavy toll on children.

The public media continue to demonise children with abandon and are never called to account by those in government or authority. Indeed, it is nothing less than horrifying to read social media responses from adults in relation to such articles which shows a clear disregard for balance or thoughtful consideration.

The Federal Government is clearly resistant to the recommendation that:

... the State party consider enacting a comprehensive child rights Act at the national level, which fully incorporates the provisions of the Convention and its Optional Protocols and provides clear guidelines for their consistent and direct application throughout the territory of the State party.

To the extent that some legislation and policy and some aspects of the common law may incorporate it, incorporation of the CRC remains piecemeal and does not reflect wholehearted commitment.

Federal and State Human Rights Acts might be of assistance in the implementation of CRC. The Government Report notes that the Premier of Queensland announced the Queensland Government's commitment to introduce such an Act in October 2016.

Protection of Children's Rights through independent Commissioners

We acknowledge the importance of the establishment of the role of the National Children's Commissioner in 2013. It is a small beacon of light in an otherwise somewhat bleak landscape in terms of recognition of children's rights in Australia.

While we do not underestimate the importance of the Aboriginal and Torres Strait Islander Social Justice Commissioner and her role within the Australian Human Rights Commission, we consider that there should be an Aboriginal and Torres Strait Islander Children's Commissioner who works with and alongside the National Children's Commissioner. Indeed, the CRC Committee recommended that:

...the State party consider appointing a Deputy Commissioner for Aboriginal and Torres Strait Islander children's issues at national and/or state/territory level to ensure the effective monitoring of child rights in those communities.

We would suggest that the appointment should be a Commissioner of equal standing, not a Deputy.

In terms of Queensland, YAC is disappointed that the Commission for **Children and Young People** has been replaced by the Queensland **Family and Child** Commission. The terminology gives quite a different message. It remains unclear why the "Carmody Inquiry" considered the change necessary.

Education on child rights

We see limited acknowledgement from Governments of the human rights of children even in the areas in which they profess to provide assistance. We note that in response to Training and awareness-raising* (Arts 3(3), 42) (Concluding Observation 24, OPSC Concluding Observations 15, 17) the Government Report has noted:

The full text of the CRC is available through the Australasian Legal Information Institute Treaties Library, a free public resource.

Austlii is a great resource for lawyers, being a joint facility of the UTS and UNSW Faculties of Law. Publication here does not make the CRC readily accessible by the general public – and particularly not by children who have the right to know about the CRC. It is to Governments' great shame that they do not place these documents prominently on their own websites in formats which are readily accessible to all who might wish to view them. We do not consider that a link to Austlii fulfils the Government's obligation to raise

awareness of this Convention or any others and this is probably also a breach of Article 17, access to appropriate information (Art 17).

It is important to ask, in the context of human rights education in schools, the extent to which there is specific and significant discussion of the CRC and how children can use it practically in their lives as opposed to more generic discussion of human rights.

While reference is made in the Government Report to National Frameworks – the important question which is not answered is the outcomes these are achieving. The answer in general seems to be – very little:

- The number of children receiving child protection services Australia wide rose by about 25 % over 5 years—from 135,139 children in 2012–13 to 168,352 children in 2016–17.
- The number of children accessing specialist homelessness services increased from 82,000 in 2011–12 to 180,000 in 2015–16 Australia-wide
- The Human Rights Commission’s 10 year Review of the [Aboriginal and Torres Strait Islander] Closing the Gap Strategy, came to the damning conclusion that “the Strategy remains in name only” (YAC notes that the Strategy has no targets for child protection and youth justice).

“In the twenty-six years since the report of the Royal Commission into Aboriginal Deaths in Custody was tabled in the Parliament of Australia, the proportion of the prison population that is Indigenous has doubled” (PWC, *Indigenous incarceration: Unlock the facts* May 2017).

Assertion of child rights

The vast majority of legal and government complaint and review mechanisms remain of little assistance to children because they are not child-friendly with no visible strategies for engaging children – assuming children even know they have a right which could be enforced or protected.

For example, the Government Report claims that:

...children are able to lodge complaints of privacy violations with the Office of the Australian Information Commissioner or with relevant complaints mechanisms in most States or Territories.

