

CHILD RIGHTS COALITION

Submission

National Human Rights Consultation

15 JUNE 2009

Executive Summary

This submission has been prepared by the **National Children’s & Youth Law Centre** for the **Child Rights Coalition**¹ to address the questions posed by the **National Human Rights Consultation**. We address the questions on the basis of our experience working with children and in the context of our commitment to the protection and promotion of the human rights of all Australian children.

Which human rights and responsibilities should be protected and promoted?

We believe that international human rights treaties provide a clear universal framework for the recognition and protection of all people including children. We use the United Nations Convention on the Rights of the Child (“**the Convention**”) to guide our work with children.

Over many years, we have listened and responded to children throughout Australia as they voice their concerns. They use words that may be different from those that we use as adults communicating with adults. However, their meaning is clear – they wish to be treated fairly, with respect and in a just manner. The framework of the Convention and the human rights of children have provided us with a valuable touchstone for seeking to support children, to have their voices heard and to support their survival, development and participation in Australian society.

Are human rights sufficiently protected and promoted?

We believe that our current political and legal system has failed to adequately protect the rights of children in Australia. In our view, the evidence is clear.

How could Australia better protect and promote human rights?

We believe that in order to better protect the human rights of children in Australia, the following steps need to be taken.

Australia should develop and implement a **national policy framework for children** based on the international framework set out in the Convention. This framework must be supported by legislative and administrative measures and implemented with adequate resources, including appropriate cross-governmental budgetary allocations. The intent of the framework should be to implement and safe-guard the rights of children in Australia. The framework should include evaluation, monitoring and reporting – to the Australian community, to the international community and in particular to children themselves.

Australia should develop and implement an **education strategy** that provides children and the wider Australian community with the knowledge and skills to be able to use the framework provided by the international human rights treaties that Australia has ratified. This should include human rights education in the curricula of primary and secondary schools and human rights training in all tertiary educational and training institutions.

Finally, once these first two steps have been implemented, we should examine and develop **the most effective mechanisms** that will work to protect the human rights of all Australians. These mechanisms must provide for the protection and participation of children in addressing the conditions and decision making processes that affect their survival, development and participation in Australian society.

¹ The Child Rights Coalition comprises the National Children’s and Youth Law Centre, Defence for Children International (Australia), Save the Children (Australia) and UNICEF Australia.

Table of Contents

Executive Summary	2
1. The Child Rights Coalition	4
2. The National Human Rights Consultation	5
3. A Child-Rights-Based Approach to the National Human Rights Consultation	5
4. Which Human Rights and Responsibilities should be Protected and Promoted?	6
5. Are Human Rights Sufficiently Protected and Promoted?	7
6. How Could Australia Better Protect and Promote Human Rights?	10
7. A National Policy Framework for Children	10
8. Development of a National Human Rights Education Strategy	12
9. Establishment of Effective Protective and Promotion Mechanisms	14
10. Judicial Consideration of Ratified International Instruments	15
11. International Examples of Human Rights Legislation	16
12. Australian Examples of Human Rights Legislation	17
13. Constitutional Reform	18
X. Conclusion	19
Appendix 1: Children Talk About Their Rights	20
Appendix 2: Significant Breaches of Children’s Rights in Australia	25

1 The Child Rights Coalition

This submission is endorsed and presented by the **Child Rights Coalition**. The Child Rights Coalition comprises **UNICEF Australia, Save the Children Australia, Defence for Children International (Australia)** and the **National Children's & Youth Law Centre**.

1.1 The National Children's and Youth Law Centre

The National Children's and Youth Law Centre ("**the Centre**") is the principal author of this submission. The Centre was established in 1993 and is Australia's only national community legal centre dedicated to the promotion and protection of the rights and interests of Australia's children and young people.

2 The National Human Rights Consultation

- 2.1 The questions posed by the National Human Rights Consultation (“**the Consultation**”) are:
1. Which human rights and responsibilities should be protected and promoted?
 2. Are human rights sufficiently protected and promoted?
 3. How could Australia better protect and promote human rights?
- 2.2 This submission has adopted a child-rights-based approach to address these questions and has drawn upon our experience working with children.

3 A Child-Rights-Based Approach to the National Human Rights Consultation

- 3.1 A child-rights-based approach ‘exists as a complex set of ideas and principles which have their foundations in international human rights standards, principally the United Nations Convention on the Rights of the Child’ (“**the Convention**”)². Each constituent principle does not operate in isolation but supports and tempers every other member of the collective body of principles. Drawing upon the collective human rights instruments and jurisprudence, the child-rights-based approach applies three general principles: that the rights of children are interdependent and indivisible³; that states are accountable for securing the rights of children⁴; and that children’s rights are universally applicable⁵. The child-rights-based approach includes the four specific principles: non-discrimination in the applicability of children’s rights (Article 2)⁶; the primacy of the consideration of the child’s best interests (Article 4)⁷; the child’s right to survival and development (Article 6(1))⁸; and the child’s right to participation in decision-making (Art 12)(p 47).
- 3.2 A child-rights-based approach identifies and evaluates children’s needs by reference to their rights under international legal instruments including the Convention⁹. In an Australian context, this analysis is linked to an examination of the factors within Australian society – social, cultural, economic, political, legal, economic and personal – that support or undermine the realisation of these rights¹⁰. This determines that a child-rights-based approach will often call for a response that is not simply legal or political. The response will be multi-sectoral and interdisciplinary and developed in a manner that builds community ownership and support¹¹.

² John Tobin, “The Development of Children’s Rights” in Geoff Monahan & Lisa Young (eds), *Children and the Law in Australia* (2008) at 32.

³ Id at 39.

⁴ Id at 40.

⁵ Id at 41.

⁶ Id at 43.

⁷ Id at 44.

⁸ Id at 46.

⁹ Id at 48.

¹⁰ Ibid.

¹¹ Id at 49-50.

