Examining The Legal Landscape for Street Involved Children and Youth:

Australia 2015

By Pro Bono Volunteers From

Baker & McKenzie

and

Accenture

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# Table of contents

**Contributors** .......................................................................................................................... 1  
**A Legal Analysis of the Issues Facing Street Youth** ........................................................................... 2  
**Human Rights** ............................................................................................................................... 2  
**Child Welfare in Australia** .............................................................................................................. 9  
**Criminalisation of homelessness** ..................................................................................................... 24  
**Education and employment** .......................................................................................................... 35  
**Cross Borders and Conflict** ............................................................................................................ 43  
**Minority Populations** ..................................................................................................................... 45  
**Appendix A - Summary of relevant legislation** ................................................................................. 57  
**Appendix B - Mandatory Reporting Requirements** ............................................................................ 60  
**Appendix C: An analysis of laws relating to Cross Borders and Conflict** .......................................... 65
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A Legal Analysis of the Issues Facing Street Youth

Human Rights

1. Executive Summary

1.1 The Australian legal framework does not have a strong explicit human rights basis for youth and children, with neither a constitutional source of rights nor a federal Bill of Rights.

(a) Two jurisdictions, Victoria and the Australian Capital Territory, have passed human rights legislation which affords children a right to protection by virtue of being a child. However, both Acts are dialogue-based and the rights provided can be overridden.

(b) International law is a strong source of human rights, but ratified conventions must be incorporated via domestic legislation before they have any legal effect. Thus, conventions may not provide any enforceable domestic legal rights.

1.2 Children have an independent legal status under Australian law, and reach majority at the age of 18. Children also have specific rights within the criminal justice system.

1.3 Under Australian family law, in all decisions made regarding a child, the court must consider the best interests of the child as the paramount consideration. Parents have an obligation to provide for the maintenance, protection, and education of their child.

1.4 Social security is accessible for young people from the age of 16 onwards, where they are studying full-time, working, looking for full-time work, have an illness or disability, or carers responsibilities.

1.5 The Australian treatment of children and youth from minority groups remains highly politically contentious. This is particularly so in relation to the treatment of children from Aboriginal and Torres Strait Islander backgrounds, and children who are seeking asylum or are in immigration detention.

2. General Legal Structure

2.1 The Constitution of Australia is largely concerned with the federal framework and political process, and unlike similar documents in other jurisdictions, is not a strong source of express rights for citizens.

(a) Some members of the judiciary have argued that, in interpreting ambiguity in the Constitution, the Court should “adopt that meaning which conforms to the principles of fundamental human rights rather than an interpretation which would involve a departure from such rights.”

(b) However, this approach is not currently favoured, and applies only to interpreting ambiguities in the Constitution - not to interpreting legislation generally.

2.2 There is also no federal ‘Bill of Rights’ or other such document which specifically sets up rights for young people. Nor is there rights based legislation in most States of Australia.

2.3 However, in 1990, Australia ratified the UN Convention on the Rights of the Child (“CROC”). Whilst Australia has ratified the convention, it has not been directly incorporated into domestic law. This means that national laws will take precedence over the convention where there is any conflict.

2.4 The High Court has stated that decision makers have an obligation to ensure that domestic legislation is interpreted in a manner consistent with International Treaties ratified by Australia. In effect, this means that treaties such as the CROC are an indirect source of rights.

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1 Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513, 657. (some judges = Kirby J)
2 Minister for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273
2.5 The Australian Human Rights Commission (AHRC) was established to monitor Human Rights in Australia, including overseeing Australia’s commitment to the CROC. In 2013, Australia appointed the first National Children’s Commissioner to the AHRC to advocate for the rights of Children and Young People in Australia and monitor how Australia meets its international human rights obligations to children and young people. The purpose of appointing a Commissioner was to institute a dedicated advocate focused on the human rights of children and young people at the national level. The powers of the Commissioner are focused on advocacy and monitoring, but do not extend to the power to take action on behalf of young people to enforce their rights.

2.6 However, while one of the National Children’s Commissioner’s duties is to look at “laws, policies and programs to ensure they protect and uphold the rights of children and young people”, the National Children’s Commissioner stated in her 2014 report that the existence of state/territory-based Children’s Commissioners and Guardians “explains why my functions to examine laws, and compel the production of documents, are limited to the Commonwealth level”. Accordingly, while similar positions exist at the state/territory level, Australia does not have an office responsible for comparing the various legislative regimes that exist throughout Australia and ensuring that all Australian children have the benefit of the same legal protections.

2.7 There are in fact very few laws in Australia which specifically aim to enforce and protect the human rights of children. This means that there are gaps in the system which create disadvantage for particular groups of children and young people, particularly refugees in immigration detention, indigenous people and homeless people.

2.8 These gaps are especially obvious when you consider that there are no specific enforceable remedies a child/young person/parent or guardian can seek if that child’s rights under the CROC are breached.

2.9 Legal rights that are specifically enshrined in legislation are scattered through a variety of both State and Federal laws in areas such as discrimination, education, care and protection, family law and juvenile justice and often vary or even conflict across different jurisdictions.

2.10 International law provides a strong source of rights for young people and children. Various international conventions can be extended to “youth populations” or “children”, including:

(a) International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”);
(b) International Covenant on Economic, Social and Cultural Rights (“ICESCR”);
(c) International Covenant on Civil and Political Rights (“ICCPR”);
(d) Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”);
(e) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”);
(f) Convention on the Rights of the Child (“CROC”); and
(g) Convention on the Rights of Persons with Disabilities (“CRPD”).

2.11 Other than the CROC, international conventions do not target the specific vulnerability of youth.

3. Human rights Legislation in Select Jurisdictions

3.1 Although there is no federal Bill of Rights, two jurisdictions - Victoria and the ACT - have introduced human rights legislation.5

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3.2 Both acts establish that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination. The family unit is recognised as the fundamental group unit of society and is entitled to protection by society and the State. A child also has individual rights to peaceful assembly and association, participation in public affairs, freedom of expression, and to have their privacy protected.

(a) Legislators are required to draft in accordance with these rights. Supreme Courts can declare that particular laws are not consistent with a human right. For example:

(i) A child’s right to protection has been considered as relevant to the granting of bail for a parent, where a newborn and a two year old child would otherwise be left without proper care.

(ii) The failure to give proper consideration to the protection of the family group in a household and the best interests of any child affected by the decision is sufficient to render the decision unlawful according to the Charter.

(b) Public authorities must act consistently with conferred rights. It is unlawful to act in a way incompatible with a human right, or fail to give it proper consideration.

(c) Where public authorities do not act consistently with rights, the victim can commence court proceedings and seek relief.

3.3 However, this framework remains problematic at the enforcement level.

(a) Failure to follow the scrutiny process does not affect a law’s validity. Where laws cannot be interpreted or applied in a way consistent with a human right, that right can simply be overridden.

(b) A declaration of incompatibility by the Supreme Court does not affect the validity or enforcement of the law, or establish rights for a victim.

(c) A person’s ability to enforce his/her rights may still be limited based on context, taking into account the nature of the affected right, the importance of the purpose for the limitation, and the nature and extent of the limitation, the relationship between the limitation and its purpose, and whether a less restrictive means of achieving this purpose is reasonably available.

4. Legal Identity, Status and Citizenship

4.1 In Australia, children are not treated as chattel. This concept has evolved through the common law since Roman times when a father had absolute control over his children. The English House of Lords case of

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4 Victorian Charter s 17(2); ACT Act s 11(2).
5 Ibid s 17(1), 11(1).
6 Victorian Charter ss 16, 18, 15, 13; ACT Act ss 15, 17, 16, 12.
7 Victorian Charter s 28
8 ACT Act s 32(2)
9 Aldridge v R [2011] ACTCA 20
10 Burgess v Director of Housing [2014] VSC 648, [221] (unlawful under s 38 of the Charter)
11 ACT Act s 40B(1)
12 ACT Act s 40C; Victorian Charter s 38(1), 39(1)
13 Victorian Charter s 29; Victorian Charter s 31(1)
14 ACT Act s 40B(2)
15 ACT Act s 32(a), (b); Victorian Charter s 32(3), 36(5)
16 ACT Act s 28; Victorian Charter s 7(2)
Gillick ([Gillick v West Norfolk Health Authority] [1986] AC 112) in 1985 found that children are not incompetent and powerless beings. This common law concept is applicable in Australia.

4.2 Children’s general legal status and rights in Australia can be summarised as follows:

(a) The age of majority in Australia is 18 at which time people can purchase alcohol and tobacco, vote in all levels of elections, gamble, marry and enter into legally binding contracts.

(b) The law of consent dictates when a child can provide informed consent to sexual intercourse and varies between States, but is generally 16 years of age.

(c) There are specific laws in each State governing how long a child must remain in full time education (in most States, this ranges from 16 to 17 years of age) and how old a child must be to be employed (mostly 15).

(d) A child must be given an independent legal identity at birth. In most states of Australia, a parent must register a child’s birth within 60 days. Minors can apply to the Registrar for a copy of their birth certificate at any age.

5. Legal Rights in the Criminal Justice System

5.1 In the criminal justice system, a child will be treated differently from adults and will be subject to differing procedures and protections. Criminal law is dealt with by the States so the provisions vary slightly between States. Generally, each state provides for an alternative process for young offenders. For example, in New South Wales (Australia’s largest State by population), the Young Offenders Act 1997 establishes a system of warnings, cautions and youth justice conferences. This is in recognition that early diversionary strategies are valuable in avoiding criminalization of a young person.

5.2 Children under 10 years of age cannot be charged with a criminal offence. Between 10 and 14 years of age, a child can be charged but the prosecution must prove that the child knew that what they did was seriously wrong, and that the child fully understood consequences of the criminal action. Young people over 14 are seen as being fully criminally responsible for their actions; however they will be dealt with under a separate system. In NSW and Victoria, the Children’s Court deals with most offences committed by young people. If the alleged perpetrator was under 18 years of age at the time of the offence, the matter will usually go before the Children’s Court.

6. Children under Australian Family Law

6.1 Under art 7(1) of the CROC, children have a right to know and, so far as possible, be cared for by their parents. Under article 16(1), no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or home. These international commitments are reflected in the objects of the Family Law Act 1975, which references these rights in noting the objects of the Act.17

6.2 In all decisions made regarding a child, the court must consider the best interests of the child as the paramount consideration.18

6.3 Parents are obliged to provide the maintenance, protection, and education of their child.19

6.4 Parental powers decrease as a child grows older and last only for so long as needed to protect the child.20 Children may leave home whenever they have sufficient intelligence or understanding to make a

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17 Family Law Act 1975 (Cth) s 60B
18 See e.g. FLA s 60CA re parenting orders
19 Marion’s Case (1992) 175 CLR 218; Gillick [1986] AC 112; FLA s 66C
20 Marion’s case, Gillick
decision on this matter. Older case law suggests that children as young as 14 years old may be judged to meet this standard.

7. **Right to an Adequate Standard of Living**

7.1 Everyone has the right to an adequate standard of living, including adequate housing, food, and water. As an ICESCR signatory, Australia has recognised this international law right.

7.2 This should not be seen merely as a right to have a roof over one’s head, but “the right to live somewhere in security, peace and dignity” - i.e. not just to housing but to “adequate” housing.

7.3 Under Australian domestic legislation, a person is taken to have inadequate access to safe and secure housing if the only housing to which he/she has access:

(a) damages, or is likely to damage, the person’s health; or
(b) threatens the person’s safety; or
(c) marginalises the person through failing to provide access to:
   (i) adequate personal amenities; or
   (ii) the economic and social supports that a home normally affords; or
(d) places the person in circumstances which threaten or adversely affect the adequacy, safety, security or affordability of that housing.

7.4 Notably, the Australian Bureau of Statistics (ABS) has adopted the definition of homelessness proposed by Chamberlain and MacKenzie: i.e. that homelessness is best defined in relation to common community standards regarding the minimum accommodation necessary to live according to the ‘conventions of community life’.

   (a) This expands the concept of homelessness to capture primary, secondary, as well as tertiary homelessness.

   (b) This definition of homelessness covers people sleeping rough, people frequently moving from one temporary shelter to another (e.g. couch surfing), and people staying in accommodation that falls below minimum community standards - such as boarding houses and caravan parks.

8. **Right to social security**

8.1 Under international law, everyone has a right to social security, including social insurance.

(a) Lynch and Cole speculate that this right to social security may also constitute a component of the right to life, liberty and security of the person.

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21 Gillick principle - see Halsbury’s
22 See e.g. R v D [1984] AC 778 (14 years); People v Edge [1943] IR 115 (14 years and six months); W v W (1984) 2 SR (WA) 111 (15 years and six months).
23 ICESCR
24 UN comment 4 re adequate housing. [7]
26 SAAA s 4(2)
28 Refers to people without conventional accommodation, such as people living in improvised dwellings, on the streets, sleeping in parks, squatting in derelict buildings, or using cars or railway carriages for temporary shelter – Chamberlain & MacKenzie, 1992
30 ICESCR art 9
Similarly, the Canadian Supreme Court has held that a “minimum level of welfare is so closely connected to issues relating to one’s basic health (or security of the person), and potentially even to one’s survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it.”

8.2 In Australia, the Social Security Act 1991 (Cth) provides that social security is accessible for young people from the age of 16 onwards, where they are studying full-time, working full-time, or looking for full-time work.

(a) Recent data indicates that the vast majority of homeless youth receive some form of income support arrangements. However, 9% of homeless youth were not receiving any income at all at the time of the survey.