However, no information or data is provided to indicate how many children lodged such a complaint or when or how children have been advised of and assisted with this opportunity. How does Government ensure that children actually get information about their privacy rights in a way which is relevant and helpful to them and then how does the Office of the Australian Commissioner ensure child friendly access?

Rights remain illusory without the means to enforce them and that is the situation for children.

Best interests of the child

The notion of the best interests of the child has generally been articulated and included in the areas of adoption, child protection, youth justice and family law. This is possibly one of the less confronting aspects of CRC from an adult perspective as it does not, of itself, necessarily reduce an adult’s power to make decisions about a child by the adult deciding what is in a child’s best interests. Ensuring that the child’s views are heard **should**, however, be a key component in making this decision.

Governments do not let the ‘best interests’ principle stand in the way of other priorities: the CRC Committee has

...stresse[d] the need for the State party to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child.

It cannot be said that the Australian Government's treatment of this group of children has in any way improved since 2012 when the CRC Committee expressed its deep concern about:

- a) *The State party's Migration Act stipulating the mandatory detention of children who are asylum seeking, refugees or in an irregular migration situation, without time limits and judicial review;*
- b) *The best interests of the child not being the primary consideration in asylum and refugee determinations and when considered, not consistently undertaken by professionals with adequate training on determination of best interests;*
- c) *The high risk of conflict of interest where the legal guardianship of unaccompanied minors is vested with the Minister of Immigration and Citizenship who is also responsible for immigration detention and determinations of refugee and visa applications.*

Reports of children in ongoing significant distress continue:

Asylum seeker boy on Nauru pleads for medical help for his mother

'There is no one to see how we are suffering,' Ali, 12, says from tent he shares with his mother The Guardian (Australia) Thursday 26 April 2018

There are organisations better placed to provide a detailed critique in relation to such children but YAC is seeing an increasing trend to deportation of young people who do not have citizenship status if they are found to have broken the law. Whilst we are not aware of children under 18 being deported, children are being given notice of deportation whilst under 18.

This is particularly a problem for New Zealanders. They are able to enter the country under a specific visa category but are not eligible for any benefits. This includes homeless children who are unable to access youth allowance (as minimal as that is) and so have no legitimate means to survive.

Respect for views of the child

The Government Report states in relation to (Art 12) (Concluding Observations 30(d), 34) Legislative decisions)

*All Australian governments **consider** children and youth issues where legislation will affect them. [our emphasis]*

This does not, of course, necessarily translate into **hearing and listening to** the views of children. **Some** children are **sometimes** consulted through the **limited mechanisms** available in relation to a **very limited number of issues**. The National and State Commissioners for Children cannot, with the resources available, in a timely manner, consult with young people on all issues which may be of relevance to them. It is also the responsibility of Government, when seeking public comment to itself ensure that it has given children the opportunity to be heard in a meaningful way.

In reality, children's views are not sought on the vast majority of matters, particularly adolescents who are the up and coming generation and may have views and ideas on decisions or actions which will impact on them in the near future. For example: children could have input into planning decisions in the area in which they live: what facilities should be available for children, and particularly adolescents whose recreational needs are largely ignored?

It is YAC's submission that hearing the views of the child is a key part of the decision making in terms of their best interests, with the child's views being given greater weight as their ability to understand and make informed decisions increases.

Since 10 year olds can, and regularly are, prosecuted in the criminal courts in all Australian jurisdictions, it cannot be argued that children of 10 or 11 years of age are not able to contribute to discussions about their situation or future because they do not have sufficient

maturity – yet this argument is regularly used by adults for failing to talk to younger children.

The government also fails to understand that quite young children can give their views on their experiences and wishes in terms of their life and wellbeing. It simply has to be approached differently to surveying or consulting older children or adults. For example, knowing how children experience after school hours care could be useful in ensuring that the needs of children are being properly met.

The Family Law area is one of particular importance for children but being heard remains challenging. Adults argue that their input cannot be taken seriously because they are under the influence of one party or the other. Lawyers who are there to represent the best interests of the child do not always talk to the child nor have the skills to engage with children.