4 Which Human Rights and Responsibilities should be Protected & Promoted?

- 4.1 The international human rights legal framework (“**Framework**”), of which the United Nations Convention on the Rights of the Child forms part, establishes the rights and responsibilities to which, by virtue of Australia’s ratification of its constituent treaties, every adult, young person, and child within Australia is entitled. Each human right articulated under this Framework should be given appropriate recognition by the various arms of Australian Government. Then we will be able to develop an Australian understanding of the right and give it expression in our language, customs, culture and laws. The Australian Government is obliged to ensure that each human right that it has ratified under this Framework is protected and promoted within Australia.
- 4.2 The constituent elements of the Framework, such as the Convention, do not operate in isolation. Each international legal instrument interacts with the other elements of the Framework so that collectively they form the source of human rights which should be drawn upon in developing best-practice human-rights protections, particularly in relation to children.
- 4.3 The Convention guides and informs our work. For over fifteen years, the Centre has listened to the concerns of children and young persons throughout Australia. These concerns reflect a desire to have their voices heard in decisions concerning them and to be treated fairly, with respect and in a just manner. *Appendix 1* includes a selection from the enquiries received by the Centre from children and young people across Australia through its web-based services.
- 4.4 The Convention is used by all members of the Child Rights Coalition to guide our work. We seek to support these children, ensure that their voices are heard and responded to, by facilitating their survival, development, and participation in Australian society without discrimination. The Convention establishes a comprehensive code of human rights for children and young persons that includes the right to life; the right to identity and culture; the right to family life; freedom from violence and discrimination; education; quality of life; freedom of expression and participation in decision-making¹².
- 4.5 The Convention also provides the framework for reporting to the United Nations Committee on the Rights of the Child (“**UN Committee**”) and the international community on Australia’s implementation of child rights. There is a reporting framework for each of the international human rights treaties that Australian has signed and ratified. The Coalition organisations play a role in this process by supporting the preparation and presentation of the NGO (or Alternate) Report on the implementation of the Convention within Australia¹³. The NGO Report provides a comprehensive review of child rights issues that require further attention to protect children. This process also generates a set of Concluding Observations from the UN Committee on the Rights of the Child¹⁴ that can be used as a benchmark against which Australian governments can develop, implement and monitor laws and policies for children.

¹² United Nations Convention on the Rights of the Child articles 2, 6, 8, 9,12, 13, 19, 24, 27, 28, 30.

¹³ Please refer to <http://www.ncylc.org.au/croc/consultpaper.html>

¹⁴ Please refer to <http://www2.ohchr.org/english/bodies/crc/crcs40.htm>

5 Are Human Rights Sufficiently Protected and Promoted?

- 5.1 We believe that the Australian political and legal system, both past and present, has failed to adequately protect the rights of children and young people.
- 5.2 Breaches of children's rights have occurred and continue to occur across all states and territories. Some of the more serious systemic breaches include:
- the conditions within which many Indigenous children continue to live particularly in remote and regional communities across the country;
 - the policies that resulted in the "Stolen Generation";
 - the recent experience of children in immigration detention;
 - ongoing reports of abuse to children in the care of the State;
 - the failure of our child protection systems; and
 - the continuing disproportionate rates of Indigenous children in the justice system and their related experiences of policing and detention (including of deaths in custody).
- These and other breaches are specified in greater detail in *Appendix 2*.
- 5.3 In 1997, the Australian Law Reform Commission and the (then) Human Rights & Equal Opportunity Commission jointly published the *Seen and Heard: Priority for Children in the Legal Process* report ("**the Seen & Heard Report**"). The Seen & Heard Report detailed the systemic failures of the legal, political and social systems to provide for children and to ensure that their voices are heard in decision-making processes concerning matters affecting them.
- 5.4 The Seen & Heard Report stated that children and young people are marginalised and have been frequently ignored in the legal process, even when young people are turning to the law for assistance¹⁵.
- 5.5 The Seen & Heard Report identified that children do not use adult decision-making processes or complaints mechanisms for decisions made that affect them¹⁶. These processes and mechanisms have not been designed for use by children and young people. Children rarely have had experience in engaging with formal decision-making processes. Often the experiences that they have had have been controlled by adults and the outcomes have been dictated by adults. Children have little expectation that they will be able to influence decision-making processes and often have previously had negative experiences ("getting in trouble") with such processes.
- 5.6 Without trust in the decision-making process, children are often left without an effective redress for abuse. The time and resources required to build a child's trust and to engage and support a child through unfamiliar decision-making processes are rarely provided. Workers who are equipped with the necessary communication and support skills are not an essential feature of most complaint systems and legal and administrative systems.

15 Australian Law Reform Commission & Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (Australia; 1997) at 15 (hereafter *Seen & Heard Report*).

16 Id at 67–70.

CHILD RIGHTS COALITION

Submission to the National Human Rights Coalition

- 5.7** The Seen & Heard Report underlined the need for the implementation of complaint mechanisms which are child-friendly and child-focused, particularly with regards to the agencies with which children have contact (such as schools, the police and child protection agencies).
- 5.8** The Seen & Heard Report made significant recommendations seeking to address these systemic failures. However, to date, little progress has been made in implementing these recommendations¹⁷. These recommendations included: the development of a national policy for children with appropriate structural mechanisms within government; development of standards for the representation of children in family law and protection; endorsement of rehabilitation as the primary aim of youth justice; national standards in care and protection and youth justice; and child friendly service delivery standards for Government agencies¹⁸.
- 5.9** The Australian Research Alliance for Children & Youth (“ARACY”) Report Card on the Well Being of Young Australians¹⁹ also offers us evidence that Australia’s children are not yet receiving adequate support during this “most critical stage in human development”²⁰. The Report Card is built on the UNICEF Child Wellbeing Framework which is a set of measures that are used to assess implementation of the Convention for children in an international context.
- 5.10** In 2009 ARACY also published *Inverting the Pyramid: Enhancing Systems for Protecting Children* which identified a growing consensus that the current child protection system does not effectively protect our children²¹. This Report cited studies that demonstrated that out-of-home care contributes to children achieving poor long-term outcomes, particularly where placements are unstable²². The Report stated that the best way to protect children was to prevent abuse from occurring in the first place²³. This required robust systems that provided families with the assistance they needed before they come into contact with the statutory child protection system²⁴.
- 5.11** The evidence of the inadequacy of current protections is not just found in reports and inquiries. Children and young people also voice their concerns regarding their human rights. Since 1997, the Centre has also been able to hear children express their concerns in their own words through the Centre’s web-based services²⁵.

¹⁷ Peter Henley, James McDougall (NCYLC Director) & Tiffany Overall, ‘Seen and Heard Revisited’ (2008) 92 *Reform* (Winter) 9 at 10.

¹⁸ Seen & Heard Report, above n14.

¹⁹ Australian Research Alliance for Children and Youth, *The ARACY Report on the Wellbeing of Young Australians – Technical Report* (Australia: 2008)

²⁰ *Id* at 13

²¹ Australian Research Alliance for Children and Youth, *Inverting the Pyramid: Enhancing Systems for Protecting Children* (Canberra: 2009) at 2.

²² *Ibid*.

²³ *Id* at 3.

²⁴ *Id* at 3.

²⁵ The Centre operates www.lawstuff.org.au which provides legal information and referral options on a wide range of legal issues of relevance to children and young people. The Centre also provides a legal advice and information service via email which allows children to directly ask us questions relating to the law and their rights via email.