8.3 The Australian social security regime does not confer an enforceable ‘right’ to social security, but a benefit or privilege that can be revoked at the Government’s discretion.

(a) Thus, street youth may encounter a number of issues in enforcing their right to social security. For further discussion, please see the chapter entitled ‘Child Welfare’.

9. Children from Aboriginal and Torres Strait Islander and asylum-seeking backgrounds: political issues

9.1 The treatment of children and youth from minority groups remains highly politically controversial within Australia and in the international community more broadly.

9.2 The UN Committee on the Rights of the Child has been critical of Australia on this point, citing concern with:

(a) “the serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children, including in terms of provision of and accessibility to basic services and significant overrepresentation in the criminal justice system and in out-of-home care”;
(b) the fact that the “principle of the best interests of the child is not widely known, appropriately integrated and consistently applied,” and especially concerning “asylum-seeking, refugee and/or immigration detention situations”; and
(c) the mandatory detention of asylum-seeking children, without time limits and judicial review, and the best interests of the child “not being the primary consideration in asylum and refugee determinations”.

9.3 The Forgotten Children, the recently released report from the National Inquiry into Children in Immigration Detention, has also proven politically contentious. The report argues that these children suffer from significantly higher rates of mental health disorders; have their right to education denied; that children born in detention may be stateless; that children with physical and mental disabilities have also been detained; and that children detained on Nauru are suffering from “extreme levels of distress.” For further information, please see the section entitled ‘Minority Populations’.

32 Gosselin (2002) 221 DLR (4th) 257, [358]
33 The Costs of Youth Homelessness in Australia Survey - Wave 1 (Snapshot Report 1)
34 Lynch, Cole, pg 21; Green v Daniëls, 469.
35 CROC Committee Comment 4 re Aus report, 28 Aug 2012, [29-30], [31-32], [80]
10. **Conclusion: street youth in the Australian legal framework**

10.1 Recent data on Australian homeless youth reinforces that early experiences of homelessness and life on the streets as a minor is often linked with long periods of adult homelessness.\(^{37}\) Disrupting this cycle earlier in life is key to ending the cycle of homelessness and poverty, preventing it progressing to the next generation of youth.

10.2 Studies suggest that rights-based approaches to addressing homelessness can produce very positive outcomes - not only in the empowerment and successful housing of the homeless people enforcing their rights, but also in the delivery of assistance services to these clients.\(^ {38}\)

10.3 The legal framework introduced above establishes a number of rights and benefits for youth and minors, particularly in Victoria and the ACT where children’s rights are expressly recognised through human rights legislation.

10.4 However, the position of street youth within this framework remains problematic in a number of ways. The following chapters of this report will outline the specific legal position of street youth in five key areas; child welfare, criminalisation, education and employment, cross borders and conflict and minority populations.

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\(^{37}\) The cost of youth homelessness in Australia study, snapshot report 1, Feb 2015: pg 7

Child Welfare in Australia

1. Legal protections for children who have been victims of abuse, neglect or abandonment

1.1 Legislative framework

The laws affecting children who have been victims of abuse, neglect or abandonment are largely the individual responsibility of the six states and two territories of Australia. This section primarily focuses on the legal protections found in the key pieces of child protection legislation which exist in each state/territory, with subsection No. 3 providing an overview of that legislation.

An absence of national laws has resulted in a fragmented approach to child protection in Australia. Individual state/territory responsibility has resulted in differences in the level of protection afforded to young people across Australia, lack of coordination in planning and implementation and lack of information sharing and innovation.

1.2 National Framework for Protecting Australia’s Children


The Framework proposes adopting a “public health model” to promote the safety and wellbeing of children. The focus of the Framework is on implementing universal initiatives to assist all families and children to prevent abuse and neglect occurring in the first place and then only providing early intervention or targeted programs for vulnerable or “at-risk” families and children. According to the Framework, it is only when these measures fail that the legislative framework should come into play.

1.3 Mandatory Reporting

One form of early intervention that is entrenched in Australia’s child protection legislation is mandatory reporting. In general, mandatory reporting laws place defined, obligatory duties on designated persons to provide information on children who may be or are at risk of experiencing some form of harm or disturbance to their development and transition into adulthood.

All Australian state and territory jurisdictions have enacted mandatory reporting laws, however these laws vary significantly in terms of:

- who has to report;
- the circumstances in which a report should be made;
- the type of harm that has to be reported by each of the designated mandatory reporters; and
- the penalties for non-compliance.

39 See Children and Young People Act 2008 (ACT), s 356; Children and Young Persons (Care and Protection) Act 1998 (NSW), ss 23 and 27; Care and Protection of Children Act 2007 (NT), ss 15, 16 and 26; Child Protection Act 1999 (Qld) s 9, ss 13a and 13b, s 148; Education (General Provisions) Act 2006 (Qld); Children’s Protection Act 1993 (SA), ss 6, 10 and 11; Children, Young Persons and Their Families Act 1997 (Tas), ss 3, 4 and 14; Children, Youth and Families Act 2005 (Vic), ss 182(1)(a)-(e), 184 and 162(c)-(d); Children and Community Services Act 2004 (WA) and Family Court Act 1997 (WA).
As a form of early intervention, mandatory reporting laws may provide some protections to street-involved children and youth who are at risk of homelessness. This may come in the form of preventative protection (as abuse, neglect or harm could be precursors to youth homelessness) and remedial protection (as substantiated reports of harm may lead to social support/welfare being provided to the child and/or the child’s family). However, the level of protection that mandatory reporting laws provide may, in practice, vary greatly depending on the legislative formulation. Some of the differences between state/territory formulations are considered below. A summary of all state laws is included in Appendix A.

(a) **Who has to report?**

Mandatory reporting laws require individuals outside of the child or young person’s family to report suspected and actual cases of child abuse, neglect or harm. These individuals are granted confidentiality and immunity from liability when a report is made in good faith.\(^{40}\) In most jurisdictions the class of persons required to report is quite broad, and usually include classes of persons who are likely to work with children and young persons in a professional capacity. However, the groups do vary between different states.

The broadest coverage is contained in the Northern Territory legislation, which requires any person to report when there is a belief on reasonable grounds that a child has suffered or is likely to suffer harm or exploitation as a result of physical abuse, sexual abuse, emotional/psychological abuse, neglect or exposure to physical violence. At the other end of the spectrum, the Western Australian legislation focuses mandatory reporting responsibilities on registered medical professionals, teachers, police officers, court personnel and family counsellors.

At the Commonwealth level, the Family Law Act 1975 bolsters state and territory mandatory reporting laws by introducing a mandatory reporting duty on court personnel such as dispute resolution practitioners, counsellors, registrars of the Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia, who have reasonable grounds for suspecting actual or potential child abuse to a relevant child welfare authority.

(b) **Activation of the Mandatory Reporting Duty**

The legislation in each jurisdiction differs in relation to the state of mind a mandatory reporter must have before the duty to report is activated. Most jurisdictions either use ‘belief on reasonable grounds’ or ‘suspect on reasonable grounds’ to activate the mandatory reporting duty, with the former requiring a higher degree of certainty. At a practical level, state and territory governments have developed training programs for mandatory reporters to help those reporters identify and determine when a report should be made.

The legislation in each jurisdiction also differ in relation to the type of harm that must be reported, and the extent of harm that must be present before a report is mandatory. In some states/territories, it is mandatory to report in circumstances of physical, sexual, emotional abuse or neglect. In others, the duty is only activated in relation to certain forms of abuse. For example, Western Australia only requires certain mandatory reporters to report sexual abuse (in the case of doctors, nurses and midwives, teachers and police officers), and requires other mandatory reporters to report sexual abuse or physical abuse (in the case of court personnel and certain classes of people likely to be involved in family court proceedings).

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Notably, the mandatory reporting requirement in New South Wales ("NSW") is only activated in relation to children aged 15 years or under, given the definition of "child" in the Children and Young Persons (Care and Protection) Act 1998.41

(c) Enforcement of the Mandatory Reporting Duty

With the exception of NSW, all jurisdictions have penalties for non-compliance with the aim of encouraging reporting.42

The penalties for non-compliance differ greatly between jurisdictions. For example, the Northern Territory imposes a maximum penalty of 200 penalty units ($26,000) while Victoria imposes a maximum penalty of 10 penalty units ($1,408). The Australian Capital Territory combines a maximum penalty of 50 penalty units and imprisonment of 6 months.

It is not clear whether, or the extent to which, these differences make mandatory reporting more or less effective in practice. However, these differences could potentially have an effect on both the quantity and quality of reports made, especially if there is a lack of appropriate reporter training.

(d) Criticisms of Mandatory Reporting

There appears to be general consensus that mandatory reporting is relevant and required. The Wood Inquiry in NSW found that mandatory reporting encourages the timely sharing of information, interagency collaboration, and increased awareness among professionals.43 Based on empirical evidence, it has also been concluded that mandatory reporting promotes beneficial reporting behaviour and outcomes for children who are suffering abuse in Australia.44 However, one primary criticism is if the scope of mandatory reporting is cast too wide (i.e., a broad class of mandatory reporters, broad situational and temporal scope and forms of harm), this will cause unnecessary reports to child welfare agencies for minor incidents. In turn, this will overburden the child protection system and child welfare agencies.

Although mandatory reporting is an early intervention mechanism, some critics believe it sits paradoxically in a landscape where child protection services can be considered as a residual approach to social welfare, where child protection services are only triggered when an individual believes or suspects that a child or young person has experienced, or is at significant risk of harm.45 Indeed, there have been inquiries that suggest failures in child protection services are correlated with issues such as rising demand on child protection services where staff are ill-equipped to deal with the rise in reports and inadequate and untimely intervention.46

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41 Section 3.
42 Originally, NSW did have a penalty provision (a maximum penalty of 200 penalty units or $22,000) but this penalty was removed by the Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 No 13, Schedule 1.1 following a recommendation that was made in the Wood Inquiry.
2. Foster care systems

2.1 Overview

Out-of-home care refers to the provision of accommodation for people under 18 years old who are unable to live with their immediate family. It is provided by each state and territory with the federal government playing no direct role in the delivery or funding of out-of-home care services. Out-of-home care can consist of home-based care or residential care. Home-based care is a placement provided by a kinship (family member or friend) or foster carer who may receive reimbursement from the federal government for expenses associated with providing the placement as part of the broader family support and social welfare system. Due to developments in legislation and policy across jurisdictions, there has been a growth in the numbers of statutory kinship placements driven by a greater willingness and priority to place children within family/friend networks. The second main type of out-of-home care is residential care, which is a placement in a group home. In addition to home-based or residential care, there are some specific facilities to cater for youths with specific health issues and/or disabilities.

The number of children and young people in out-of-home care has doubled over the past decade, with approximately 39,600 children in out-of-home care in 2012, 93% of whom were in home-based care. The majority of children in out-of-home care was 9 years old or younger and 30% was aged between 10 to 14 years old in 2012. In total, the states and territories spent $1.95 billion on out-of-home child care in 2011-2012. Given that each state and territory is responsible for out-of-home care legislation, policy and practice, there is significant variation across the country. Some services are also contracted to non-government organisations. Over the past decade, child protection and out-of-home care policy and practice have undergone significant legislative and policy reform across the states and territories. In some cases, this has led to a greater focus on early intervention to reduce the need for children to require out-of-home care.

Young people who have experienced state care under the child protection system have disproportionately poor outcomes in education, employment, housing and health. Young people leaving child protection systems also report high levels of homelessness. Some statistics indicate that up to 88% of young people transitioning from care will experience homelessness. Children who experience homelessness are more likely to become homeless when they reach adulthood. Many who are accommodated in the specialist homelessness system require a tailored approach to help deal with common legal issues that arise at the time of becoming homeless. The focus of a coordinated National approach to tackling the issue of youth homelessness and effective legislative reform has been placed on young people leaving the child protection system as they are at a statistically higher risk of homelessness.

In Queensland, the Queensland Public Interest Law Clearing House (“QPILCH”) has developed ‘LegalPod’, a new service for young people transitioning out of the child protection system. The initiative matches a small team of pro bono lawyers (the “Pod”) with a young person exiting care, to proactively address the legal needs that arise on the road to independence. Legal Pod was designed in recognition of the vulnerability and risk of homelessness that young people face as they exit the child protection system.

47 Professional Foster Care - Barriers, Opportunities, & Options, pV.
2.2 National Standards for Out-Of-Home Care

The Commonwealth government together with state and territory governments developed a set of national standards ("National Standards") as part of the Framework. The National Standards focus on children whose care arrangements have been ordered by the Children’s Court. They focus on the key areas of: health, education, care planning, connection to family, culture and community, transition from care, training and support for carers, belonging and identity and safety, stability and security.

In order to monitor performance against the National Standards, a set of measures was also developed and is reported to the Council of Australian Governments ("COAG"), which is the peak intergovernmental forum in Australia and made up of the Prime Minister, State Premiers, Chief Ministers and the President of the Australian Local Government Association. The National Partnership Agreement on Homelessness (the transitional NPAH) has also been a key Australian Government initiative working to implement a policy to prevent homelessness following custodial care.