Birth certificates

It is noted that there is a national governmental Identity Documents Working Group to consider approaches to increase birth registration and to simplify the process of accessing identity documents for children receiving statutory child protection services. The issue of birth certificates is particularly relevant to Aboriginal and Torres Strait Islander children in regional and remote Queensland. Since a birth certificate is required to enrol a child at school, this would be a key time to address lack of birth registration. It is important to focus on assistance to resolving this issues and not prosecution for failure to register at the time. The sooner the matter is attended to, the better, so that the people who are necessary for evidential support are still around to provide this.

Freedom of expression (Art 13), freedom of thought, conscience and religion (Art 14) and freedom of association and of peaceful assembly (Art 15) (Concluding Observation 40)

As the Government Report notes:

Public Order Offences

In Australia, children freely congregate in public spaces, both in areas specifically designed for children such as playgrounds, sporting venues, parks or skate parks, or in public facilities such as shopping precincts, public transport, streets and public squares.

We would, however, disagree with the view that:

*Public order offences, including those specifically relating to children, uphold the dual purposes of **keeping children safe** and maintaining public order. [our emphasis]*

In our experience as an organisation which daily represents children in court, the use of public order offences generally has nothing to do with keeping children safe. Children are often charged with public nuisance related offences as a result interaction with the police, not because they were actually doing anything illegal before that interaction. Children tend to be subject to over-surveillance once known to police. Move on powers are over-used in relation to vulnerable groups who tend to be visible on the street – young people, Aboriginal and Torres Strait Islander people and homeless people.

In Queensland in early 2018 we learnt that children (including those under the age of criminal responsibility) were being stopped on the street in some regional towns and asked for their details and photographed (although no allegation of any wrongdoing). The taking of their photos is in contravention of the *Police Powers and Responsibilities Act 2000*. It was claimed that police sought the children's permission – despite the Act not allowing for this exception. Clearly, it could not, in any event, have been informed consent because the children would have had no idea what the police would or could use those pictures for.

Young people's ability to move freely around the community, particularly when there is a group of more than 3 or 4 of them, is regarded with suspicion by adults and police – even

though we know that young people tend to use public space and to be in groups. There is a tendency in more recent times to assume that “group = gang” and place more sinister connotations on groups of young people.

Of concern to YAC, particularly in light of issues with cyberbullying, is the way adults respond to and comment on allegations of misconduct by children and young people. Again, earlier this year in regional Queensland, a business alleged that three young people had got into a staff room at the back of a shop and taken \$1000 worth of goods from an employee. The store put photos of three children from its CCTV cameras on line and asked people to look out for them. The children were small in size and looked to be quite young – they could well have been under 10. They were all wearing T-shirts and shorts and two at least were carrying nothing. The third may have had something small in his hand. There was nothing bulging under the shirts of any of them.

Thus – although it was less than clear that these children were responsible for the loss of the goods as claimed, they were clearly identified and the vitriol of a good number of adults responding to the post was highly disturbing in terms of what they would do if they saw them.

It was not clear that this identification was a breach of the prohibition of identification of (potential) offenders under Queensland’s Youth Justice Act as it was technically prior to any proceedings being commenced. In light of the common use of CCTV cameras in shops and other public places and spaces, there should be greater consideration of its impact on children and young people. Children and young people also need to be protected from the abuse and threats of harm by adults. If children and young people see that this sort of response and language is apparently acceptable, it is hardly surprising that this is mimicked in terms of children’s own relationships.

Education

Children have a right to an education under the CRC and also under Queensland legislation.

As Chris Sidoti (HR Commissioner 29th Annual Federal ICPA Conference, Griffith NSW, 3 August 2000)

Education is fundamental to the development of human potential and to full participation in a democratic society. That's why it's recognised as a human right. Everyone has the right to education, regardless of where you live, what your race is or whether or not you have a disability.

Education is also fundamental to the full enjoyment of most other human rights: most clearly the right to work but also the right to health. And to the exercise of social responsibilities including respect for human rights.

It would be reasonable to think that children should be considered as clients for the purpose of delivering education services to them and that therefore the child’s best interests and individual needs would be paramount. This is the rhetoric which is in departmental strategies and plans but not necessarily how the education system seems to work in practice, particularly for some vulnerable and disadvantaged young people.

Exclusion and suspension

The right to an education is undermined by the ease with which children can be suspended or excluded from school. The Australian Government’s investment in education as described in the Australian Report is of little use for those not able to benefit from that investment.