- 5.12** These children use language that may be different from the language that we use as adults communicating with adults. However, their meaning is clear – they wish to be treated fairly, with respect and in a just manner. Their concerns can be clearly characterised as expressions of their desire for recognition and respect for their rights. *Appendix 1* includes a few of the concerns in the words of the children themselves.
- 5.13** These children wish to have their rights recognised and respected. They wish to see their rights better protected. These children come from all over Australia and from all communities. Children’s experiences are as complex and diverse as those of adults, so their rights reflect many of those that adults seek to enforce – their right to family, the right to education, the right to culture and identity and religion, the right to play and to work, the right to privacy and to safety and protection – including, above all, their right to be heard.
- 5.14** We support their wishes and call for better protection and promotion of the rights of children and young people. We believe that better protection and promotion of the rights of children and young people will support their survival and development, their health and wellbeing and their participation in Australian society.

5.15 A Brief Reflection on the National Human Rights Consultation Process

- 5.15.1** This submission acknowledges that the National Human Rights Committee has endeavored to involve children and young people in the Consultation. This recognition of the importance of hearing directly from children and young people is important and vital to the development of ongoing effective mechanisms for the protection and promotion of the rights of children and young people.
- 5.15.2** However, we note that no resources were provided by the Federal Government to support the involvement of children and young people in the development of the Consultation participation mechanisms. We call for children and young people to be involved in the **development** of future consultative mechanisms and that resources are provided to ensure the effective implementation of these mechanisms.

6 How could Australia Better Protect and Promote Human Rights?

6.1 We believe that the following steps should be undertaken in order to better protect the human rights of children in Australia:

Step 1:	The development of a comprehensive national policy framework for children and young people
Step 2:	The development of a comprehensive national human rights education strategy
Step 3:	The investigation and development of effective human rights protection mechanisms that can be used by all Australians including children and young people

7 A National Policy Framework for Children

7.1 The development of a clear national policy framework based upon the international framework set out in the Convention is vital in ensuring the protection of the human rights of children within Australia. In order to be effective, this Policy Framework must be supported by legislative and administrative measures and implemented with adequate resources, including cross-governmental budgetary allocations. The intent of the framework should be to implement and safeguard the rights of children in Australia.. The Framework should include mechanisms for the evaluation, monitoring and reporting of the status of Australian children and their protection and participation - to the Australian community, to the international community and in particular to children themselves.

7.2 Australia currently lacks such a framework. In 2005, *The NGO Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (“**NGO Report**”) noted the “absence of a comprehensive policy for children at the federal level” and a “lack of monitoring mechanisms at federal and local levels”²⁶. This contrasts to the approach adopted by the Federal Government towards the environment, which is subject to a national agenda, and to companies, which are subject to national standards²⁷.

7.3 Where a child lives determines many aspects of their legal and social status, their access to services, and their treatment by the legal system²⁸. This is often compounded by a lack of cooperation between governments and departmental ‘portfolios’ and agencies²⁹. A complex array of legislation (over 230 pieces) and policies determining how services for children are delivered³⁰ is a manifestation of this situation. The consequence is fragmented and ad hoc policy development.

26 The Centre and Defence for Children International (Australia), *The Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (May 2005) at 1.

27 Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child (17th Report)* (Canberra, August 1998) at 140 (hereafter *Joint Standing Committee on Treaties 17th Report*),.

28 Id at 139; Seen and Heard Report, above n 14 at 111-112.

29 Seen and Heard Report, above n 14, at 111.

30 Joint Standing Committee on Treaties 17th Report, above n 16, at 7-9.

CHILD RIGHTS COALITION

Submission to the National Human Rights Coalition

- 7.4** Ultimately, children are the victims of this failure. There have been numerous reports that have highlighted the lack of services to children.³¹ We continue to fail to provide many Indigenous children with their basic survival rights to health, welfare and education. Problems have also been identified in relation to youth justice, the family law process and services for children with a disability and refugee and asylum-seeking children³².
- 7.5** The Federal Government is seeking to address some of these issues. We note the National Child Protection Framework and initiatives in relation to homelessness and “closing the gap” between indigenous and non-indigenous Australians³³. However, a national policy framework is still necessary for the development of a consistent, co-ordinated and comprehensive policy that ensures the well-being of all Australian children.
- 7.6** A clear national policy framework is also vital in empowering children, their families and communities. There are still no ongoing effective mechanisms to ensure that children are heard – in the home, at school, at local councils, detention centres, government offices, community organisations, and in court.³⁴
- 7.7** The framework must include mechanisms for the evaluation, monitoring and reporting of the status of human right protections for children within Australia to the Australian and international community and to children themselves.
- 7.8** The establishment of an independent National Commissioner for Children and Young People would be a valuable element of the monitoring of a comprehensive national policy framework for children – although by itself the position is not an adequate substitute for the implementation of a national policy framework.
- 7.9** As we develop policy responses, we should reflect upon the assumptions and prejudices concerning children and young people which have influenced policy development. Some generalisations such as that ‘*young people are inherently troublesome and troubled*’³⁵ are not only wrong but unhelpful in the development of good policy and practice. We must distinguish fiction from the often more complex realities for children and young people³⁶.
- 7.10** The participation of children and young people in the development of policy would be a vital and important first step towards an inclusive and non-discriminatory environment for the development, protection and participation of children and young people in Australian society.

³¹ Id at 17; Seen and Heard Report, above n 12, at 111.

³² Ibid.

³³ For more information concerning “Closing the Gap”, please refer to:

http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget09_10/indigenous/Pages/ClosingtheGap.aspx (accessed 11 June 2009); for more information regarding the National Child Protection Framework, please refer to: http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf (accessed 11 June 2009); and for information concerning Federal Government Initiatives in relation to homelessness, please refer to:

<http://www.aihw.gov.au/housing/sacs/index.cfm> (accessed 11 June 2009).

³⁴ Joint Standing Committee on Treaties 17th Report, above n 16, at 85-86.

³⁵ As noted by Judith Bessant in her article ‘The Politics of Scary Youth: Policy Making and Prejudice’

³⁶ Ibid.

8 Step 2: Development of a National Human Rights Education Strategy

- 8.1** We call for the development of a broad community-based **education strategy** that provides all Australians (including children and young people) with the knowledge and skills to be able to use the framework provided by the international human rights treaties that Australia has ratified (including the Convention). This education strategy should involve the inclusion of human rights education in the curricula of primary and secondary schools and human rights training in all tertiary institutions and professional and technical training programmes.
- 8.2** We believe that the effective protection and promotion of human rights requires a clear understanding on the part of the Australian community of the value of human rights. Whilst support by government is an important element, an effective framework will be linked to the development of a human rights culture in the Australian community.
- 8.3** As a nation, we already possess a strong ethical and social commitment to equality and fairness. These values are consistent with a human rights culture. A broad-based community education strategy can influence, articulate and develop community understanding of concepts such as human rights. Australians have developed an understanding of the relatively complex concept of anti-discrimination law and rights over the last twenty years. Now is an appropriate time for the Australian Government to commit to a human rights education strategy.
- 8.4** We note that the international human rights treaties that Australia has ratified provide for and call for the development of such education strategies. It is arguable that the Australian Government has breached its obligations under these treaties by having failed to develop and implement such strategies.
- 8.5** A human rights education strategy that provides children and young people with the knowledge and skills to better understand and use the framework provided by the Convention and other international human rights instruments would be a powerful aid to promote and protect child rights. The existing educational system and curriculum development process can accommodate the development of such a strategy. A recent example of a similar development has been the National Financial Literacy Framework³⁷.
- 8.6** A comprehensive national human rights education strategy which engages primary, secondary and tertiary levels of the education system would help to embed a human rights framework more fully into Australian community discourse. We refer to the submission of the UN Youth Association which articulates a strong and clear case for the development of such a strategy.