2.3 After care

In 2011, the Commonwealth government together with the state and territory Community and Disability Services Ministers developed a publication which outlines a nationally consistent approach to planning for young people transitioning from out-of home care to independence. The “Transitioning from out-of home care to Independence: A Nationally Consistent Approach to Planning" recognises that improved consistency across the country is necessary to deliver equity in in the planning process for young people. This document has been developed to align with the National Standards and aims to provide a framework to improve the connections between the various services provided by government and non government organisations.\(^{51}\)

2.4 National Partnership Agreement on Homelessness

In 2009, at a COAG meeting, the Australian and state and territory governments implemented a National Partnership Agreement on Homelessness (“NPAH”) which was to run for five years and involved a $1.1 billion commitment from the Commonwealth government and a $4.9 billion combined commitment from state and territory governments for homelessness and housing programs. Under the NPAH, parties committed to implement a policy of “no exits into homelessness” from statutory, custodial care and hospital, mental health and drug and alcohol services for those at risk of homelessness.

2.5 Transition to Independent Living Allowance

The Transition to Independent Living Allowance (“TILA”) is a one-off payment from the Australian government to young people leaving out-of home care. The TILA represents a contribution of up to $1,500 to assist the young person move into independent living. In addition, young people have access to a range of support services, training and educational materials and furniture and white goods.

3. Care and protection in each State/Territory

3.1 New South Wales

With over 28,000 people experiencing homelessness in the State, New South Wales ("NSW") is the state with the highest number of homeless people in the country (total = 105,237), with 37.5% of these aged under 24 years and 22% under 18 years.\(^{52}\) The key child protection legislation in NSW is the Children and Young Persons (Care and Protection) Act 1998 ("NSW Act") and it was implemented in stages from 2000 and reviewed in 2005-2006.

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\(^{51}\) Transitioning From Out-of Home Care to Independence: A Nationally Consistent Approach to Planning., 4.

In 2012, the NSW Government announced its intention to reform the homelessness service system based on the new service delivery approaches outlined by the National Partnership Agreement on Homelessness (NPAH) projects 2009-2013. The reformed Specialist Homelessness Services (SHS) system focuses on prevention and early intervention, re-housing, crisis, transition and intensive tailored responses for clients with complex needs. The system focuses on five reform strategies which include changing the design of service delivery, improving access to homelessness services; allocating funds appropriately; supporting service providers and using new contracting methods to fund providers focusing on quality improvement and performance management.

The NSW Act recognises that the primary means for providing for the safety, welfare and wellbeing of children is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement. The permanent placement is to be identified based on what is in the best interests of the child, and the following in order of decreasing preference: (i) his/her parent; (ii) a relative, kin or other suitable person; (iii) adoption (other than for Aboriginal or Torres Strait Islander children); and (iv) the parental responsibility of the Minister.

For Aboriginal or Torres Strait Islander children, the NSW Act contains principles under which Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children with as much self-determination as possible.

The NSW Act promotes the principle of participation, which encourages a child to participate in decisions concerning his/her life.

In addition to mandatory reporting as discussed above, the key protections contained in the NSW Act include:

(a) request for assistance: a child or his/her parent can seek assistance from the Director-General to enable the child to remain in, or return to, the care of his/her family;

(b) broad powers of Director-General: if the Director-General forms the opinion, on reasonable grounds, that a child is in need of care and protection, the Director-General is to take whatever action is necessary to safeguard or promote the safety, welfare and wellbeing of the child. This can include providing support services for the child and his/her family, developing a care plan for the child or seeking appropriate orders from the Children’s Court;

(c) emergency removal: if the Director-General or a police officer is satisfied, on reasonable grounds that a child is at immediate risk of serious harm and the making of an apprehended violence order would be insufficient to protect the child from that risk, then the child may be removed from the place of risk without a warrant;

(d) emergency care and protection orders: the Children’s Court may make an order for the emergency care and protection of a child if it is satisfied that the child is at risk of serious harm. While in force, the order places the child in the care responsibility of the Director-General or the person specified in the order;

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53 Children and Young Persons (Care and Protection) Act 1998, s8.
55 Children and Young Persons (Care and Protection) Act 1998, s10.
56 Children and Young Persons (Care and Protection) Act 1998, s20-22.
57 Children and Young Persons (Care and Protection) Act 1998, s34.
58 Children and Young Persons (Care and Protection) Act 1998, s43.
59 Children and Young Persons (Care and Protection) Act 1998, s46.
(e) **care orders**: the Children’s Court may make a care order for the care and protection of a child in circumstances where there is no parent available to care for the child, the parents acknowledge that they have serious difficulties in caring for the child, the child has been, or is likely to be, physically or sexually abused or ill-treated. The care order could require a person to provide support services to the child, require the child to attend therapeutic treatment or place the child under the supervision of the Director-General.

(f) **other orders**: parent capacity orders (requiring a primary care giver to participate in a program, service or course, or engage in therapy or treatment to build or enhance his/her parenting skills);

(g) **crisis resolution**: the NSW Act provides for conflicts between a child and his/her parents to be resolved as far as possible, without recourse to legal proceedings and contains mechanisms to resolve those conflicts. The NSW Act operates on the principle that the parents of a child should have responsibility for the child unless it is not in the best interests of the child;

(h) **mandatory reporting of homelessness**: It is an offence for a person who provides commercial residential accommodation (other than a friend or relative), to fail to report the whereabouts of a child if the person has reasonable grounds to suspect that the child is living away from home without parental permission. Where the Director-General receives a report that a child may be homeless, the Director-General must conduct such investigation and assessment concerning the Child as considered necessary. The Director-General may also arrange for services to be provided to the child such as residential accommodation;

(i) **Out-of home care**: the NSW Act provides for three types of out-of home care: statutory out-of home care; supported out-of home care; and voluntary out-of home care. Only authorised persons may provide out-of home care and the scope of their responsibilities and authority are set out in the NSW Act;

(j) **After care**: under the NSW Act, the Minister is to provide or arrange such assistance for children of or above 15 years and young persons who leave out-of home care until they reach the age of 25 years as considered necessary for their safety, welfare and wellbeing. Such assistance may include providing information about available resources and services; financial, accommodation, employment, health or legal assistance; or counselling and support. The Minister has the discretion whether to continue to provide assistance to young persons after they turn 25. In addition, the designated agency having supervisory responsibility for a child must prepare and implement a plan, that includes reasonable steps that prepare the child for leaving out-of home care.

(k) **offences against children**: the NSW Act contains a number of offences against children. For example, it is an offence for a person to abuse a child (physically, sexually or psychologically); or to neglect a child by failing to provide adequate and proper food, nursing, clothing, medical aid or lodging; or to remove a child without lawful excuse from the primary carer of a child.

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60 Children and Young Persons (Care and Protection) Act 1998, s71.
61 Children and Young Persons (Care and Protection) Act 1998, s74-76.
62 Children and Young Persons (Care and Protection) Act 1998, s91B.
63 Children and Young Persons (Care and Protection) Act 1998, s112.
64 Children and Young Persons (Care and Protection) Act 1998, Chapter 7 Part 2.
65 Children and Young Persons (Care and Protection) Act 1998, s135.
66 Children and Young Persons (Care and Protection) Act 1998, s137.
68 Children and Young Persons (Care and Protection) Act 1998, Chapter 8.
69 Children and Young Persons (Care and Protection) Act 1998, Chapter 14.
Fostering NSW is a partnership between the NSW government and non-government foster care agencies. Foster care is broken down into six categories: immediate/crisis care, respite care, short to medium term care, long-term care, relative/kinship care or fostering to adopt.

3.2 Queensland

The primary child protection legislation in Queensland is the Child Protection Act 1999 ("Queensland Act") which recognises as its paramount principle the safety, wellbeing and best interests of the child.

In addition to mandatory reporting as discussed above, the key protections contained in the Queensland Act include:

(a) **Effect of taking child into custody on existing order:**\(^{70}\) where an authorised officer or police officer takes a child into the chief executive’s custody and a child protection order granting custody or guardianship someone other than the chief executive is in force, the order has no effect while the chief executive’s custody of the child continues.

(b) **Moving child to safe place:**\(^{71}\) where an authorised officer or police officer believes a child under 12 years old is at risk of harm but does not consider that the chief executive’s custody is necessary, and a parent or family member is not present at the place where the child is, the officer may move the child to a safe place and make arrangements for the child’s care.

(c) **Unborn children:**\(^{72}\) where the chief executive suspects that a child may be in need of protection after he/she is born, the chief executive must have an authorised officer investigate and assess the likelihood that the child will need protection and offer help and support to the pregnant mother. If the child is Aboriginal or Torres Strait Islander, the chief executive or authorised officer must also consult with a recognised entity for the child, where the pregnant mother agrees to such a consultation.

(d) **Temporary assessment orders:**\(^{73}\) a magistrate may make a temporary assessment order for the child where satisfied that investigation is necessary to assess whether the child needs protection and it cannot be properly carried out unless a temporary assessment order is made.

(e) **Case plans:**\(^{74}\) the chief executive must ensure a case plan is developed for each child where the child needs protection and the ongoing help and support services available under this act. Case planning must appropriately facilitate the participation of the child, the child’s parents, members of the child’s family group and, where the child is Aboriginal or Torres Strait Islander, Aboriginal and Torres Strait Islander agencies.

(f) **Care agreements:**\(^{75}\) care agreements are entered into between the chief executive and the child’s parents for the short-term placement of the child into someone else’s care.

(g) **Transition from care:**\(^{76}\) as far as practicable, the chief executive must ensure the child or person is provided with help in the transition from being a child in care to independence.

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\(^{70}\) Child Protection Act 1999, s 19.

\(^{71}\) Child Protection Act 1999, s 21.

\(^{72}\) Child Protection Act 1999, s 21A.

\(^{73}\) Child Protection Act 1999, s 27.

\(^{74}\) Child Protection Act 1999, s 51A.

\(^{75}\) Child Protection Act 1999, s 51ZD.

\(^{76}\) Child Protection Act 1999, s 75.
3.3 Victoria

The primary child protection legislation in Victoria is the Children, Youth and Families Act 2005 ("Victoria Act") which recognises the protection of the best interests of the child and the participation of the child in the decision-making process.

In addition to mandatory reporting as discussed above, the key protections contained in the Victoria Act include:

(a) **Unborn child:**\(^{77}\) if a person has significant concern for the wellbeing of a child after his/her birth, a person may make a report to the Secretary before the birth of the child.

(b) **Short-term child care agreements:**\(^{78}\) a parent of a child may enter into a written agreement with a service provider to place the child in the care of the service provider for the purpose of supporting the child and his or her parent and encouraging and assisting the child’s parent to resume the care of the child.

(c) **Long-term child care agreements:**\(^{79}\) a parent of a child may, with the written approval of the Secretary, enter into a written agreement with a service provider with respect to the care of the child.

(d) **Protective intervention:**\(^{80}\) the Court may make a temporary assessment order if it is satisfied that the making of the order is in the best interests of the child, it is necessary for the Secretary to assess whether or not the child is in need of protection and the Secretary cannot properly carry out the investigation or assessment unless the order is made.

(e) **Child in need of therapeutic treatment/therapeutic treatment orders:**\(^{81}\) a child is considered to be in need of therapeutic treatment if the child is of or above the age of 10 years and under the age of 15 years and has exhibited sexually abusive behaviours.

(f) **Interim accommodation order:**\(^{82}\) the court may make an order regarding where the child must live until the next court date. An interim accommodation order is made when the Court believes that there are certain issues that must be addressed regarding the child’s safety and wellbeing.

(g) **Supervision order:**\(^{83}\) a supervision order gives the Secretary responsibility for the supervision of the child but does not affect the guardianship or custody of the child. It provides for the child to be placed in the day to day care of one or both of the child’s parents.

(h) **Interim protection order:**\(^{84}\) the Court may make an order in hearing and determining a protection application or an irreconcilable difference application where it is satisfied that the child is in need of protection or that there is a substantial and presently irreconcilable difference between the person who has custody of the child and the child, to such an extent that the care and control of the child are likely to be seriously disrupted.

(i) **Permanent care order:**\(^{85}\) the court may make an order in respect of a child if a parent has died and the surviving parent is unable or unwilling to resume custody or guardianship of the child or it would not be in the child’s best interests for the parent to resume custody.

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\(^{77}\) Children, Youth and Families Act 2005, s 29.

\(^{78}\) Children, Youth and Families Act 2005, s 135.

\(^{79}\) Children, Youth and Families Act 2005, s 145.

\(^{80}\) Children, Youth and Families Act 2005, s 231.

\(^{81}\) Children, Youth and Families Act 2005, s 244.

\(^{82}\) Children, Youth and Families Act 2005, s 262.

\(^{83}\) Children, Youth and Families Act 2005, s 262.

\(^{84}\) Children, Youth and Families Act 2005, s 280.

\(^{85}\) Children, Youth and Families Act 2005, s 319.
3.4 Western Australia

The primary child protection legislation in Western Australia is the *Children and Community Services Act 2004* ("WA Act") which recognises the best interests of the child as its paramount consideration.

The key protections contained in the WA Act include:

(a) **Power to keep child under 6 years old in hospital** \(^{86}\): if a child under 6 years old is brought to hospital for observation or treatment and the officer in charge believes that the child is in need of protection, the officer may keep the child in hospital without parental consent for no more than two working days to ensure the wellbeing of the child.

(b) **Protection orders**: the WA Act differentiates between four types of protection order. ‘supervision’ orders \(^{87}\) which do not affect the parental responsibility of any person for the child except to the extent (if any) necessary to give effect to the order; ‘time limited’ orders \(^{88}\) during which the CEO has parental responsibility for the child; ‘until 18’ orders \(^{89}\) during which the CEO has parental responsibility for the child until the child reaches 18 years of age; and ‘special guardianship’ orders \(^{90}\) during which a special guardian has parental responsibility for child.