The Queensland *Education (General Provisions) Act 2006* includes provisions which enable a school principal to:

- *Suspend a child of any age from their school where*

- a child is charged with ANY offence (and so does not need to have any connection with the school, save the child is a student there); and
- the principal is reasonably satisfied that it would not be in the best interests of other students or staff for the student to attend school while the charge is pending.
- Exclude or cancel the enrolment of a child of any age from their school where
 - a child is charged with ANY offence (and so does not need to have any connection with the school, save the child is a student there); and
 - the principal is reasonably satisfied that it would not be in the best interests of other students or staff for the student to be enrolled at the school (s 292(2))

These are very low thresholds and, we argue, are an affront to the principle of ‘innocent until proven guilty’ in the first instance and ‘double jeopardy’ in the latter. In any event, withdrawal of education should not be used as a punishment when the research tells us that disengagement from education is a key risk factor in youth offending and anti-social behaviour.

YAC put in objections at the time the provisions were enacted and has since written to the two following Education Ministers who have declined to address this. The data indicate that these provisions are not greatly used but this is no justification for such provisions being retained.

An exclusion on their record for whatever reason can make it difficult for the child to re-enrol.

The chief executive can exclude from all schools in Queensland on the same grounds, thus denying the child their right to an education. It has been argued that the child’s ability to use Distance Education means this is not the case.

The Departmental website states:

Distance has always been a challenge for education in Queensland. The state covers a vast area with communities small and large spread over many thousands of square kilometres.

Education to isolated children was initially achieved through itinerant teachers for those who could not afford their own live-in tutor. The postal system and new and developing technologies has enabled a more equitable educational experience.

There are seven state schools of distance education (SDEs): aside from Brisbane, they are located in rural, regional Queensland. Charleville State School, whose motto is *Divided by distance, united by voice* says on its website:

Welcome to Charleville School of Distance Education, a Queensland State School offering quality educational services to home based learners from Prep to Year 10 in rural and remote Queensland and beyond.

The Brisbane School of Distance Education (BSDE) website states that it has

...a strong tradition of providing innovative education to Queensland’s rural and remote families. From its Brisbane campus, BSDE provides Prep to Year 12 programs for students residing across the state, travelling within Australia, living and travelling overseas, students with medical conditions which preclude them from attending a local school and those whose individual needs are best served by a more personalised service. This service includes a strong commitment to the training and support of home tutors who are an essential link in the education process.

Clearly, the focus remains on Distance Education doing just that – educating children who are at a distance.

The “home tutor” is considered to be a key component of the SDE – basically a parent. There is, however, a recognition of the challenges of being a home tutor:

As a home tutor you may feel overwhelmed and perhaps unsure of school processes. The school recognises the difficulties that may occur for families unfamiliar with the systems and processes used. There is help at hand!

SDEs are not a viable alternative for many young people suspended or excluded from school, particularly those who are involved in the youth justice and/or child protection systems and/or are homeless. It is most likely that they do not have someone who can be a home tutor – if they did, then they would probably not be in the youth justice and/or child protection systems and/or be homeless.

There is also a fee incurred in relation to SDEs. This fee is waived if the Chief Executive excludes the child from **all** State Schools but not if the principal excludes the child from their school, or the Chief Executive excludes from some schools and the remote area rule does not apply. There will therefore be a group of young people who are excluded whose parents may be required to pay a fee. Again, for this cohort, this will effectively mean total exclusion from education. There is a discretion to waive on hardship grounds but there is clearly a risk that exclusion may mitigate against this waiver.

Exclusions and suspensions are not limited to secondary students. Students of all primary grades and Prep students are suspended and a very small number even excluded. Suspensions may only last up to 10 days but some children are suspended more than once. The Brisbane Times reported on 11 July 2017:

The data shows 1028 pupils in their Prep year were suspended last year [approx. 1%], compared to 572 in 2013.

A spokesperson for the Queensland Education Department noted:

... a small number of unruly Prep students were responsible for the bulk of suspensions.

School disciplinary absences have increased over the three years since principals were given increased powers against disruptive behaviours in 2014

... the department supported principals in taking strong disciplinary action where a student's behaviour was unacceptable.