³⁷ Please refer to <http://www.mceetya.edu.au/mceetya/default.asp?id=14429> for more information regarding the National Financial Literacy Framework.

CHILD RIGHTS COALITION

Submission to the National Human Rights Coalition

- 8.7** We also note the recent call for the development and implementation of an education strategy by the United Nations Economic, Social and Cultural Rights Committee in its Concluding Observations on Australian's implementation of the International Covenant on Economic, Social and Cultural Rights³⁸.
- 8.8** We believe that effective human rights education would empower and encourage children and young people to recognise issues which affect their rights and give them the confidence to more actively assert their rights. It will also encourage the development of a 'human rights' culture so that issues impacting upon human rights will receive better recognition and protection in the wider Australian community.
- 8.9** We also support greater public participation in the Executive and Parliamentary processes that give consideration to the signing and ratification of international human rights treaties.
- 8.10** We note that the comprehensive consideration by the Australian Parliamentary Joint Standing Committee on Treaties of the detail and application of the Convention was driven by community concerns as to the impact of the Convention.
- 8.11** Whilst this process was invaluable in developing a greater understanding within government and the wider community of the value of the Convention, there is some merit to the argument that such a process should have occurred prior to Australia's ratification of the treaty.
- 8.12** A more comprehensive and consultative process would ensure that the Australian community better understands Australia's rights and responsibilities under international human rights instruments and the impact of these treaties upon daily life.

³⁸ Committee On Economic, Social And Cultural Rights, Forty-Second Session, Geneva, 22 May 2009, Consideration Of Reports Submitted By States Parties Under Articles 16 And 17 Of The Covenant, Concluding Observations Of The Committee On Economic, Social And Cultural Rights, Australia E/C.12/Aus/Co/4

9 Step 3: Establishment of Effective Protective and Promotion Mechanisms

- 9.1** Whilst we wholeheartedly endorse the importance of the development of effective mechanisms for the protection and promotion of human rights within Australia, we are not yet able to endorse a particular mechanism. We believe that further work is required to identify the most effective mechanisms for this purpose. We note that no appropriate and effective mechanism currently exists to ensure the “coherence and compliance of all jurisdictions³⁹” in Australia for the protection of human rights.
- 9.2** The human rights protection mechanisms that are developed must be able to effectively protect the rights of children and young people. Given the experience of children and young people in relation to the existing legal and administrative decision-making systems, we believe that particular attention should be given to ensure that the mechanisms developed are available, accessible and appropriate for children and young people as well as adults.
- 9.3** The existing body of knowledge as to effective human rights protection mechanisms for children is in our view incomplete. The following sections of this Submission contain our initial explorations as to the effectiveness of existing or proposed mechanisms in protecting the rights of children.
- 9.4** At this point in time it is yet to be determined whether the development of discrete and specific child-rights mechanisms for children is required or whether general human rights mechanisms can be flexible enough to specifically guarantee the protection of the rights of children and young people.
- 9.5** The answers to these questions may emerge from this Consultation. Whatever form these proposed mechanisms may take, we believe that these mechanisms should be capable of protecting the human rights of our children and young people. A key feature of effective human rights machinery is provision for the protection and participation of children in the making of decisions which affect their survival, their development and their well-being within Australian society.
- 9.6** In the following sections, we offer some brief initial reflections on a few of the possible mechanisms. These are judicial consideration of ratified international instruments; the introduction of human rights legislation; and constitutional reform.

³⁹ Ibid.

10 Judicial Consideration of Ratified International Instruments

- 10.1 Australian Courts are not required to consider all relevant ratified international conventions when making decisions concerning human rights in Australia. By amending the *Acts Interpretation Act* (2001) - which as currently drafted states that ratified international agreements, like all other 'extrinsic material', 'may' be given consideration⁴⁰ - to mandate the consideration of such instruments, Australia's commitment to the promotion and protection of human rights may be reflected in judicial practice.
- 10.2 Australian courts have not yet adopted a child-rights-based approach (as described in Section 3 of this Submission) to decision making.
- 10.3 The most obvious example of this can be found in the words of Justice Gummow of the High Court of Australia in the decision of *In re Woolley*⁴¹ where he asserted that:
"The starting point is the proposition that, at common law, a right of a parent ...to custody of children who had not reached the age of discretion ... incorporates a 'right of possession' of the child...".
- 10.4 The referral by Australian courts to the words of the Convention has largely been selective and has utilised phrases such as 'the best interest of the child' that have been incorporated into domestic legislation (the most important being the Family Law Act) from the Convention.
- 10.5 This has not resulted in the effective protection of the rights of children. The recent work of Patrick Parkinson and Judy Cashmore demonstrates how much more work is required to effectively implement the voice of the child in family law processes⁴².
- 10.6 A more detailed review of judicial decision-making internationally would assist in determining if an obligation upon Australian Courts to consider the jurisprudence of the international framework of children's rights would provide more effective protection to children.
- 10.7 Our preliminary view is that greater reference to international child rights principles in Australian courts would significantly improve the status and protection of children in Australia.

⁴⁰ *Acts Interpretation Act 2001* 15AB(2)(d)

⁴¹ (2004) 225 CLR 1

⁴² Judy Cashmore & Patrick Parkinson, *"The Voice of the Child in Family Law Disputes"* (2008).

11 International Examples of Human Rights Legislation

- 11.1 Although a number of countries have introduced a Charter of Human Rights, our Submission has briefly focused upon the Canadian and United Kingdom experience in evaluating the effectiveness of this mechanism in protecting the human rights of children and young people.
- 11.2 The *Canadian Charter of Rights and Freedoms* was assented to in 1982 whilst the United Kingdom's *Human Rights Act 1998 (UK)* came into full force in 2000 (each called a "**Charter**")⁴³. Neither Charter refers specifically to children or young people. So far neither Charter has received any clear endorsement as a mechanism for the protection of the human rights of children and young people.
- 11.3 In Canada, this is highlighted by the conclusions of the Canadian Standing Senate Committee on Human Rights in their 2007 report "*Children: The Silenced Citizens*"⁴⁴ ("**Silenced Citizens Report**"). The Silenced Citizens Report noted 24 areas concerning children that were not adequately protected by the *Canadian Charter of Rights and Freedoms*⁴⁵. These included corporal punishment, bullying, child protection, child poverty, aboriginal children, child commercial sexual exploitation and children's health⁴⁶.
- 11.4 In relation to the UK, the United Nations Committee on the Rights of the Child noted that the *Human Rights Act 1998 (UK)* has failed to prevent negative stereotyping of children by the media and the criminal justice system⁴⁷, alleged torture⁴⁸ and inadequate immigration detention centre facilities.
- 11.5 More recently, the UK has introduced a number of measures which are arguably in breach of international jurisprudence concerning children's rights. These measures include the introduction of mosquito devices (designed to stop children loitering) and anti-social behaviour orders⁴⁹ which regulate the clothing, movements and associations of young people.