(c) **Provision of social services, assistance to obtain accommodation**: The CEO must ensure that a child who leaves the CEO’s care is provided with any social services that the CEO considers appropriate \(^{91}\) and is provided with services to assist with access to accommodation, education/training, employment, legal advice, health and counselling services. \(^{92}\)

3.5 Australian Capital Territory Act

The primary child protection legislation in the Australian Capital Territory is the *Children and Young People Act 2008* ("ACT Act") which recognises the best interests of children and young people as its paramount consideration.

In addition to mandatory reporting as discussed above, the key protections contained in the ACT Act include:

(a) **Family group conferences**: \(^{93}\) encourage the child or young person and his/her family members to engage and participate in the decision-making process with a goal to reducing the likelihood of the child or young person being in need of care and protection in the future.

(b) **Temporary parental responsibility provision**: \(^{94}\) a four week provision in an appraisal for a child or young person that transfers daily care and responsibility to the director-general and may provide for the director-general to enter and search any place to locate the child.

(c) **Emergency action**: \(^{95}\) action taken by the director-general or a police officer to transfer daily care responsibility to the director general, to move the child to another place for the child’s protection.

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\(^{86}\) Children and Community Services Act 2004, s 40.  
\(^{87}\) Children and Community Services Act 2004, s 47.  
\(^{88}\) Children and Community Services Act 2004, s 54.  
\(^{89}\) Children and Community Services Act 2004, s 57.  
\(^{90}\) Children and Community Services Act 2004, s 60.  
\(^{91}\) Children and Community Services Act 2004, s 98.  
\(^{92}\) Children and Community Services Act 2004, s 99.  
\(^{93}\) Children and Young People Act 2008, s 74.  
\(^{94}\) Children and Young People Act 2008, s 373.  
\(^{95}\) Children and Young People Act 2008, s 405.
(d) **Care and protection orders:** an order about the child or young person which may contain provisions relating to contact, drug use, enduring parental responsibility, mental health, residence, short-term parental responsibility and supervision.

3.6 South Australia

The primary child protection legislation in South Australia is the *Children’s Protection Act 1993* ("SA Act") which recognises the protection of children from harm and the child’s right to care among its fundamental principles.

The key protections contained in the SA Act include:

(a) **Family care meetings:** family care meetings provide an opportunity for a child’s family, in conjunction with a Care and Protection Co-ordinator to make informed decisions as to the arrangements for best securing the care and protection of the child.

(b) **Charter of rights of children and young people in care:** it is the responsibility of the legal guardian of a child to develop a charter of rights having regard to the fact that the State government is responsible for the care of children under the guardianship of the Minister.

3.7 Tasmania

The primary child protection legislation in Tasmania is the *Children, Young Persons and their Families Act 1997* ("Tasmania Act") which recognises the best interests of the child as its paramount consideration.

In addition to mandatory reporting as discussed above, the key protections contained in the Tasmania Act include:

(a) **Assessment orders:** the Tasmania Act differentiates between several different assessment orders, including ‘assessment orders’ where the child is thought to be at risk; ‘restraint orders’ may be made in addition to or instead of assessment orders; ‘limited adjournment orders’ which adjourns a hearing for no more than 14 days; and ‘interim assessment orders’ through which the Court may grant custody to the Secretary; order the guardian to secure the proper protection of the child; restrict access to the child; or order examination and assessment of the child.

(b) **Commissioner for children:** The Governor may appoint a person to be the Commissioner for Children.

(c) **Offences for failure to protect child:** a person who has a duty of care in respect of a child must not intentionally take, or fail to take, action that could reasonably be expected to result in significant harm to the child. A person who has the control or charge of a child must not leave the child unattended without making reasonable provision for the child’s supervision and care for a time which is unreasonable.

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96 Children and Young People Act 2008, s 422.
97 Children’s Protection Act 1993, s 27.
98 Children’s Protection Act 1993, s 52EB.
Child Protection legislation in the Northern Territory is discussed below under the case study on Indigenous youth.

4. Laws affecting youth who are addicted to drugs/right to access treatment

Substance abuse is an issue with a high correlation to chronically homeless young people. It can be a precipitating cause, as well as an outcome, of homelessness. Much of what needs to be done to address the link between homelessness and mental health, substance abuse and family violence requires early intervention and a multidisciplinary approach. Access to treatment and justice as well as improved legal services for homeless people and people at risk of homelessness has been the focus of several nationwide and state-based government initiatives and law reform. Severe Substance Dependence Treatment Act 2010 (Vic)

The objective of this Act is to provide for the detention and treatment of persons with a severe substance dependence where it is necessary to save the person’s life or prevent serious damage to the person’s health and also enhance the capacity of the person to make decisions about their substance use, personal health, welfare and safety.106

Persons under 18 years old cannot be detained under this Act unless the person has a severe substance dependence, requires immediate treatment as a matter of urgency that can only be provided at a treatment centre and there is no less restrictive means reasonably available to ensure the person receives the treatment.107 Corresponding legislation exists in NSW.108

5. Mental Health

There is high prevalence of mental illness among young people who experience homelessness. Access to treatment and a range of longer-term support and community-based services reduce the risk of homelessness using a strategy of early intervention.109

6. Access to justice and homelessness services

In NSW, a new client access system is being developed as a part of the SHS reforms. The system consists of ‘Links2Home’, a new 24-hour telephone service providing information, assessment and a referral centre. It also includes a new client Information Management System for use by SHS providers and an e-client record directory feature (due 2014-2015). The positive prevention of homelessness requires emphasis on services catering to people at risk of losing their private rental or social housing. Rapid rehousing in rental markets where availability and affordability of housing access issues exist should also be possible. However, a continuing lack of new social and affordable housing supply continues to hamper efforts to provide affordable housing for people leaving the homelessness service system.

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106 Severe Substance Dependence Treatment Act 2010 (Vic), s3.
107 Severe Substance Dependence Treatment Act 2010 (Vic), s8.
108 Drug and Alcohol Treatment Act 2007 (NSW)
7. **Family and Domestic Violence and Family Breakdown**

Overall, domestic and family violence was the most common reason young people would seek assistance for specialty homelessness agencies. For many young people, returning home is not a viable option. At the same time young people are also trying to continue their schooling and to deal with the issues of independent living. Australian protection order legislation is a key legal response to domestic violence and victim safety. Recently, the joint Australian and NSW Law Reform Commissions recommended a core common purpose for all state and territory domestic violence legislation to maximise the safety and protection of persons who fear/experience family violence. Over the past decade, Australian states and territories have amended protection order legislation to improve victim safety, ensure access to justice and increase legal empowerment for victims of family and domestic violence. Protection order legislation that ensures the ability of victims to stay in their own homes is of particular importance and reduces the likelihood of homelessness and poverty.

8. **Case Study: Indigenous youth in the Northern Territory**

The Northern Territory records the highest rate of homelessness per capita in Australia and approximately 90% of the homeless are Aboriginal or Torres Strait Islander. At the national level the rate of homelessness among Indigenous Australians is significantly higher than among non-Indigenous Australians.

The Department of Children and Families is the lead agency in the Northern Territory (“NT”) for child protection and provides support and services to promote child safety and wellbeing in the territory. It was established on January 1, 2011 and provides services including child protection, adoption, foster care, family and parenting support, early years, domestic and family violence. It aims to grow its capacity to deliver child protection, out-of-home care and family support services across the NT.

8.1 **Abuse and neglect**

Indigenous children are significantly over-represented amongst the number of children subject to child abuse and neglect and are six times more likely to be a victim of abuse or neglect than other children. Due to the importance of maintaining family, community and cultural connections, it is important that measures aimed at protecting Indigenous children are holistic and culturally sensitive and empower families and the wider community to develop and take responsibility for child protection.

8.2 **Foster care**

One in three children in out-of-home care in 2012 were Aboriginal and/or Torres Strait Islander.

8.3 **Care and Protection of Children Act 2007 (NT)**

The Care and Protection of Children Act 2007 (NT) (“NT Act”) is the main law in NT that provides for child protection. Its main objective is to promote the wellbeing of children by protecting them from harm and exploitation and maximising the opportunities for them to realise their full potential. It also aims to assist families and anyone having responsibilities for children to achieve those foregoing objectives.

In order to do this, the NT Act provides measures for safeguarding the wellbeing of children which include mandatory reporting requirements for children at risk of harm or exploitation (as discussed above) and giving the responsible Minister, other officers and the Court the power to take actions or

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110 See for example, the *Family Violence Protection Act 2008*

111 *NT Homelessness - A Statistical Profile*, p.8


113 *Professional Foster Care - Barriers, Opportunities, & Options*, p.V.
make orders for the wellbeing of children. The NT Act also establishes a framework for the sharing of information about children.

The NT Act identifies when a child is in need of care and protection and therefore will fall under the provisions of the legislation. For example, it states that a child is in need of care and protection if he/she has suffered or is likely to suffer harm or exploitation because of an act or omission of a parent of the child, the child is abandoned and no family member of the child is willing to care for him/her, the child is an orphan or has no family member willing to care for him/her, or the child is out of control and is engaged in conduct that causes or is likely to cause harm to the child or other persons.

In recognition of the important role that kinship groups play in Aboriginal communities, the NT Act specifically recognises the role that these groups have in promoting the wellbeing of Aboriginal children. The NT Act provides that an Aboriginal child should, as far as practicable, be placed in order of priority with: a member of the child’s family, an Aboriginal person in the child’s community in accordance with local community practice, an other Aboriginal person; a person who is not Aboriginal but is (in the opinion of the Chief Executive Officer of the Department of Children and Families (“CEO”)), sensitive to the child’s needs and capable of promotion the child’s ongoing affiliation with the culture of the child’s community.

(a) Temporary placement arrangements

Under the NT Act, the CEO may arrange for the temporary placement of a child who is residing with his/her parents where it would be in the best interests of the child to do so. The temporary placement involves the child being taken into the CEO’s care for up to six months and placed in an arrangement that is subject to the conditions specified by the CEO.

This temporary placement can only be entered into if the CEO reasonably believes it will safeguard the wellbeing of the child, the parents agree to the arrangement and if the child is over 15, has also consented to the arrangement. At any time, the parents may terminate the arrangement and request the CEO to return their child to them.

(b) Mediation conference

Another power of the CEO conferred by the NT Act is the ability to arrange for a mediation conference between the child and his/her parents to be convened if concerns have been raised about the wellbeing of the child, the CEO reasonably believes the conference may address those concerns and the parents of the child are willing to participate in the conference.

(c) Care plans

If a child is under the daily care and control of the CEO under an order of the Court (e.g. a protection order) or a law of the NT, the CEO must, as soon as practicable after the child is taken into care, prepare and implement a care plan for the child. The written plan must identify the needs of the child, outline the measures that must be taken to address those needs and set out decisions about the placement arrangement for the child and about contact between the child and other persons. The care plan must be reviewed within two months after the child was first taken into the CEO’s care and every six months thereafter. It must also be reviewed immediately after the death of a parent, the death of the carer, a change of the placement arrangement of the child or an extension or variation of a court order relating to the child.

114 Care and Protection of Children Act 2007 (NT), section 46.
115 Care and Protection of Children Act 2007 (NT), section 49.
116 Care and Protection of Children Act 2007 (NT), section 70-74.
The care plan must be modified if the child is about to leave the CEO’s care. The modified plan must identify the needs of the child in preparing to leave the CEO’s care and the child’s transition to other living arrangements and outline measures that must be taken to assist the child in meeting those needs. The modified plan is then to be provided to the child, the parents of the child, the carer of the child and any other person considered by the CEO to have a direct and significant interest in the wellbeing of the child. A child who has left the CEO’s care is defined as someone who has left the CEO’s care and is between 15-25 years old, was last in the CEO’s care for a continuous period of at least six months and in the CEO’s opinion, is unlikely to be in the CEO’s care again in the future.

(d) After care

The CEO must ensure that a young person who has left the CEO’s care is provided with child-related services (e.g. medical/health related services, information and advisory services, counselling services, advocacy services and mediation services) and other services as the CEO considers appropriate (e.g. accommodation, education or training, employment and legal services).

The CEO may also give the young person financial assistance for education or training, obtaining furnishings or securing accommodation. The CEO is given the discretion to determine the terms and conditions under which the financial assistance may be given and is based on what the CEO considers appropriate in the circumstances.

8.4 The Child Wellbeing and Safety Plan

The Child Wellbeing and Safety Plan progresses activity across seven key reforms outlined by the Northern Territory Government’s ‘Safe Children, Bright Futures: Strategic Framework 2011-2015’. The Northern Territory Care and Protection of Children Act 2007 (NT) provides the legislative framework for promoting a partnership approach to child protection and recognises that the Northern Territory Government has responsibility for promoting and safeguarding the wellbeing of children. The Act recognises that kinship groups, representative organisations and communities of Aboriginal people play a key role in promoting the wellbeing of Aboriginal children. The Act also provides the foundation for mandatory reporting and placed an obligation on the community to report when children are vulnerable, leaving care or there are concerns of risk or harm.

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117 Care and Protection of Children Act 2007 (NT), section 86.
Criminalisation of homelessness

1. Introduction

1.1 People experiencing homelessness are among the most criminalised population in Australia. The lack of conventional housing or secure tenure means that homeless Australians lead a transient lifestyle in which they are forced to carry out many aspects of their daily life in public or turn to petty crime just to survive. In turn, these individuals regularly encounter the criminal justice system as a direct result of their homelessness and are, subsequently, criminalised.