These are likely to be the children at greatest risk of disengaging from school in due course and then involvement in the youth justice system. There is no information as to whether the group of children with behavioural issues have been referred for any assessment or assistance or whether there has been any engagement with their families to assess whether issues at home are contributing to children's actions. The statement from the Education Department spokesperson implies a punitive approach. Principals must be given the responsibility to make appropriate referrals and investigations, not simply given the right to suspend or exclude and "move the problem on".

In 2016 23.5% of all suspensions, exclusions and cancellations were of Aboriginal or Torres Strait Islander children while they make up only about 7% of the relevant age cohort.

Preventing children from having a proper education should not be used as a punishment. It is clearly not in the best interests of the child. Additionally, the cost to the community will be potentially significant and long term, financially and socially, with an increased risk of the young person's involvement in the criminal justice system and limited prospects to contribute to society in the future.

Corporal punishment

The second issue which is related to education but also has broader effect, is s 280 Queensland Criminal Code (Domestic discipline) which provides:

It is lawful for a parent or a person in the place of a parent, or for a schoolteacher or master, to use, by way of correction, discipline, management or control, towards a child or pupil, under the person's care such force as is reasonable under the circumstances

In 2012 the CRC Committee, referring to its previous recommendation (CRC/C/15/Add.268, para. 36), noted its regret that corporal punishment remains lawful and that Australia should:

- *take all appropriate measures to explicitly prohibit corporal punishment in homes, in public and private schools, detention centres and alternative care settings in all states and territories;*
- *strengthen and expand awareness-raising and education campaigns, in order to promote positive and alternative forms of discipline and respect for children’s rights, with the involvement of children, while raising awareness about the adverse consequences of corporal punishment.*
- *ensure that “reasonable chastisement” is not used as defence to a charge of assault of a child*
- *consider undertaking an independent study on the probable linkages between domestic violence and corporal punishment.*

Education Queensland (EQ) policy has prevented the use of corporal punishment in State schools for some years. However, it would still be legal for its use under the Code provision and the EQ policy does not apply to the large number of private schools in the State. The provision also still allows a parent to legally assault their child.

We note that the Queensland *Child Protection Act 1999* at section 122, Statement of Standards, states:

(1) The chief executive must take reasonable steps to ensure a child placed in care under section 82(1) is cared for in a way that meets the following standards (the statement of standards)—

.....

(g) the child will receive positive guidance when necessary to help him or her to change inappropriate behaviour;

.....

*(2) For subsection (1)(g), techniques for managing the child’s behaviour **must not include corporal punishment** or punishment that humiliates, frightens or threatens the child in a way that is likely to cause emotional harm. *[Our emphasis]**

YAC has advocated for the repeal of s 280: its removal would place the same expectation on families generally as is placed on foster carers. We also consider that it is unacceptable that one parent cannot assault the other, being domestic violence, but a parent can assault their child. This is a mixed message for children.

Administration of juvenile justice

YAC is pleased to advise that after a 25 year campaign and ongoing criticism by the CRC Committee, the Palaszczuk Government amended the law in Queensland in 2017 so that 17 year olds now come within the youth justice system in Queensland and can only be placed in youth detention – and commends the Government for doing what previous governments either promised but failed to do, or refused to do for reasons with no evidence base.

With others, YAC is now advocating for the raising of the minimum age of criminal responsibility from 10, noting the position of the CRC Committee that the minimum should be at least 12 years.

Queensland has a range of sentencing options for children and young people, including police diversionary practices. Again to the credit of the Palaszczuk Government, a priority was to re-instate the principle of detention as a last resort and the ability of the courts to refer children to restorative justice processes as either a diversionary or sentencing measure. These had been removed by the previous Newman Government, along with other protections for children in the criminal justice system, despite significant criticism from across the legal community that the Government’s actions were not evidence-based (in fact, quite the opposite) and removed key, longstanding principles underpinning the criminal justice system.