⁴³ The Canadian Charter is constitutionally entrenched. Please refer to http://www.charterofrights.ca/en/26_00_01

⁴⁴ The full report can be found at <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/huma-e/rep-e/rep10apr07-e.pdf>

⁴⁵ The 2007 Report Card on Child Poverty reported that 11.7% of children, 788,000 children, live in poverty. Available at www.campaign2000.ca

⁴⁶ Recommendations 2,3,9,14,18,6,15.

⁴⁷ The United Nations Committee on the Rights of the Child reported on the compliance of the United Kingdom in September 2008. The Committee found that intolerance and negative public attitudes toward children were prevalent, as was negative stereotyping of children in the legal system.

⁴⁸ The National Council for Civil Liberties ("Liberty") addressed the issue of physical restraint methods in Secure Training Centres, arguing this behaviour falls short of the Convention: '*It is a national embarrassment that the most fundamental and inalienable right of all – the right not to be subjected to torture, inhuman and degrading treatment – cannot be guaranteed for the most vulnerable in our society – our children, when they are entrusted into the hands of the state. The use of violent physical restraint techniques against children in detention is wholly unacceptable and Liberty urges the Committee to continue to treat this issue as a matter of urgent priority.*'

⁴⁹ Please refer to the *Policing and Crime Bill*.

12 Australian Examples of Human Rights Legislation

- 12.1 The Australian Capital Territory (“ACT”) and Victoria have both recently introduced human rights legislation. The ACT has introduced the *Human Rights Act (2004) (ACT)* (“**the Human Rights Act**”), and Victoria has introduced the *Charter of Human Rights and Responsibilities Act (2006) (Vic)* (“**the Charter**”)⁵⁰.
- 12.2 Limited judicial consideration of the Human Rights Act or the Charter has occurred to date. Academic review is also in its early days. There has been no concerted effort to evaluate either piece of legislation in terms of their effectiveness in protecting the rights of children.
- 12.3 Gabrielle McKinnon reviewed initial judicial consideration of the Human Rights Act in her article ‘*The ACT Human Rights Act 2004 – The First Year*’ and stated:
- “The Act could not be said to have been a decisive factor ... and the judgments do not consider its provisions in any great depth. At most, the Act has been used to lend support to a conclusion already reached by other reasoning.”*⁵¹
- 12.4 Our attention has been drawn to the passage of the *Graffiti Prevention Act 2007 (Vic)* (“**Graffiti Act**”) in Victoria which occurred after the enactment of the Charter. The Graffiti Act has significant implications for children and young people. The purpose of the Graffiti Act is to ‘*reduce the incidence of graffiti*’⁵². The Graffiti Act appears to include a number of restrictions upon the civil rights of children and young people (including interference with the presumption of innocence and freedom of movement). On its face, the Graffiti Act appears to operate in a discriminatory manner against children and young people.
- 12.5 The passage of the Graffiti Act does appear to raise questions regarding the effectiveness of the Charter in protecting the human rights of children within the legal system.
- 12.6 Our current view is that further review is required to determine the effectiveness of such mechanisms in protecting the human rights of children.

⁵⁰ The Convention articles 13 to 16 correspond to the Victorian CHRRA Sections 15, 14, 16, 13, 17 respectively.

⁵¹ Gabrielle McKinnon, *The ACT Human Rights Act 2004 – The First Year*, Gabrielle McKinnon Regulatory Institutions Network, ANU available at http://acthra.anu.edu.au/articles/Gabrielle_McKinnon.pdf

⁵² Graffiti Prevention Act 2007 s 1

13 Constitutional Reform

- 13.1 An examination of international experience can broaden our knowledge of possible mechanisms for the protection of the human rights of children. The obligations assumed by states under international law, including the Convention, have increasingly been transformed into constitutional recognition and protection of children's rights⁵³.
- 13.2 The Australian Constitution is silent with respect to children's rights and contains no express reference to an instrument capable of adequately protecting human rights in line with the requirements of international human rights jurisprudence.
- 13.3 South Africa has incorporated extensive children's rights into its Constitution⁵⁴ encompassing children's civil, political, economic, cultural and social rights⁵⁵. Chapter 2 of the Constitution enshrines a Bill of Rights (ss7-39) and section 28 makes specific mention to the rights of children⁵⁶ (including the right to: nationhood; family; health and shelter; protection from harm and exploitative labour; liberty; and due process⁵⁷). The constitution also explicitly adopts the 'best interests' principle⁵⁸ and the right to a basic education⁵⁹.
- 13.4 However it does appear that even the South African experience of recognising children's rights under a Constitution is not sufficient to ensure adequate protection. A balanced and flexible mechanism to allow for the enforcement of those rights is also required⁶⁰.
- 13.5 We do note that the South African experience has given legitimacy to the process of legal recognition of children – as children (or their representatives) are able to commence legal action where there is an apparent breach of the child's rights⁶¹. This type of constitutional reform has provided for children to be treated as 'independent actors', rather than merely 'objects of parental concern'.⁶²

⁵³ J Tobin, Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights, (2005) 21 *South African Journal of Human Rights* 86.

⁵⁴ Constitution of the Republic of South Africa, 1996

⁵⁵ <http://www.childrenslawcentre.org/HowtheBillofRightscanbestprotectandPromotetheRightsofChildrenandYoungPeopleinNorthernIr.htm> (accessed 29/05/09). See also J Tobin, Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights, (2005) 21 *South African Journal of Human Rights* 119; *Minister of Health v Treatment Action Campaign* (2) 2000 (5) SA 721 (CC).

⁵⁶ See also section 9 which states that the government may not unfairly discriminate against people based on a number of factors, including age: Constitution of the Republic of South Africa, 1996, Chapter 2.

⁵⁷ Constitution of the Republic of South Africa, 1996, Chapter 2, Section 23, Subsection 1

⁵⁸ Section 28(2) states: 'A child's best interests are of paramount importance in every matter concerning the child.'