1.2 Criminal law in Australia is the jurisdiction of the states and territories. Consequently, while many of the criminal laws and procedures are similar throughout the country, there are also differences. This section provides a broad overview of the types of issues affecting homeless individuals’ encounters with the criminal justice system. Particular focus is on the legal issues in the state of Victoria. It should, therefore, be noted that the approach taken in other states and territories may differ.

1.3 The Australian paper has defined the youth demographic as individuals aged 21 years and under. In discussing the legal issues affecting young homeless individuals and the criminal law, this section focuses at issues and responses taken at the youth and adult levels of the criminal justice system.

1.4 This section begins by defining criminalisation and providing an overview of the youth justice system in Australia. It then describes some of the most common laws affecting homeless youth and homeless people more broadly, such as public space, theft and drug offences. Attention is then turned to some of the procedures encountered by homeless youth once they are in the criminal justice system, including the infringement system, bail and remand, and post-imprisonment support programs.

1.5 Throughout the discussion it will become clear that although homelessness is not a crime, various laws in Australia have a disproportionate negative impact on individuals experiencing homelessness. As a result, these individuals not only get caught in a system that does not address the underlying cause of their vulnerability and needs, but which also further stigmatises their conduct as criminal.

2. Criminalisation

2.1 Criminalisation has been defined as ‘the use of policing and the criminal justice system as central features of our response to homelessness’. As a term, criminalisation also recognises that using law enforcement mechanisms to address homelessness means that people enter the criminal justice system.

2.2 In this section, criminalisation focuses on the interrelationship between people experiencing homelessness and the criminal law. The term is used to describe how the application of some laws and procedures may result in a homeless person:

(a) entering the criminal justice system; or

(b) being subject to inappropriate treatment once they are entrenched in the system.

2.3 The types of laws impacting people experiencing homelessness can be categorised into various classes. This section will focus on:

(a) express laws, which directly prohibit the activities of homeless people; and

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119 Ibid.

120 For the various categories of enforcement-based measures to homelessness, see ibid 11 12.
neutral laws, which are enforced differently or have a disproportionate impact on an individual for the mere fact that they are homeless.

3. **Australian criminal justice system**

3.1 In Australia, criminal justice is the jurisdiction of the states and territories. Each state and territory has a constitutional responsibility to administer the criminal justice system in Australia: police services, courts, and correctional services.

**Youth justice system**

3.2 Established youth justice systems (also referred to as juvenile justice) exist in all states and territories in Australia. Specialised courts deal with offences committed by young people and may be overseen by a children’s court magistrate or judge.

3.3 The framework for dealing with young people suspected or convicted of committing a criminal offence is established by legislation. The relevant legislation generally covers, among other things, the definition of a young person, the way police may proceed against a young person and which diversionary schemes are available.\(^{121}\) Young people are also affected by legislation covering criminal justice procedure and bail.

3.4 Most youth justice systems consider cases for children who have been charged with an offence while they are under the age of 18 years. Victoria, which focuses on children who are under the age of 17 years at the time of the offence, is an exception to this. These boundaries are, however, flexible, permitting young people accused of serious offences to be transferred to adult courts while young adults who are 18 years or older may be kept in youth detention.\(^{122}\)

3.5 Children enter the youth justice system when they are investigated by the police for allegedly committing a crime. Police play a major part throughout the enforcement of youth justice, including:

(a) deciding whether to give a young offender a warning or to proceed with court action;

(b) being involved in diversion schemes, the determining of bail and prosecuting cases in the children’s court;\(^{123}\) and

(c) deciding whether to refer a young person to youth detention with supervision or to allow them to remain unsupervised within the community prior to the young person appearing in court.

Before a court hearing, the court also plays a part in deciding whether to remand the young person or release them on supervised bail or unsupervised bail.\(^{124}\)

3.6 Once a young person appears in court the judge may decide to:

(a) transfer the youth to a specialist or high court;

(b) render other court action such as a conference or program attendance; or

(c) dismiss the case if the charge was not proven.

If the charge is proven, other options include:

(d) an unsupervised order, for example, a fine or community-based supervised order; or

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\(^{121}\) Geoff Monahan and Lisa Young (Editors) *Children and the Law in Australia* (LexisNexis Butterworths, 2008) 188.

\(^{122}\) Ibid 187.

\(^{123}\) Ibid 192.

(e) a detention order, which is rarely chosen. Once the detention order has been completed the individual is released on parole or is under supervised release.125

**Criminal justice system as it applies to adults**

3.7 The adult justice system in Australia is overseen by the courts and generally deals with people aged 18 years and over.

3.8 The courts in the states and territories are divided into hierarchies. Most states adopt a three tier hierarchy comprising of Local or Magistrates Courts, District or County Courts and Supreme Courts. Other states maintain a two tier hierarchy comprising Local or Magistrates’ Courts and Supreme Courts.

3.9 Criminal matters will initially be heard in the Local or Magistrates’ Court before progressing to the County or Supreme Courts depending on the severity of the offence.

4. **Homelessness as a crime**

4.1 Australia’s legal position on homelessness was derived from laws that were established in England to address the perception that vagrants were criminals. A vagrant describes a person who has no settled home or means of support.

4.2 In 1828, the *Australian Courts Act*126 provided that all statutes in force in England at that time were applicable to the situation and condition of the colony and received as law. Consequently, the *Vagrancy Act of 1824*,127 which implicitly criminalised rough sleeping and begging, was incorporated into Australian law. Most Australian colonies eventually deemed the laws inapplicable. However, New South Wales enacted the *Vagrancy Act 1835 (NSW)* (“Vagrancy Act”) which sought to prevent vagrancy and punish the idle, disorderly, rogues, and vagabonds. Certain provisions of the Vagrancy Act were later enacted, with minor amendments, in South Australia, Victoria, and Western Australia.

4.3 Vagrancy is no longer a criminal offence in any Australian state or territory. Current laws do not allow for apprehension of a person because they are homeless.128

4.4 Although homelessness is no longer a crime, people experiencing homelessness remain the most criminalised of all population groups.129 The homeless face a wide range of legal difficulties as laws have a disproportionate and, often unintended negative, impact on them because of how they live.

5. **Laws impacting on people experiencing homelessness**

**Public space offences**

5.1 Laws regulating public behaviour have a disproportionate impact on homeless people.

5.2 Those who are forced to live in public space risk committing offences for conduct that, if done in the privacy of their home, would not be illegal. These types of acts include sleeping, urinating or drinking alcohol. Other types of public offences are more targeted at the homeless, such as begging.130 Some jurisdictions in Australia even make it illegal to sleep in a public space, prohibit camping, or limit access to parks and recreational areas during certain hours. Public space laws such as these impact the way the homeless live and can ultimately affect their safety.

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125 Ibid, 1–3.
129 Ibid.
130 Ibid 76.
5.3 Public space laws typically provide broad discretionary powers when allowing enforcement agencies to act. The homeless people have regular interaction with enforcement agencies and, in some cases, find themselves in a constant state of offending. In NSW, however, the Protocol for Homeless People in Public Places (the “Protocol”) aims to provide guidelines for interactions with the homeless. Key language in the Protocol includes leaving the homeless alone unless they are a:

(a) child who appears to be under the age of 16 years;
(b) young person who appears to be 16 17 years old and may be at risk of significant harm; or
(c) child or young person who is in the care of the Director-General of the Department of Family and Community Services or the parental responsibility of the Minister for Family and Community Services.

Since the Protocol aims to leave the homeless living in a public space alone, but allows exceptions to disturb children and young people, it may be more discriminatory towards the youth even though it aims to protect them. It should nevertheless be seen as a positive development seeking to regulate the interactions between the homeless and public authorities.

5.4 The laws on begging and police move-on powers are two examples of how laws regulating conduct in public space can have an impact on a homeless person.

Begging

5.5 The laws on begging expressly prohibit conduct commonly associated with people experiencing homelessness. Begging and homelessness are clearly linked. The majority of people who beg experience primary homelessness and have few other ways by which to provide themselves with their daily needs.

5.6 It is an offence to beg for goods or money or to ‘gather alms’ in a public space in most Australian states and territories except Western Australia, New South Wales and the Australian Capital Territory. Perhaps unsurprisingly, many people who do beg in jurisdictions where it is an offence are unaware that they are acting illegally.

5.7 While organisations have advocated for the repeal of begging offences, governments continue to retain the offence.

5.8 The City of Melbourne’s Operation Minta demonstrates some effort by authorities to respond to the issue of begging. Operation Minta was a coordinated initiative by the City of Melbourne, Victoria Police and the Salvation Army to respond to concerns about aggressive begging. The operation involved those whom were apprehended for begging in the City of Melbourne being brought before the Magistrates’ Court at which point Victoria Police could recommend an individual for a diversion program with the Salvation Army. Manager and Principal Lawyer of Melbourne’s Homeless Law, Lucy Adams, acknowledges the operation’s effort to divert people experiencing homelessness away from the criminal justice system and connect them with support. However, in relying on enforcement

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133 Walsh, above n 11, 79.
134 Summary Offences Act 2005 (Qld) s 8; Summary Offences Act 1953 (SA) s 12(1); Police Offences Act 1935 (Tas) s 81(a); Summary Offences Act 1966 (Vic) s 49A(1); Summary Offences Act 1923 (NT) s 56(1)(c), cited in Walsh, above n 11, 77.
135 Walsh, above n 11, 80.
136 The City of Melbourne is a local government in Victoria, Australia, located in the central city area of Melbourne.
137 Homeless Law is a specialist legal service for people experiencing or at risk of homelessness.
via the courts instead of linking people with services at the point of contact, the model is flawed as it still categorises begging as criminal conduct.\textsuperscript{138}

\textbf{Police move-on powers}

5.9 Move-on powers are an example of a neutral law that can have a disproportionate impact on people experiencing homelessness. Move-on powers do not typically involve the issuing of a criminal penalty, but can have a disproportionate impact on the lives of homeless people. Among the homeless population, young people are among those most likely to be asked to move-on.\textsuperscript{139}

5.10 Police in all states and territories have the power to direct a person to move away from a public area when the police officer believes on reasonable grounds that a person is causing an obstruction, provoking fear or is about to commit an offence.\textsuperscript{140} Being required to move-on does not, however, constitute an offence unless they fail to comply with the demand.\textsuperscript{141}

5.11 Often, in areas of high police presence, the homeless are asked to ‘move on’. Move-on orders may force migration to more remote and, in some cases, less safe areas in order to avoid being woken up or cited for a public offence.

5.12 Recent changes introduced by the \textit{Summary Offences and Sentencing Amendment Act}\textsuperscript{142} in Victoria illustrate how move-on powers can impact homeless people. The laws extended police powers by allowing move-on directions to be given in additional situations including if a person:

(a) has committed a public offence in the last 12 months; or

(b) is present for the purpose of buying or selling drugs.

5.13 While the changes were aimed at public gatherings such as social protestors, the ability for police to enact move-on laws simply because they suspect someone may be buying or selling drugs or may have committed a public offence stands to further criminalise the homeless, especially youth.\textsuperscript{143}

5.14 The extended powers can affect people experiencing homelessness because the laws provide for the issuing of:

(a) a fine as high as $720 for disobeying a move-on order. This can act as an additional barrier to exiting homelessness; and

(b) an exclusion order against anybody who has violated a move-on order three times within a six month period or five times in a 12 month period. The exclusion order directs a person to stay away from a specified area for 12 months and failure to comply can result in imprisonment. Given that homeless people conduct their lives in public spaces, there is an increased chance they will be fined or imprisoned for disobeying move-on orders, in turn furthering the criminalisation of homelessness.\textsuperscript{144}

\textsuperscript{139} Walsh, above n 11, 86
\textsuperscript{141} \textit{Law Enforcement (Powers and Responsibilities) 2002} (NSW) s 199; \textit{Police Powers and Responsibilities Act 2000} (Qld) s 791; \textit{Summary Offences Act 1953} (SA) s 18(2); \textit{Police Offences Act 1935} (Tas) s 15B(2); \textit{Summary Offences Act 1966} (Vic) s 6(4); \textit{Criminal Investigation Act 2006} (WA) s 153; \textit{Criminal Code (WA)} s 64(2); \textit{Crime Prevention Powers Act 1988} (ACT) s 4(4); \textit{Summary Offences Act 1923} (NT) ss 47A(2), 47B(4), cited in Walsh, above n 11, 85, 86.
\textsuperscript{142} \textit{Summary Offences and Sentencing Amendment Act 2014} (Vic).
\textsuperscript{144} Lucy Adams and Christopher Holt, Submission to Scrutiny of Acts and Regulations Committee, \textit{Summary Offences and Sentencing Amendment Bill 2013} (Vic), 3 February 2014, 4, citing Summary Offences and Sentencing Amendment Bill 2013 (Vic) s 5 inserting s 6E into the Summary Offences Act.
In February 2015, the Victorian State Government introduced the *Summary Offences Amendment (Move-On Laws) Bill 2015*. Homelessness organisations such as Homeless Law supports the proposed repeal of laws that could impact and potentially see individuals jailed for activities connected to their homelessness.\(^{145}\)

**Theft and drug offences**

Although laws on theft and drug offences do not expressly target homeless people, these offences are common among people experiencing homelessness. Drug offences are particularly prevalent among homeless young people while theft is common among those who steal in order to survive.