It is a great concern that crime, and particularly, youth justice continues to be a ‘political football’ with the result that not only is there a great deal of misinformation (to be

generous) put out about the level of youth offending, but there is a lack of consistency of law, policy and practice as different political perspectives take hold. This is not helpful in developing a coherent and appropriate response to youth offending. Instead of informing and reframing the debate around youth offending and young offenders, political parties, and so governments, pander to the populist “law and order/soft on crime” rhetoric in order to keep in power. The Palaszczuk Government has bucked this trend to some extent by the actions it has taken in recent times but youth justice, like child protection, should have a bi-partisan, evidence based approach with the best interests of the child at its centre. The media also has to take responsibility for its often partisan reporting of youth justice issues which misleads the community about the real extent and nature of youth offending and young offenders.

The CRC Committee in 2012 (Juvenile Justice and Detention (Art 25) (Concluding Observation 84) noted its regret that:

despite its earlier recommendations, the juvenile justice system of the State party still requires substantial reforms for it to conform to international standards, in particular the Committee is concerned that:

- a) No action has been undertaken by the State party to increase the minimum age of criminal responsibility (CRC/C/15/Add.268, para. 74(a));*
- b) No measures have been taken to ensure that children with mental illnesses and/or intellectual deficiencies who are in conflict with the law are dealt with using appropriate alternative measures without resorting to judicial proceedings (CRC/C/15/Add.268, para. 74(d));*
- c) Expediently establish an accessible and effective mechanism for investigating and addressing cases of abuse at its youth detention centres*

These matters remain to be addressed.

With respect to Children with mental illness in proceedings (Concluding Observation 84, the Australian Report states:

All jurisdictions have legislation that deals specifically with situations where a person with a mental illness commits an offence. Section 20BQ of the Crimes Act 1914 (Cwth) provides a person, including a child over the age of criminal responsibility, is not criminally responsible for an offence if, when they committed it, they were suffering from a mental impairment, which affected their ability to control their conduct or otherwise know their conduct was wrong.

In Queensland, for children under 14 years of age, there is a requirement that the prosecution not only prove their case but also that at the time the offence occurred, the **child had capacity to know** that they should or should not have done what they are alleged to have done. The bar is set very low in Queensland in relation to this so that in practice very few children would be considered not to have the requisite capacity. Children with low to moderate intellectual impairment are particularly at risk.

In relation to fitness to plead, the bar is, again, so low that it is almost impossible to avoid judicial proceedings. Clearly, prosecuting children with significant mental illness or intellectual impairment, is not in the best interests of those children or in the public interest. Young people in out of home care are probably among the most at risk: this is discussed later.

Overall – much still needs to be done to ensure that the criminal justice system is only applied where it is appropriate and genuinely in the public interest to do so and with full consideration of the best interests of children. “Best interests” needs to be considered in the immediate but also with a view to the medium and longer term. Queensland’s youth justice system is, in reality, only a relatively modified version of the adult court rather than being regarded as a specialist jurisdiction which requires specialists in all of the professions involved – police, prosecutors, defence lawyers, magistrates and judges.

Aboriginal and Torres Strait Islander children remain significantly overrepresented in the system. Children entrenched in the system have characteristics of low to moderate intellectual impairment, mental health issues, conduct disorders, substance use issues, etc. The 2015 Report on the Australian Child and Adolescent Survey of Mental Health and Wellbeing found almost 13.9% 4–17 year olds were assessed as having mental disorders in the previous 12 months. ADHD was the most common mental disorder in children and adolescents (7.4%), followed by anxiety disorders (6.9%), major depressive disorder (2.8%) and conduct disorder (2.1%). These figures are higher among the population in youth detention centres.

Detention

In the last two years significant evidence has come to light in relation of mistreatment of children in youth detention centres and, in Queensland's case, 17 year olds in adult prison. As a result, there have been formal government inquiries.

The Queensland Family and Child Commission is currently considering the best mechanism for independent oversight of the State's two detention centres. However, it can hardly be said that governments have acted "expeditiously" and probably would not have acted at all but for allegations coming to public attention.

In December 2016, the Australian Government asked the Australian Law Reform Commission to examine the factors leading to the national over-representation of Indigenous people in prisons, and consider law reform to ameliorate it. The Report was tabled in Parliament in early 2018. It is unclear why we needed yet another report: there have been a number of inquiries and papers on this issue and we are long past the time for action. A fundamental flaw of the report is also that its terms of reference did not include youth detention. The report discusses the importance of early intervention and diversion: if these do not happen in the youth justice space, the best opportunity is lost.