⁵⁹ Constitution of the Republic of South Africa, 1996, Chapter 2, Section 29

⁶⁰ *Minister of Health v Treatment Action Campaign* (2) 2000 (5) SA 721 (CC) para. 78

⁶¹ See J Tobin, Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights, (2005) 21 *South African Journal of Human Rights* 121 and references to the Indian and South African Constitutions.

⁶² Tsepho Mosikatsana, Children's Rights and Family Autonomy In The South African Context: A Comment On Children's Rights Under The Final Constitution *Michigan Journal of Race and Law* 3(2) 341

Conclusion

We thank the Committee for the opportunity to make this submission and conclude by citing the report recently submitted by the Canadian Coalition for the Rights of the Children⁶³ to the UN Human Rights Council for Canada's Universal Periodic Review of its commitment to human rights ("**CCRC Report**"). The CCRC Report called for greater participation from children and young people in the development and implementation of those laws, policies and administrative decisions which impact upon their lives.

It is our view that Australia should also heed this call and ensure that children and young people have a clear voice and role in the development of law, policy and decisions affecting them – including in the development of any processes that emerge from this Consultation.

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63 Canada and the Rights of Children: Submission for Stakeholder Report on Canada: Universal Periodic Review – 4th cycle, February 2009. This report can be found at www.rightsofchildren.ca

Appendix 1

Children Talk About Their Rights

At the Centre, we hear directly from and provide advice to children and young people younger than 18 years of age through our website www.lawstuff.org.au. On this site, we have legal information and referral options on a wide range of legal issues of relevance to children and young people. In addition to this information, we provide a legal advice and information service called LawMail, which allows children to directly ask us questions relating to the law and their rights via email. Their questions are then answered and sent back to the child or young person via email.

A cross-section of LawMail queries from children and youths concerning their general rights, and the ways in which the law may affect their rights, is included below. The names of the children have been altered to protect their privacy but the text of their questions has not been altered.

General rights-related enquires

“how do young peoples rights differ to those of adults in australia?”
Samantha, ACT

“I am a 16yr old and i was interested in my personal rights regarding my parents and there limits towards me. Like telling me what i can and cant do etc.”
Jane, 16, VIC

The Right to Privacy

“Are teachers legally allowed to search you bags, lockers or pockets and are they legally allowed to confiscate things?”
Tom, 14, WA

“A few years ago my parents helped me to open a bank account, and I've kept it because it's easier to use...Recently, I received one of these statements, but I wasn't aware of it. My parents opened it without my knowledge or permission. Is there anything I can do about this?”
Sophia, 17, NT

The Right to an Education

Children and young people often ask about their right to education and related issues.

“I am sixteen. If I wanted to move out of home now how would I stay in school if my parents wouldn't support me?”
Rebecca, 16, NT

“Are my parents allowed to send me to a boarding school without my consent.”
Dave, 14, VIC

CHILD RIGHTS COALITION

Submission to the National Human Rights Coalition

“If a teacher at school confiscates an item such as a scarf or football, how long do they have the right to keep it?”

Colin, NSW

“can my dad make my school tell him about my reports and if i have been away from skool. does my dad have to know what skool i go to and where i live. I don't want my dad to know anything about me”

Eric, 15, VIC

“In WA they are introducing new legislation next year making it compulsory for all High School students to wear a proper uniform with no denim!!! We want to know if it is within our rights to refuse to be told what to wear, as it is our life and our choice!”

Kathryn, 16, WA

“I was just wondering, about leaving school, is it possible/legal for me to leave school now, even without my parents consent? I'm fifteen and 4 months.”

Sascha, 15, NSW

“my friend who is 16 has been living on the streets for quite some time and he hasnt been to highschool since year nine, i think he either left or got expelled and i want him to go to school again. hedid recently apply to go to my school, but was declined beacuse of his past high school record... can my school actually do this”

Chloe, QLD

“Is there anything I can do to make my father pay for my education? He has refused for 2 years now and does not pay for anything.”

Natalie, 18, ACT

“What restrictions must teachers observe with physical contact with students? My teacher has been transferred to a different school, resulting in me probably never seeing her again - I hugged her on her last day. Is this permitted? Also, as she's left my particular school - would it be permitted to add her, as a friend, on Facebook?”

Aaron, 16, NSW

The Right to Family

Issues relating to family are very common. The following highlight that young people want to be involved in decisions relating to their care and protection within the family.

“My mum and dad don't want to live with each other anymore, can I stay with my sister and can I see my Nan?”

Siobhan, 12, VIC

“My mum is with a guy who sexually assaulted my sisters. Is there any way I can get to see her?”

Victor, 15, QLD

CHILD RIGHTS COALITION
Submission to the National Human Rights Coalition

“i\’m \’supposed\’ to visit my dad every second weekend, but i don\’t want to any more. i\’ve tried talking to him, but he says its the law and constantly refers to \’court orders,\’ is it true that i have to see him?”

Kristen, 15, NSW

“I am 13 years old and live with my mum, but want to go and live with my dad. What are my legal rights? Can my mum stop me?”

Amelia, 14, VIC

“My younger brother is always p-ssing me off but my parents never do anything. They always act like nothing is wrong. Is there something I can do to force them to do something?”

Jason, 14, VIC

“My Girlfriend and I are both 16, and therefore can legally have sex...I was just wondering if her parents actually have any legal say in whether or not we have sex”

Mark, 16, NSW

“I wish to change my last name to...the last name of my step-father and mother however my biological father won’t give consent...this means a lot to me, my step father has always been there through thick and thin and it would mean so much to both of us if I were able to take on his name”

Lucia, 15, QLD

“i would like to know if parents can keep you from going out...they dont let me go over to my friends house...i feel like i have absoultly no freedom. can they do this to me?”

Sam, 15, QLD

The Right to Safety and Protection

Children have a right to feel safe and protected from harm. The following highlight that in practice this right is not respected for many children and young people.

“I have run away from home because of my abusive family and am living with my grandmother. I have just turned 14. I need to know can I be forced to return to this terrible place.”

Kylie, 14, NSW

“My friend was assaulted by her boyfriend and made a statement to police, but doesn’t want him charged, just a warning or something he is 19. Police keep telling my friend that he will be charged anyway because it is domestic violence is this true?”

Alice, NSW

CHILD RIGHTS COALITION

Submission to the National Human Rights Coalition

"I'm 15 and my little sis is 5 at the moment. We have abusive parents and so I was wondering what the legal age is for me to take custody over my sister."

Mel, 15, VIC

"...help me get an AVO off me and my boyfriend. My boyfriend has not been abusive in any way. My step-father...placed an AVO on my boyfriend for the following reasons which i find unappropriate. -My stepfather dislikes my boyfriend...[and]... is a policeman and has the power to do so. -My boyfriend is two years older"

Aleta, 15, NSW

"Ever since after breaking up with my boyfriend, he has tried to make my life hell. He has made serious threats to me at home and at school. He has sent his friends into my work to watch me and try and intimidate me. What action is likely to be taken by the school? (i go to a private school) And what other actions can be taken?"