Widespread drug use means that many people, experiencing homelessness, are charged with minor drug offences. Chroming (where a person inhales solvents, paints, or other household chemicals in order to get high), is particularly prevalent among homeless young people. While chroming is not a crime, in many jurisdictions police have targeted policy responses allowing them to confiscate volatile substances or to take a person found chroming into protective custody.\(^{146}\)

People experiencing homelessness are most commonly charged with use or possession of a prohibited substance (in small quantities). These offences are typically dealt with summarily but also have the potential to attract prison sentences.

**Experience of homeless people once in the criminal justice system**

**The infringement system**

Infringements, fixed-penalty fines issued on the spot rather than an arrest or other court order, are used as an alternative method for dealing with minor law-breaking offences in Australia, including public space offences.

For individuals who can afford to pay an infringement, the system provides an efficient way to expiate the offence as there is minimal recourse to the criminal justice system. However, what are typically minor penalties for most people are significant to the homeless or mentally-ill and create barriers to exiting homelessness and remaining out of the criminal justice system. Infringements are an example of how a system can have a disproportionate impact on people experiencing homelessness.

**The infringement system in Victoria – adults**

As an example, the infringements system in Victoria, which is administered under the *Infringements Act 2006 (Vic)* (“*Infringements Act*”), can be a perplexing and intimidating system for people experiencing homelessness. In Victoria, more than 120 agencies are authorised to issue infringements, which makes the system hard to navigate.

Options for dealing with infringements vary according to the age of the infringement and where it sits in the enforcement process. Options range from an option to apply for internal review or a payment plan at the agency stage to applying for the fines to be revoked at the enforcement order stage.

Failure to pay an infringement can result in various punitive sanctions, including a criminal record and imprisonment. Consequently, despite the system fulfilling some objective in declaring what society will not tolerate, it can increase the criminalisation of behaviours characteristically linked with poverty and homelessness.\(^{147}\)

The Infringements Act does, however, include some provisions to mitigate the circumstances of people facing particular types of disadvantage. Special circumstances provisions allow for people experiencing ‘special circumstances’, which includes homelessness, to have their infringements revoked at the enforcement order stage if it can be shown that their personal circumstances contributed to them being unable to control the conduct of the offence. These special circumstances provisions nevertheless often have an adverse impact on the vulnerable members of the community they seek to protect.

In 2013, the Infringements Working Group (“IWG”) submitted its position paper on flaws in the infringements system to the Sentencing Advisory Council, which was responsible for reviewing the operation of the infringements system in Victoria.

The Group proposed reforms in relation to improving the system’s efficiency and fairness. The recommendations included:

(a) establishing one central agency responsible for determining special circumstances applications without referring matters back to the enforcement agencies. As it stands, the infringement system is complicated and relies on people experiencing disadvantage to engage in multiple processes in order make out their claim;

(b) making fines proportionate to an individual’s capacity to pay and considering all of the factors preventing individuals from paying their infringements on time, including poverty;

(c) providing people with special circumstances with assistance from infringements system personnel with expertise in poverty and disadvantage. It is important to recognise that the circumstances which often underpin rough sleeping and associated activities are health issues and not criminal; and

(d) establishing guidelines and criteria for determining applications for special circumstances, which are made publically available by the proposed central agency.

Some of these recommendations have been incorporated into the Fines Reform Act 2014 (Vic) (“Reform Act”), which is due to take effect in June 2016.

Among the submissions that were made to influence the Victorian reforms, guidance was taken from reforms made to the infringement system in New South Wales.

In New South Wales, the Fines Act 1996 (NSW) (“Fines Act”) was met with criticism because applying the same infringements to persons at various income levels does not provide ‘equity of treatment’. The infringements imposed by the Fines Act were especially adverse for disadvantaged youth because failure to pay infringements could result in the prevention of applying for or receiving a driver’s license. Without a valid driver’s license, young people are often unable to apply for jobs or obtain work.

The Fines Further Amendment Act 2008 (NSW) made changes to the infringements enforcement system whereby it provided the option for police officers to issue an official caution rather than a fine. It also

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148 Infringements Act 2006 (Vic) s 65.
150 The Sentencing Advisory Council is a statutory body established to conduct research on sentencing matters, gauge public opinion, consult and advise the judiciary and government in the state of Victoria.
151 Some progress has been made towards this when, in February 2014, a group of community sector organisations developed the Model Operating Policy for Enforcement Agencies. The policy was developed to promote transparency in enforcement agencies when reviewing special circumstances applications at the internal review level. Topics covered by the policy include the information that should be made available to special circumstances applicant and questions to be addressed by the decision maker when reviewing the application. Specifically in relation to homelessness, the decision maker is encouraged to ask whether it is more likely than not that in the case of homelessness, the application was unable to control the conduct that led to the offence.
permitted more flexible payment options and the ability for disadvantaged persons to apply for a Work and Development Order ("WDO").

6.13 WDO’s were implemented so that those who were eligible could reduce their fines by performing unpaid work. Eligibility requirements include:

(a) having a mental illness, intellectual disability or cognitive impairment;

(b) having a serious addiction to drugs, alcohol or volatile substances; and

(c) are experiencing financial hardship to satisfy their fines through unpaid work with an approved organisation or through certain courses of treatment.

6.14 Key changes introduced by the Reform Act include:

(a) establishing a central agency, Fines Victoria, which will be a central accessible body for the public to deal with in relation to fines. This will make the system easier to access and understand; and

(b) introducing work and development permits, under which vulnerable people will have more options to repay their unpaid infringements by paying their penalty off by undertaking approved activities.

6.15 Homeless Law is optimistic that the reforms will improve the fairness and efficiency of the system for its clients. However, one flaw in the reforms, as pointed out by a member of the IWG, is that the work and development permit is only eligible for infringements still at the agency stage of the enforcement process. The IWG is continuing to make submissions arguing that this limitation defeats the overall objective of the reforms.

The infringement system in Victoria – children

6.16 For the most part, the infringement system applies to a young person (someone under 18 years old) in the same way as it does to adults, with infringements progressing through an enforcement process until the matter is resolved. Young people have the same rights, responsibilities and payment options.

6.17 The primary difference between the children and adult infringements systems is that infringement enforcement is dealt with under the Children’s and Young Persons’ Infringement Notice System ("CAYPINS"). The system is administered in the Children’s Court and is activated when the infringement is not paid in the first instance, and is registered with the Children’s Court. The child is then given the option to pay the fine, apply for more time to pay, have the infringement amount reduced or request the matter be heard by a magistrate.

6.18 Youthlaw, a community legal centre in Melbourne specialising in legal services to young people up to age 25, has enunciated concerns with the children’s infringements system in its position paper A Fairer Fines System for Children: Key Issues & Recommendations.

[References]


www.bakermckenzie.com
6.19 The paper argues that children are disproportionately affected by infringements and laws regulating public behaviour. Youthlaw’s paper also highlights some flaws in the CAYPINS system as they specifically relate to young homeless people and recommends:

(a) lowering the amount of infringements to reflect the lower or lack of income of children. Children who are homeless are particularly disadvantaged because they lack support networks and stable housing and have increased reliance on public services (e.g. public transport);

(b) ensuring that a child receives effective notice of their infringement being registered in CAYPINS and not proceeding to hear the matter unless court officers are sure that notice has been satisfactorily effected. When notices are only served by post, homeless children are more likely to have a high number of infringement matters heard without them; and

(c) reviewing CAYPINS sentencing and guidelines and conducting training for CAYPINS registrars which teaches them to consider a child’s personal and special circumstances when assessing a matter.¹⁵⁸

Bail, remand and post-imprisonment

6.20 The link between homelessness and crime is evident. Many young people involved in the youth and criminal justice systems present with socio-economic disadvantage and homelessness. Research conducted by the Australian Institute of Health and Welfare (‘AIHW’) has found that many young people under juvenile justice supervision are not living in a family before entering supervision.¹⁵⁹ Young people under juvenile justice supervision typically have higher levels of substance abuse, mental illness and lower levels of education, which increases the probability of being homeless.¹⁶⁰

6.21 These pre-existing factors can further perpetuate disadvantage once an individual becomes involved with the criminal justice system, as neutral laws are enforced differently and can have a disproportionate impact because of an individual’s pre-existing circumstances. This can be seen at various stages of criminal justice procedures including pre and post-sentencing.

Bail and remand

6.22 Lack of accommodation options result in young people being refused bail and remanded. Homelessness may influence the type of juvenile justice supervision received. For example, young people who are homeless may be at greater risk of being placed on remand in situations where, if they were not homeless, they would be released on bail.

6.23 This has previously been an issue in New South Wales and is currently presenting as an issue in Victoria.

6.24 Prior to reforms to bail legislation in New South Wales, homeless young people were being held in remand because the Department of Human Services could not find the young person accommodation. This was argued to be a breach of the fundamental principles of criminal law and youth justice.¹⁶¹ The passing of the Bail Act 2013 (NSW), which repealed the Bail Act 1978 (NSW), has gone some way to resolve the issue by virtue of section 28, which provides that ‘(1) a bail condition imposed by a court or


¹⁶⁰ Ibid 6.

authorised justice on the grant of bail can require that suitable arrangements be made for the accommodation of the accused person before he or she is released on bail.\textsuperscript{162}

6.25 The provision of accommodation is spearheaded by the New South Wales Department of Justice Bail Assistance Line, which provides an after hours service for police who are considering conditional bail to a young person who is in their custody, but cannot be released as they cannot meet the bail conditions.

6.26 Recent changes to the Bail Act 1977 in Victoria have seen homeless youth being remanded for technical breaches of their bail conditions. In Victoria, young people are subject to the same considerations and conditions of bail as adults; however, the Children, Youth and Families Act 2005 (Vic) contains a number of protective mechanisms relating specifically to young people.\textsuperscript{163}

6.27 The changes were introduced by the Bail Amendment Act 2013 (Vic) and now make it an offence punishable by 30 penalty units\textsuperscript{164} or 3 months imprisonment to contravene certain conditions of bail. The conduct conditions include residing at a particular address, curfew times and geographical exclusion zones (being places or areas the accused must not visit or may only visit at specified times), all of which are, arguably, more difficult for a homeless person to comply with.

6.28 The level of support provided to assist young people in finding accommodation in situations where homelessness is the primary reason for being remanded and help them to meet the conditions of supervised bail varies between States.\textsuperscript{165} In Victoria, the Youth Justice Intensive Bail Supervision Program provides a young person with assistance in relation to their accommodation needs. The program is voluntary and a young person will only gain access to the program when it has been set as a bail condition.

6.29 An overview of the bail support and accommodation programs in other states and territories can be found in a comprehensive report published by Australian Institute of Criminology called Bail and Remand for Young People in Australia: A National Research Project.\textsuperscript{166}

Post-release and recidivism

6.30 There is an issue of under resourcing of post-release programs to help young offenders from becoming homeless after release from detention. Young offenders may be seen as undesirable housing tenants post-release.

6.31 Statistics indicate that:

(a) approximately 43% of people exiting prison expect to be homeless on release, making it impossible for people to get their lives back on track;\textsuperscript{167}

(b) young people, especially young women, completing a sentence of detention are at greater risk of homelessness than others; and\textsuperscript{168}

(c) prisoners who are released to unstable housing are almost three times more likely to return to prison than those released to stable housing, and 61% of those released to homelessness return to prison.\textsuperscript{169}

\textsuperscript{162} Bail Act 2013 (NSW) s 28(1).
\textsuperscript{163} For example, if the court is not sitting, an accused young person must be brought before a Bail Justice no longer than 24 hours after being taken into custody: Children Youth and Families Act 2005 (Vic) s 346(2).
\textsuperscript{164} One penalty unit is equivalent to $147.61.
\textsuperscript{165} Aalders. Anderson and Karmel, above n 42, 11.
\textsuperscript{166} Kelly Richards and Lauren Renshaw ‘Bail and Remand for Young People in Australia: A National Research Project’ (AIC Reports Research and Public Policy Series 124, Australian Institute of Criminology, Parliament of Australia, 2013). The Australian Institute of Criminology is Australia’s national research and knowledge centre on crime and justice.
\textsuperscript{167} Jesuit Social Services, ‘Money spent on prisons could prevent crime before it occurs: Jesuit Social Services’ (Media Release, 24 February 2015).
\textsuperscript{168} The Honourable Wayne Martin AC, ‘The Cost of Homelessness - A Legal Perspective’ (Speech delivered at the Homeless Persons Week Conference, Parmelia Hilton Hotel, 6 August 2014) 6.
6.32 States and territories provide programs to support young people leaving detention although that support varies between states.170

6.33 The Youth Justice Community Support Service (“YJSS”) in Victoria provides young people involved with youth justice with access to, among other things, accommodation to improve their social connectedness and transition to independence after detention. This is an integrated approach to the provision of intensive support and services to youth justice clients, recognising that these clients present with a range of complex and varied needs.171

6.34 A component of the YJSS is the provision of post-release housing and accommodation support, which is provided in 55 properties across Victoria for up to 110 young people every year. Information and referral workers from the Youth Justice Homelessness Assistance Service also provide outreach to assist young people who are not able to access the properties and support. While the service demonstrates some effort to address the needs of vulnerable individuals, it should be questioned whether it is adequate to meet demand.

6.35 This is an issue which Jesuit Social Services (“JSS”), a social change organisation based in Melbourne, Victoria is trying to respond to. JSS runs a program called Next Steps. The program cares for young people aged from 16 years old who have been involved with the criminal justice system and who have experienced or are at risk of homelessness. As part of the program, JSS runs a short-term supported, staffed residential program for young people up to age of 25 years who are exiting the justice system and whom are at risk of homelessness. The model is proving successful; however, the availability of supported housing for this group remains a major issue.