Australia's ratification of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) on 21 December 2017 is an important step in improving oversight of places of detention under Australia's jurisdiction and control.

Child Protection

The National Children's Commissioner and her Office will be very well acquainted with the Royal Commission into Institutional Sexual Abuse and the recommendations of the Report which all jurisdictions are now considering. YAC therefore does not intend to make further comment in relation to this except to say the Report is relevant to the future as well as the past and all governments must be committed to properly implementing the recommendations.

In particular, there must be a change of culture across the entire community in terms of ensuring that we are a child safe society, and not simply relying on Working With Children checks as being the "silver bullet".

That change of culture must include listening to, and believing, children. It is clear from the evidence provided to the Royal Commission, that children who did say anything at the time were simply not believed. Ensuring that from here, children have access to mechanisms to enable them to divulge information and can be confident that adults will take such information seriously is paramount if we are to avoid future repetition of the appalling events which have happened. This is particularly important for those children who have no adult in their lives they can generally rely on.

Children deprived of their family environment

The Australian Report states that:

Out-of-home care is considered an intervention of last resort, and the preference is always for children to be reunited with their birth parents if possible.

All jurisdictions have measures in place to review out-of-home care placements. In all jurisdictions, child protective services work with other relevant authorities to ensure children's wellbeing is upheld.

YAC remains concerned at the criminalisation of children in out of home care in particular. Discussions as to the appropriateness of involving the police in an incident which most families would deal with internally have been happening for many years in Queensland with no resolution. The police and courts are not an appropriate behaviour management response for traumatised children.

There are two types of behaviour which potentially lead to police involvement: damage to property and injury to a person. YAC considers that the issue of property damage would usually never be sufficient to call the police. Property will usually involve the premises or the fixtures and fittings of the premises where the child is staying. It is YAC's experience that these can be quite trivial events, such as the breaking of a mug or plate, or of a more significant nature but in circumstances where staff clearly do not have the appropriate training or skills to de-escalate or manage the behaviour of the young people they are working with. Situations have got out of control as a result.

The use of insurance for damage is a matter for the agency running the premises and as such it can clearly determine that the police should not be called. The excess on a policy would be such that most damage would not justify the use of the insurance policy.

Injury to a worker is more complex because it is ultimately for the worker to make the decision as to prosecution. Clearly, if there is a serious and immediate risk of significant harm to a worker, the young person, or anyone else, the police may need to be called. However, injury should be avoidable on most occasions if staff are appropriately trained to manage challenging behaviours and there are suitable internal behaviour management processes in place to address these. This should include restorative justice processes.

The agency running the premises has the ultimate responsibility to ensure that it is employing the right staff with the right training. Government needs to ensure that if it is funding external agencies for residential care placements, then the agencies have appropriate behaviour management responses in place and they have sufficient funding to employ staff with the relevant skills.

YAC lawyers regularly advocate for charges to be dropped in relation to incidents in residential care premises. On one occasion, the assault charge only involved flicking a worker with a tea towel. On another occasion, a young teenager was prosecuted for a number of quite violent assaults in their out of home care placement. The circumstances of their living and schooling arrangements led YAC to seek an assessment – which was that the young person had an intellectual impairment to the extent that they were considered unfit to be prosecuted and they would likely never be competent. Clearly, prosecution was never going to be an effective response and what was needed was a proper plan to recognise and address what is likely to be a lifelong significant disability.

Family and domestic violence

YAC is seeing an increasing number of young people appearing in court in relation to Protection Orders in situations of partner-partner violence. Generally these are brought by the Police, no doubt with the best of intentions, and are often cross orders.

Young people are confused by these orders and struggle not to breach them because they still want to be in the relationship. For example, they will actually come and leave court together even though they have an order which says that they must not have contact - on one occasion recently, one young person left the court with her boyfriend, travelling down in the same lift as the court prosecutor.

What is required in these situations is not court orders but therapeutic interventions around respectful and healthy relationships and possibly some general living and life skills support so that they can develop an appropriate lifestyle where they are living together. Court orders bring the risk of breach and criminalisation.