Emma, 17, NSW

"My boyfriend got me pregnant and im only 14. He strapped me down by my wrists and ankles and forced me to have sex with him, can i take him to court and make him pay for all the damage he has done to me?"

Abby, 14, WA

"When i was travelling home from school one day a boy punched me in the head...i am wondering wether i can get a restraining order against him"

Gemma, 17, VIC

"I'd like to know about child abuse and what it is. Are my parents allowed to hit me even if it is a slap on the arm. Are they allowed to grab and arm forcibly and abuse them constantly putting them down? Do they have any right at all to touch us in an aggressive manner?"

Kate, VIC

Rights at Work

As young people enter the workforce, they want to know their rights in the workplace.

"I just wanted to know what's the legal age to work part-time? I am 13 and a half and I would really like to get a part time job in a store locally."

Sara, 13, NSW

"my dad is threatening to contact my work to tell them that i can't work weekdays because of school, although i am managing all my school work fine, is it MY decision when and how much i work? Can my dad stop me from working?"

Kurt, 14, NSW

CHILD RIGHTS COALITION
Submission to the National Human Rights Coalition

“I am being harassed at work by other team members...I have complained to my boss but so far nothing has been done to stop it and I dont want to have to change jobs...Do I have to put up with it? what else can I do?”

Gavin, 18, NSW

“...my boss takes money out of my pay if I sell someone something at the wrong price accidentally. What can I do? Is he allowed to do this?”

Annabella, 14, ACT

“When can someone legally work during the day and the night?”

Charlie, 14, QLD

“i have recently been let go from my job i am 14 years old and was wondering if i could sue them for unfair dismissal”

Oliver, 14, QLD

“I am a casual employee at my local supermarket. Ususally I am offered a shift at a specified time. However, if the shift gets cancelled or changed without anyone telling me before i arrive, do i have the right to be paid a minimum of three hours?”

Matt, VIC

“Can my Mum stop me from spending my own money that i made from a job on anything I want?”

Ben, 16, ACT

Appendix 2

SIGNIFICANT BREACHES OF CHILDREN'S RIGHTS IN AUSTRALIA

1.1 Stolen Generation

In the late nineteenth century, Australian governments developed policies of removing indigenous children from their families. This practice, aimed at 'integrating' these children into white society and 'merging' people of mixed-indigenous descent into the non-indigenous population, continued throughout the majority of the twentieth century. It represents one of the most significant failures in recent Australian history to protect the rights of the child. The devastating impact of these policies has been well documented⁶⁴. Despite the documentation of these child rights abuses, Governments have still been slow to acknowledge the damage caused. The 2008 Apology by the Federal Government came only after a change of government and the expression of considerable public disquiet.

The application of human rights principles played a key role in the recognition of these historical policies as profoundly discriminatory and lacking in basic respect for human dignity.

However the development of appropriate political and legal responses was undermined by the lack of an effective national human rights policy framework with protections and redress for rights abuses. We failed to protect these children and only belatedly acknowledged the pain and suffering which resulted from this failure.

1.2 Children in Immigration Detention

In 2004, the Australian Human Rights Commission ("**the Commission**") (then known as the Human Rights and Equal Opportunities Commission) published "*A last resort?*" which focused upon children in immigration detention. The report found that Australia's mandatory immigration detention system was 'fundamentally inconsistent with the Convention of the Rights of the Child'⁶⁵. The Convention requires the detention of children to be a measure of last resort for the shortest possible period. These rights extend to children in Australia whether they are citizens or not.

Australia's detention laws, and the administration of these laws by the Minister and the Department, were in breach of articles 3(1)⁶⁶, 20(1),⁶⁷ 37(b) and 37(d)⁶⁸ of the Convention as well as articles 9(1) and 9(4)⁶⁹ of the International Covenant on Civil and Political Rights ("**ICCPR**"). The combination of Australia's punitive immigration policy and limited judicial review of detention⁷⁰ meant that Australia's immigration detention regime breached children's rights.

⁶⁴ HREOC, 'Bringing Them Home' (1997) National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families

⁶⁵ HREOC, Full Report, Last Resort? (2004) at 849 (Major Finding 1):

http://www.humanrights.gov.au/human_rights/children_detention_report/

⁶⁶ Article 3(1) - the best interests of child must be a primary consideration in all actions concerning children.

⁶⁷ Article 20(1) - unaccompanied children are entitled to special protection.

⁶⁸ Article 37(d) - children are entitled to prompt and effective review of the legality of detention.

⁶⁹ Article 37(b) of the Convention; article 9(1) of the ICCPR - children should not be arbitrarily detained.

⁷⁰ HREOC, Full Report, Last Resort? (2004) at 10

These policies and laws put children in detention ‘*at high risk of serious mental harm*’. It was asserted that the government’s failure to address this issue ‘*amounted to cruel, inhuman and degrading treatment of those children*’ in refugee detention centres.⁷¹ The Report also found that ‘*the failure to make routine assessments regarding the mental health of children on arrival in order to ensure appropriate services were provided (e.g. for torture and trauma assessments)*’ was inconsistent with the United Nations (UN) Rules for the Protection of Juveniles Deprived of their Liberty.⁷²

In 2005, the administrative arrangements were changed to better reflect the principle that the detention of children was a ‘measure of last resort’. However the laws providing for detention remained in place.

1.3 Children in Care

Over the past 10 years, nearly every jurisdiction in Australia has held an inquiry into its child protection system⁷³. In addition, two national inquiries (and subsequent reports) into children in institutional or out-of-home care were conducted in 2004 and 2005⁷⁴.

The majority of the state-based inquiries were initiated in response to instances of serious neglect, abuse or death of a child or number of children in care. The national inquiries confirmed that there were incidents of child abuse and neglect in each state and territory in Australia and recommended a review of the existing institutional and out-of-home care systems. The *Forgotten Australians* report, for example, is an extensive review on the history of children in the welfare system in Australia and was instigated as a result of a number of complaints from people who were fostered or put into religious institutions when they were young. The report aimed to “*recognise and acknowledge the painful and haunting experiences and memories*” of children in care⁷⁵.

These reports are highly critical of the policies and procedures of the state and territory departments overseeing the care and protection of children and highlight the problems which arise when responsibility for a child’s welfare or problem-solving within a system can be shifted between governmental agencies. The reports suggested that collective action as a nation was required to tackle the abuse of children.

The Federal Government has recently announced the development of a National Child Protection Framework. The challenge facing all child protection systems in Australia is sufficiently resourcing flexible prevention and early intervention services so as to reduce the numbers of children and young people who require the state to intervene and keep them safe.

The existing ‘child protection’ systems still lack effective mechanisms to adequately provide for the enforcement of the rights of children – most noticeably with no appropriate provision for the participation of children themselves.