6.36 An explanation on the different accommodation support programs available in other states and territories can be found on the AIHW website: www.aihw.gov.au/youth-justice.

7. Conclusion

7.1 Although homelessness is not a crime in Australia, it is clear that the operation of certain laws – be they express or neutral in nature – see homeless young people become entrenched in the criminal justice system.

7.2 Public space and petty criminal offences may cause homeless people to enter the system and, once they are there, the application of infringement or bail laws have the potential to perpetuate their disadvantage, until even after they have been released from prison.

7.3 Concentrated responses, such as Operation Minta and reforms to the Victorian infringement system have sought to address the impact of such laws on people experiencing disadvantage. Yet the real problem arising in this context is that the criminal law is even applied to people experiencing homelessness in the first place.

7.4 The laws in Australia, as demonstrated by examples drawn from Victoria, instead need to target the disadvantage behind the crime by investing in vital support services. Money spent on programs aimed at reducing homelessness and its associated problems are more likely to reduce crime than trying to fit homeless people into a criminal justice system which is ill equipped to respond to their unique needs.

169 Ibid 5.
170 Aalders. Anderson and Karmel, above n 42, 16.
Education and employment

1. Introduction
1.1 The education and employment of youth in Australia is governed by a combination of federal, State or Territory laws, as well as the applicable industrial instruments. These laws regulate, amongst others, employment of school-aged persons and the relevant school leaving age. While the laws in this area are largely similar among the jurisdictions, variations exist.

1.2 This piece provides an overview of the education and employment laws applying to youth in Australia and considers the successes and challenges facing the implementation of the laws in practice from the perspective of youth homelessness in Australia.

2. Overview of education and employment laws

Compulsory education

2.1 Since 2010, students in all States and Territories in Australia are required to continue their education until 17 years of age, either at school or through some combination of training and employment. This lengthened the period of compulsory education for youth, which was previously set at 15 or 16 years of age.

2.2 However, the education laws allows for exemptions from school attendance and enrollment to be granted in certain circumstances. There must be reasonable cause for non-attendance and it must be in the student’s best interests to do so. The main grounds of such an exemption include commencement of full-time employment, traineeship or apprenticeship. In each case, the parent or carer of the student must make an application through the school. The principal or regional director (depending on the circumstances) may then authorise an exemption and provide written approval for the student to be exempt from school attendance and/or enrollment, or for attendance to be reduced to less than full time.

2.3 Education laws also provide alternatives to students who are unable to attend school. For example, children may be exempted from attending a school if they live too far away from an appropriate institution. These children receive tuition through various means, including use of computer, facsimile and satellite technologies. Boarding facilities are available at some non-government schools, mainly in cities and regional centres. A small number of government schools, in particular those catering for groups such as Indigenous students, have residential hostels located close by. Children may be homeschooled if they have met the criteria set down by the relevant State or Territory education authority.

Minimum age for and conditions on employment

2.4 A common mechanism for ensuring children and youth meet and obtain the minimum levels of education is to impose a minimum age for employment, however it is certainly not a universal measure. Victoria, Queensland and Western Australia have each set a minimum age (subject to certain exceptions), but the remaining States and Territories do not do so. Where there is a minimum age, it applies to all workers, including apprentices, interns and trainees.

2.5 Regardless of whether a minimum working age is imposed or not, all States and Territories utilise a range of other mechanisms to ensure children and youth are protected in relation to employment, including what types of work and when work can be undertaken or requiring mandatory working with children and police checks for those who work with children. A number of these measures are set out in Table 1 below.

2.6 All other laws that apply to adult workers apply to child or youth workers. Special exceptions or requirements may apply to certain types of youth employment, including entertainment / acting, deliveries, farm work and family businesses. Different jurisdictions have different terms and definitions.
for children and young persons (e.g. by reference to age groups or to school requirements). In turn, different regulations apply to those defined persons.

2.7 A brief snapshot of the minimum working ages and other employment laws relevant to children and youth, though not complete, is representative in Table 1 below.

**Table 1: Youth employment-related laws in Australia**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Minimum working age</th>
<th>Other relevant employment laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>None</td>
<td>Subject to certain exceptions, an employer of a person under 15 years of age employed in entertainment, still photography and door-to-door selling or, under 16 years of age if employed as a model, must hold an employer’s authority.</td>
</tr>
<tr>
<td>Victoria</td>
<td>11</td>
<td>There is no lower age limit for employment in the family business or farm or in the entertainment industry, although other conditions apply. Persons under 15 years of age can only perform light work, cannot be employed during school hours and cannot work more than a certain number of hours. Employers must have a Child Employment Permit for each person under 15 years of age they employ, except where the employer is a family business or farm.</td>
</tr>
</tbody>
</table>
| Queensland   | 13                  | Persons under 15 years of age can work in some circumstances, including:  
|              |                     | • working in a family business;  
|              |                     | • working in the entertainment industry; and  
<p>|              |                     | • some forms of supervised employment (e.g. deliveries, charitable collections). Parental permission is required before a school-aged (i.e. under 16 years of age and required to be enrolled at school) or young child may be employed. Limits apply on number of hours, when a child can be employed (e.g. not during school hours), number of shifts and minimum break lengths. |
| ACT          | None                | A child or young person may not be employed during school hours if that person is required to attend school. Persons aged 15-17 are not restricted in terms of hours, but employment must not adversely affect that person’s ability to benefit from education. Limits on type of work and hours apply to persons under 15 years of age. Such persons may only undertake light work (defined as work that is not contrary to the best interests of the child or young person) unless they have a government permit for high risk employment. Written parental consent to employment is required for persons under 15 years of age. Supervision, either parental/guardian or a responsible adult approved by a parent/guardian, is required. |
| Tasmania     | None                | Age limits apply to type of work when performing in public and selling things |</p>
<table>
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<tr>
<th>Jurisdiction</th>
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<td>Western Australia</td>
<td>15</td>
<td>As long as work does not prevent school attendance, a child of any age can work in a family business, perform professionally in the entertainment industry or work as a volunteer. Children between 10-14 years of age can perform a range of jobs (e.g. deliveries, cafes etc.) however requirements of parental accompaniment or permission, maximum hours and when the work can be done apply.</td>
</tr>
<tr>
<td>South Australia</td>
<td>None</td>
<td>Limits apply on type of work. A child of compulsory school age (between 6-16 years of age) cannot be employed during the hours that they are required to attend school, and cannot work at a time that is likely to render them unfit to attend school or to obtain the proper benefit from such attendance during the school week.</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>None</td>
<td>Children (i.e. persons under 18 years of age) should not be required to work in jobs that are, or are likely to be, exploitative or harmful to their physical, mental or emotional wellbeing. Persons under 15 years of age cannot work between 10pm and 6am.</td>
</tr>
</tbody>
</table>

3. Implementation in practice - successes

**Improving educational outcomes for Indigenous youth and disadvantaged young Australians**

3.1 Australia recognises that children do not necessarily see homelessness as whether or not they have a house, but rather the level of connectedness to family, the presence or absence of fear and feelings of instability and insecurity. In school, children facing homelessness face issues such as emotional isolation and difficulty relating to their peers, discrimination and stigma in the schoolyard, and academic and learning delays. These issues impact on their participation in school and present a major challenge to them staying engaged in education. In particular, it has been acknowledged by the Australian governments that students from low socio-economic backgrounds, those from remote areas, refugees, homeless young people, and students with disabilities often experience educational disadvantage.

3.2 It has also been reported that young people who grow up in poverty or in rural and remote locations, as well as Aboriginal and Torres Strait Islander Australians, are much more likely to experience homelessness.\(^\text{172}\)

3.3 In recognition of the above challenges, Australian education Ministers agreed on the Melbourne Declaration on Educational Goals for Young Australians (“**Melbourne Declaration**”) in 2008, which sets the directions for Australian schooling for the ten-year period compromised between 2009 and 2018. One of the overarching educational goals of the Melbourne Declaration is that Australian schooling promotes equity and excellence.

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\(^{172}\) Homelessness Australia, Homelessness and Young People

3.4 A number of national strategies which specifically target disadvantaged children and youth have been developed under the Melbourne Declaration, including:

(a) the development of the Aboriginal and Torres Strait Islander Education Action Plan 2010-2014, which focuses on six priority areas as having the greatest impact on closing the gap between the outcomes of schooling for Aboriginal and Torres Strait Islander and non-Indigenous students (e.g., attendance, literacy and numeracy, pathways to real post-school options); and

(b) the establishment of the National Partnership for Low Socio-economic Status School Communities which facilitates a range of school-level and broader reforms addressing educational disadvantage associated with low socio-economic status school communities including, amongst others, incentives to attract high-quality principals and teachers and more flexible school operational arrangements.

3.5 The National Partnership on Youth Attainment and Transitions was formed in 2009 to increase the educational participation and attainment of disadvantaged youth, including Aboriginal and Torres Strait Islander youth, as well as to improve their transition to post-school education, training and employment. The raise in minimum school leaving ages and the increased flexibility in the type of compulsory education (e.g. vocational training and employment as acceptable alternatives to senior secondary schooling) also reflect the policy intent expressed in the Melbourne Declaration.

3.6 The positive impacts of the above specifically-targeted strategies and the strengthened general participation requirements for older school students are reflected in the increased student progression and retention rates. For example, in the period between 2008 and 2012, the apparent retention rate from Year 7/8 to Year 12 rose by 5.3 percentage points, from 74.6% to 79.9%. Of the increase, the greatest rise was that in the government sector, narrowing the gap in apparent retention to Year 12 between government and non-government schools.\(^{173}\)

**Protection of minors**

3.7 The employment laws of the various States and Territories recognise the desire or need for some children and youth to work even though they are still of an age below the minimum school leaving age, but try to strike a balance between this need and the need for children and youth to attain a certain degree of education. Accordingly, the employment laws are designed to ensure that work does not interfere with a child’s education, particularly for the period when the child is required to be at school. While children may be employed during school holidays or outside school hours, this is subject to the relevant laws in that State or Territory, as outlined in Table 1 above.

3.8 Employment laws aim to prevent the exploitation of children by imposing certain duties on relevant employers and prohibiting children from being required to perform work that may be harmful to their health and safety, or physical, mental, moral, educational and social welfare. Breaches of these laws may result in suspension or cancellation of a person’s authority to employ children and even prosecution of the employer.

**Availability of government funding and welfare support**

3.9 In March 2015 the Federal Government extended homelessness funding for another two years, providing $230 million under the National Partnership Agreement on Homelessness. The current funding was due to run out in June 2015. The availability of funding provides the homelessness sector, including those who are focused on youth homelessness, with the required funds to maintain critical frontline services and work towards the goals of achieving sustainable housing and social inclusion for

people who are homeless or at risk of homelessness. In the year 2013-14, specialist homelessness services succeeded in intervening to prevent about 70,000 people from losing their housing.  

3.10 The availability of welfare in Australia provides support to youth who are in need of financial help, such as to meet the costs of schooling and certain living expenses. Centrelink, an agency within the Australian Government Department of Human Services portfolio, delivers a range of payments and services to assist people to become self-sufficient and support those in need. For example, Youth Allowance provides financial help for people aged 16 to 24 years who are studying full-time, undertaking a full-time Australian Apprenticeship, training, looking for work or have an illness or disability.

4. Implementation in practice - limitations

Anti-discrimination in education and employment

4.1 Both national and State/Territory laws cover equal employment opportunity and anti-discrimination in the workplace. Discrimination laws cover both direct and indirect discrimination, but are limited to certain prohibited grounds.

4.2 Specifically, a person cannot be treated less favourably because of his or her race, colour, descent, national origin or ethnic origin, such as an employer refusing to hire a suitably qualified Aboriginal shop assistant on the basis of his/her Aboriginality and hiring a less qualified non-Aboriginal assistant instead. The Racial Discrimination Act 1975 makes it unlawful to discriminate in the area of employment in advertising jobs, recruitment, the selection process, access to training, promotion opportunities, the terms and conditions of employment and termination of employment. The Act also makes offensive behaviour based on racial hatred unlawful. Discrimination is also prohibited based on a person’s parental status, family responsibilities or responsibilities as a carer.

4.3 However, discrimination based on housing status (e.g. homelessness) is not being included in relevant legislation. It therefore remains lawful in Australia to discriminate against people on the basis of their housing status. This can have serious effects in all areas of life, but it has been noted to have particular impacts on access to education and employment.  

4.4 Homeless persons are also particularly vulnerable to intersectional discrimination. Intersectional discrimination is where a person is discriminated against on the basis of two or more attributes held by that person. Seeking to combat this, Homelessness Australia made a submission in January 2012 to the Commonwealth Attorney-General’s Department as part of its review of Commonwealth discrimination laws, noting that intersectional discrimination was a particular concern of that organisation and should be included in anti-discrimination laws.

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Barriers to employment for homeless children or youth

4.5 A number of jurisdictions require parental consent or supervision for children or youth of certain ages. This requirement seeks to avoid circumstances whereby the child or young person is put at risk (e.g. lack of safety, exploitation) and ensure the parent(s) is(are) responsible for the child’s wellbeing and employment. However in the context of homelessness, particularly where a child has left or been forced out of home or does not have a relationship with parents or a guardian, the requirement for consent or supervision can actually operate as a barrier to employment and therefore foreclose opportunities for paid work for such a person.

4.6 Some jurisdictions have sought to combat this limitation. Most notably, in Queensland, if a school-aged child does not have a parent or guardian, or the child is living independently from his/her parent or guardian, the child may apply for a special circumstances certificate that authorises the child to work when not required to be at school. This appears to be an appropriate compromise, as a child or young person is permitted to work with the consent of the government authority.