At this stage in Queensland, a parent cannot apply for a Protection Order against a child under 18. There is a push from some to allow this for 16 and 17 year olds (generally sons). YAC has argued strongly against this as the result is likely to be that the young person becomes homeless and another set of problems will arise. It is also quite likely that either the young person needs assistance with their behaviour and/or that aggressive behaviour has been modelled within the family unit and/or the family itself needs assistance. The family has to be part of addressing this and the best interests of the child must remain central, as per the CRC:

*Convinced that **the family**, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, **should be afforded the necessary protection and assistance so that it can fully assume its responsibilities** within the community, (Preamble)*

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

*2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall **render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities** and shall ensure the development of institutions, facilities and services for the care of children. [our emphasis]*

Again, we need to look to helping children and young people to develop respectful and healthy relationships and the adults around them need to reinforce this by themselves behaving appropriately. However, services and programs also need to be available when problem behaviours are developing or have developed.

Protecting children from harmful content and activity

The Australian report states:

[r]egulation of sexual activity between persons under 18 years of age is a matter for States and Territories. It is important that Australian laws protect vulnerable persons from sexual exploitation while also respecting the right of young people over 16 to make their own decisions about sex.

Queensland, as all Australian jurisdictions:

“...has criminal laws to protect children from harmful content online (including procuring and ‘grooming’ activities) and criminalise online dealings with child abuse and pornography materials”. (Australian Report)

Unfortunately, children and young people are being prosecuted under the very laws which are meant to protect them. YAC lawyers regularly make submissions for the withdrawal of charges where children are prosecuted for producing and distributing child exploitation material when taking a photo of themselves and sending it to a boy/girlfriend or similar. They are the victim of their own offence.

This would not be the case in Victoria. Therefore, we have a situation of “territorial justice” where whether a young person is criminalised depends on where they live in Australia.

On one occasion YAC is aware of, a youth worker in a residential care premises gave the phone of a young woman to the police because the worker saw that she had sent the picture.

Simply being charged with, or having a police caution for, such an offence can be sufficient to prevent the issue of a Queensland working with children “blue card”. While sending pictures of themselves to others may not be desirable, criminalising the young people and potentially severely affecting their future is, in YAC’s view, neither desirable nor in the public interest.

They are, of course, only copying what has become a trend among 18 year olds and above – “sexting”. The problem is that they are caught by a law that says sending an image which is captured by the definition of child exploitation material, which includes that the child who is in the picture is under 16 under State law or 18 under Commonwealth law, is an offence. The fact that the clear intent of the law was to deal with predatory adults does not seem to influence the police.

Further, children in Queensland are also at risk of prosecution for sexual activity which is lawful in other Australian jurisdictions. In Queensland, two fifteen year olds involved in consensual sexual activity are both liable to be prosecuted for indecent dealing of a child under 16 and potentially for one party at least, unlawful carnal knowledge. In Victoria, this behaviour is not criminalised because it allows for a two year age difference between the young people. Again, the risk for the child in Queensland is a record as a sex offender with all the implications that brings.

It is absolutely a given that such activity must be consensual, but whether adults like it or not, for children who are maturing and going through puberty, exploring their sexuality is a normal part of that process. Guidance in relation to this is important – but that is not the function of the criminal law.

In relation to both sexting and sexual activity, it is arguable that unless children are specifically told, they would not know that what they were doing was wrong to the extent that they are breaking the law. If they are copying what others older than them can legally do, how are they to know the serious implications for them?

Gender diverse and transgender children

An increasing number of children and young people are disclosing that they identify as other than the sex they were assigned at birth or during infancy, or as not being exclusively male or female. The increasing recognition of this group and their needs and interests is to be welcomed, in particular:

- the decision of the Full Court of the Family Court in Re: Kelvin on 30 November 2017, that Family Court approval is no longer required in Australia to authorise stage two treatment where there is no conflict between the child and their parents or doctors.
- The declaration of the Family Court of Australia in Re: Matthew, 16 March 2018 that transgender young people diagnosed with gender dysphoria no longer need to apply to the Court for Stage 3 treatment where:
 - the transgender teenager has been diagnosed with gender dysphoria;
 - the transgender teenager's treating practitioners agree that the child is Gillick competent; and
 - there is no controversy regarding the application (e.g. disagreement between the parents or doctors about the treatment).