71 HREOC, Full Report, Last Resort? (2004) at 850 (Major Finding 2).

72 HREOC, Full Report, Last Resort? (2004) at 854.

73 2006 NSW Ombudsman’s report, 2007 Wood Inquiry (NSW), Little Children are Sacred Report (NT), Layton Report (SA), Mullighan Inquiry (SA), Gordon Inquiry (WA), Crime and Misconduct Commission Protecting Children Report (QLD)

74 *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children* (2004) and *Protecting vulnerable children: A national challenge* (2005)

75 *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children* (2004) at 6.

1.4 Deaths in Custody

In 1991 the Royal Commission into Aboriginal Deaths in Custody (“**Royal Commission**”) reported that juvenile deaths in custody are part of a larger custodial picture in which Aboriginal youth is “*over-represented at every level of the juvenile justice system throughout Australia, from the point of apprehension through the various pre-trial processes to the ultimate stage of adjudication and dispositions*”⁷⁶. The Royal Commission highlighted Indigenous over-representation in custody as “a major reason for Aboriginal deaths in custody”⁷⁷. It also noted that the significant inequality in sentencing reflected the jurisdiction in which a young person was tried⁷⁸.

Research has consistently found that offending from a young age enhances the likelihood of ongoing contact with the criminal justice system⁷⁹. This gives rise to a further issue recognised as systematic of the juvenile and criminal justice system: greater levels of offending at a young age translate to increased contact with police into adulthood.

The report also highlighted the unacceptable situation of young people being processed by an adult criminal justice system and dying whilst incarcerated in adult prisons. One young person’s experience was used to show the harshness of the system in his treatment:

*“While still a juvenile, his first five convictions were recorded as being in an adult court. On his first offence he was sentenced to 14 days in prison for receiving stolen property, and a little later he was ordered three months imprisonment for disorderly behaviour. As I point out in my report of this case, [M] was a juvenile and should have been dealt with in a Juvenile Court. A Juvenile Court could not have ordered imprisonment.”*⁸⁰

Although the rates of death in custody have been falling in recent years, issues remain concerning the over-representation of Indigenous youths and the participation by juveniles in the adult criminal justice system.

Our existing legal system remains profoundly ill-equipped to deal with the fundamental challenges to the legal system itself that this systemic failure of justice for Indigenous children and young people poses.

76 Report on the Royal Commission into Aboriginal Deaths in Custody at 14.2.2

77 Report on the Royal Commission into Aboriginal Deaths in Custody at 6

78 Report on the Royal Commission into Aboriginal Deaths in Custody at 14.3.46

79 Deaths in Custody in Australia Report at 31

80 Report on the Royal Commission into Aboriginal Deaths in Custody at 14.4.10

1.5 The Basic Survival Rights of Indigenous Children

The human rights tragedy that is the non-existence of basic survival rights for many indigenous children has been well documented.

An article in the *Indigenous Law Bulletin* described the conditions in the Aboriginal community of One Mile Dam near Darwin's central business district⁸¹:

'Our community is in a state of profound neglect. Fifty permanent residents to live in six tin dwellings with no fans. They are unbearably hot in the wet season causing many residents sleep outside. Gaps in the floors and ceilings allow rats and insects to enter creating dangerous power problems with chewed cables. Electric shocks are an ongoing problem. The dwellings have no cooking facilities. All residents share two ablution blocks (when they are working)...The walk to use them is unacceptable for kids, sick and disabled people. Up to 20 people live in a wire mesh shelter. A number of family groups also camp in tents and under tarps in and around the One Mile Dam lease area.'

These living conditions affect the health and wellbeing of residents, and contribute to the significantly higher infant mortality rates and standardised mortality ratios of Indigenous Australians compared with the rest of the population⁸².

The Select Committee on Regional and Remote Indigenous Committees examined the impact of inadequate housing, education and health systems on child health and development⁸³. It is difficult for children to go to school and learn if they are unable to get a good night's sleep in an overcrowded house. Children in these environments live with poverty, unhygienic conditions and poor quality housing and food.

81 Smith, 'National Shame Job: Inner City Aboriginal Community Earmarked for Development for the Elite, while Residents Fight for Basic Human Rights', *Indigenous Law Bulletin*, January 2006 Volume 6 Issue 16

82 Mackean and Watson, 'Indigenous Sovereignty and Indigenous Health', [2004] *Indigenous Law Bulletin* 75

83 Select Committee on Regional and Remote Indigenous Committees, First Report 2008

1.6 Mandatory Sentencing and Indigenous Children in the Justice System

Mandatory sentencing refers to the practice of parliament setting a fixed penalty for the commission of a criminal offence. It generally involves the imposition of a significant minimum penalty, usually a jail sentence, with penalties escalating for subsequent offences⁸⁴. Mandatory sentencing effectively removes the court's ability to take into consideration discretionary factors in determining punishment. For example, during the Northern Territory mandatory sentencing regime, young people were jailed for petty crimes which involved the theft of goods of less than \$5 in value⁸⁵.

Mandatory sentencing or more colloquially the 'three strikes and you're out' sentencing law, was introduced in the Northern Territory⁸⁶ and Western Australia⁸⁷ in the late 1990's. In 2001, the newly elected Labor government in the Northern Territory abolished mandatory sentencing. In Western Australia mandatory sentencing still exists. In Western Australia, the mandatory sentencing laws provide for a 12 month sentence in a detention facility on the third and subsequent offences of home burglary. Aboriginal juveniles account for 81% of all cases sentenced under these laws compared to 31% of all offenders in the Children's Court.⁸⁸ While these laws alone do not account for the over-representation of indigenous youth in the juvenile justice system, it is recognised that the laws are inappropriate and may unfairly target Aboriginal youth.⁸⁹

Indigenous young people are overrepresented in Australia's youth justice systems. While indigenous youth make up only 4% of Australians aged 10–17, they represent 34.7% of young people in court appearances and 57% of young people in detention.⁹⁰

The Social Justice Commissioner has suggested that Governments and Aboriginal organisations 'negotiate together to devise strategies ... to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems'.⁹¹

⁸⁴ Roche, D., Trends and Issues in Criminal Justice, *Australian Institute of Criminology*, December 1999.

⁸⁵ Seen and Heard, above n 14.

⁸⁶ Under 1997 amendments to the *Sentencing Act 1995* (NT)

⁸⁷ Under 1996 amendments to the *Criminal Code* (WA)

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Anna Stewart, Griffith University, Family, Youth Conferences, and Indigenous Over-representation: Micro Simulation and Case Study.

⁹¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission (AHRC), Submission to the United Nations Committee on the Rights of the Child for their day of General Discussion on the rights of Indigenous Children, Issue 3: Law and public order, including juvenile justice. Please refer to http://www.hreoc.gov.au/Social_Justice/croc/sub3.htm