4.7 Other barriers to work for children and young persons include when they can work, what type of work they can do, and the maximum number of hours that can be worked. Enabling authorities to make to these requirements where it is appropriate may be a policy approach that could enable a homeless young person to work outside of the restrictions, however such an approach may not capture persons who do not or choose not (for any number of reasons) to engage with authorities.

Impacts of homelessness on education

Offences where child does not attend school

4.8 A number of jurisdictions, including NSW, Victoria and South Australia, have a system to ensure children of compulsory school age attend and participate at school. There are a number of steps involved in these systems, including interventions, case conferencing and employing intervention strategies. Whilst it should be emphasised that prosecution is seen as a last resort for persistent non-attendance, such jurisdictions ultimately provide that the parent/guardian commits an offence where the child fails to attend and/or participate in school. Prosecution can be in the form of court orders or infringement notices, amongst others. Prosecution is also possible where a child is not enrolled in school or registered for home schooling. Fines vary, but can be hundreds of dollars.

4.9 Whilst not a problem that is exclusively linked to homelessness, homeless families and their children, or families whose children have left home are particularly vulnerable to these laws and may be the least able to manage the consequences. Given the pressures that come with homelessness, it is not unreasonable to infer that ensuring that a homeless child attends and participates in school is more difficult. This may be even truer where the child is of an age where she/he can work. The range of mechanisms available for use before it reaches the stage of prosecution is a positive and necessary element of the system, as is the provision of flexible options for students to complete their schooling. However, the offences regime remains an issue for homeless families.

Cost pressures

4.10 An immediate impact of homelessness on education of children and youth is the diminished ability or inability to afford basic education costs. Costs such as school uniforms and textbooks, computers and associated technology, excursions and other fees (e.g. sport, special projects or materials) are much harder to meet, and where they cannot be adequately met, can affect the person’s education, friendship groups, exposure to bullying, self-esteem, engagement and participation.

4.11 The Commonwealth government has sought to somewhat alleviate education cost pressures by introducing the Schoolkids Bonus (although this payment is due to be terminated at the end of 2016). At a more general level, the Commonwealth government also offers the Child Care Benefit and/or Family Assistance. However these payments are paid directly to the parent(s) or guardian. This may be of little benefit to young persons living independently of their parent(s) or guardian.

4.12 The Transition to Independent Living Allowance seeks to address this issue somewhat. It is a one-off payment (up to $1500) that is paid directly to the young person (between 15 and 25 years of age) who is leaving formal out-of-home care. The payment may be used for a range of services, training, educational materials and other items such as furniture. However, that this payment is not available to those under the age of 15 years and is aimed specifically at those leaving foster care rather than those who are homeless.

4.13 Education cost pressures on homeless children or youth are not easily overcome by a legal framework that mandates participation until a certain age. Tailored policy-level or community-level responses are needed. One example is that of State Schools’ Relief, a Victorian charity that provides government school students with financial assistance and footwear. State Schools’ Relief responds to requests from principals, assistant principals and welfare coordinators and provides support to students where parents or carers are facing one or more of the following issues: health issues resulting in serious financial difficulty; house fires where school clothing is lost; natural disasters; or serious financial difficulty.

Obtaining parental consent

4.14 Obtaining parental consent may also be an issue for homeless youth, particularly those who are living independently from parents and other guardians. A parent or carer is required to make an application for an exemption from attendance in school. Parental consent or accompaniment is also required for, or during, the employment of children in certain circumstances.

4.15 This issue has been recognised by Victoria, which has implemented a guide to schools about how or when to obtain parental consent, and determining whether a child can provide her own consent. If it is determined that parental consent cannot be obtained and that the child cannot give her/his own consent, then a process is set in motion for addressing that child’s issues with the Department of Human Services - Child Protection. In circumstances where a child is living informally with a friend or relative, that person’s parents may be able to give consent once they have completed a statutory declaration for informal relatives care.
Case Study: Victoria’s response to youth homelessness and its education impacts

Victoria has recognised that homelessness can have serious and unique impacts on a young person’s education. To address the impacts, some of which are touched on in section 4, the Victorian government has prepared a guideline for schools to assist them in understanding and managing the issues that face and affect homeless children and young people. This guide sets out common issues concerning homelessness and young people, before outlining key service principles to help and assist such persons and their families. It provides a range of case studies that illustrate good practices and summarises the resources available to schools and affected persons to help the child or young person and their family.

Notable aspects of this guide include:

- noting common reactions to, or impacts of, homelessness, and suggesting responses thereto;
- detailing key principles that will assist schools in responding. These principles include addressing homelessness as a shared responsibility, increasing cooperation between schools and community organisations, prevention and early intervention, encouraging strong relationships, and facilitating access to education;
- providing case studies of success stories so as to help principals and teachers to implement good practices;
- extensively setting out resources available to affected parties, schools, the community, employers and networks; and
- outlining the policy framework that underpins education and youth homelessness issues.

By providing such a comprehensive and practical document to schools throughout the jurisdiction, Victoria has adopted a proactive approach to managing homeless children and youth and, in doing so, may be able to reduce the impact of homelessness on the education of children and young people.

5. Conclusion

Education and employment are matters in which the Commonwealth and all State/Territory governments have an interest and some level of legislative control. From the perspective of youth homelessness, this has a number of implications. Positively, it means there are a range of laws, government agencies, interested bodies and potential funding sources that can and do provide protection and assistance to such children and youth. However it also increases the potential for gaps in the system to develop and for prescriptive regulations to inadvertently exclude those who need the most assistance.

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Cross Borders and Conflict

1. Relationship between Cross Borders and Conflict and Youth Homelessness

For a complete discussion of the legal framework relating to issues such as refugees and asylum seekers, forced marriage and trafficking, please see Appendix C hereunder. In summary:

1.1 Australia’s unique geographical position makes a study pertaining to the legal landscape on cross borders and conflicts involving youth populations challenging. The maritime status of Australia means that refugees arriving by boat dominate the discourse surrounding asylum seekers in Australia, rather than the additional challenges associated with urbanising shift in refugee youth movement typical in other countries.

1.2 The Refugee Convention does not distinguish between arrivals on the basis of their mode of transportation - any obligations under international law apply regardless of method of arrival. This is an important factor which the Australian government has failed to consider in enforcing the guarantees for asylum seekers.

1.3 Statistically speaking, there are a high propensity of refugees in Australia arriving as a result of border conflict. Arrivals from Afghanistan, Iraq, Syria, Iran and Sri Lanka, amongst others, have experienced some form of conflict or forced displacement. For example, in 2012-2013, Australia resettled 12,515 refugees and proportionally speaking, Australia received a smaller number of asylum seekers than other nations with 13,559 asylum seeker applications by the end of 2013 - just over one percent of more than a million applications for asylum submitted worldwide in that year.179

1.4 In respect of children, there were 584 children detained in immigration detention centres on mainland Australia, 305 on Christmas Island and 179 on Nauru.

1.5 These issues are concerning as there is a clear link between the traumatisation of indefinite detention and future issues such as mental health, poverty and disadvantage, potentially leading to homelessness.

1.6 The Minister for Immigration under the Migration Act 1958 (Cth) is considered to be the ‘legal guardian’ for children asylum seekers. Australia also has specific legislative protections in place for children who enter in Australia, which can lead to such children being place under the Minter’s guardianship if it is necessary in the interests of the children to do so. Despite this, Australia continues to be the only country in the world which has a policy of indefinite detention of asylum seeker children.

1.7 The impacts of indefinite detention on refugee children are not felt only when the child is in detention, but when the child is eventually released (if at all). There are studies which have found a strong association between past detention, particularly detention for over six months, and ongoing poor mental health in people now living in the community. In some cases, the medical cost of treating mental illnesses are exacerbated or initiated by prolonged detention and can be on average $25,000 per person for treatment.

1.8 The ongoing impacts of mandatory detention are particularly compounded by virtue of a child’s inherent vulnerability. The AHRC report states that “while children show noticeable improvements in social and emotional wellbeing once released from detention, significant numbers of children experience negative and ongoing emotional impacts after prolonged detention.”180 Given that Australia’s obligations to protect children asylum seekers also extends to their release, it appears plausible to argue that Australia

179 Forgotten Children, 21.
lacks the guarantees and sufficient protections to ensure that they the health and psychological wellbeing of the children are maintained due to indefinite and mandatory detention.

1.9 There is a limited availability of settlement service for asylum seekers following release from immigration detention. These services thus fall largely to welfare and support services and are poorly funded. State governments and community based organisations have been forced to meet the gaps in provision of service to children caused by a lack of Federal funding.

2. Conclusions

2.1 The existing guarantees of family care and support, safety and stability provided by Australia to children who have crossed borders are insufficient, and fail to deal with the multitude of issues prevalent amongst refugees. This largely due to the fact that Australia is in contravention of its international obligations as the only country in the world with a policy of indefinite detention of refugee children.181

2.2 Empirical data strongly indicates that there are many adverse psychological effects associated with indefinite detention of children, which substantially impacts the effectiveness of existing guarantees and social services to those released within the community.

2.3 Temporary Protection Visas, which are by their very nature, for an indefinite period of time, compound the psychological effects and continue to impact a refugee child’s development, meaning Australia fails to fulfil its obligations to children both during their detention and subsequent to their release.

2.4 Adopting the recommendations of experts, policy makers and human rights commissions, serious reform of Australia’s asylum seeker policies is required to bring them in line with its international obligations to ensure greater guarantees of family care and support, safety and stability provided by Australia to children who have crossed borders.

2.5 Australia’s criminalisation of forced marriage and human trafficking, whilst largely in accordance with international legislation, could also be extended in scope to cover documented cases of human trafficking involving marriage and partner migration to Australia. Changes to the way the Department of Immigration handles visa applications and enhanced monitoring and support services programs with a greater appreciation of the diversity of experiences among victim / survivors of human trafficking and slavery across all aspects of the trafficking process could also strengthen Australia’s response to forced marriage and human trafficking of children escaping border conflict in Australia.

Minority Populations

1. Executive Summary

1.1 Australia guarantees safety, stability and empowerment for youth members of minority groups primarily through Australian legislation which provides basic guarantees and rights against anti-discrimination for minority groups at a Federal and State/Territory level, mainly on the grounds of:

(a) age;
(b) race;
(c) sex; and
(d) disability.

1.2 These guarantees are not restricted to “youth members” explicitly - they apply to all (minorities or otherwise) and may, by extension, apply to youth members of minority populations. These rights are all essential for the safety, stability and empowerment of youth members of minority populations.

1.3 The Age Discrimination Act 2004 (Cth) (ADA) provides protections to individuals specifically on the basis of their youth or age. Various State and Territory legislation also provides for specific prohibitions of discrimination on the grounds of age. Despite the age-specific protections, discrimination is still prevalent amongst youth members of minority populations in Australia.

1.4 These above guarantees are fundamental, minority populations of youth groups require more explicit protections under the existing Australian anti-discrimination legislation.

1.5 In particular, the disadvantage faced by youth members of indigenous Australians was recently highlighted in the Amnesty International Report 2014/15, which stated that indigenous peoples comprise around 57.2% of juveniles in prisons, despite accounting for just 5.5% of youth in the general Australian population.\textsuperscript{182} Aboriginal and Torres Strait Islander juveniles are 24 times more likely to be in detention than non-Indigenous juveniles.\textsuperscript{183}

1.6 Given the statistical evidence demonstrating discrimination amongst youth members of minority populations in Australia, such as Indigenous Australians and asylum seekers, it is clear that there ought to be additional protections in place that promote the rights of the youth, particularly amongst minority populations.

2. Minority Populations

2.1 There is no uniform definition of “minority” under international law, however there have been significant efforts to advance consensus through the former Sub-commission on the Prevention of Discrimination and Protection of Minorities, and now the Human Rights Council.

2.2 Traditionally, the “youth” members of minority populations have not been included as a distinct category from the broader minority populations.

2.3 In June 2009, there were 4.19 million children under 15 years of age in Australia, almost 20% of the total population. The minority youth population in Australia is diverse, with a high proportion of Indigenous young people and around one in five young people born overseas.\textsuperscript{184}

\textsuperscript{183} https://changethererecord.org.au/get-the-facts
3. Overview of protections for minority populations - international

3.1 Various international human rights conventions do offer protections to minority populations, at least indirectly. These rules prohibit genocide, apartheid and racial discrimination, amongst other things.

3.2 These conventions can also be extended to “youth populations” or “children” in minority populations, including in particular:

(a) the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
(b) the International Covenant on Economic, Social and Cultural Rights (ICESCR);
(c) the International Covenant on Civil and Political Rights (ICCPR);
(d) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
(e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
(f) the Convention on the Rights of the Child (CROC); and
(g) the Convention on the Rights of Persons with Disabilities (CRPD).

3.3 As highlighted by the Australian Law Reform Commission (ALRC) the position at an international level since 1945 has been one of emphasis on “general human rights” rather than on the “special rights of minorities”. The development of international law standards concerning minorities has been “slow, faltering and tentative”. For example, neither the UN Charter of 1945 or the Universal Declaration of Human Rights of 1948 contain any minority-specific provisions.185

3.4 International conventions and domestic Australian legislation do not target the specific vulnerability of youth members of minority populations.

4. Anti-discrimination legislation in Australia - federal

4.1 Australia’s federal anti-discrimination laws (the Acts) seek to implement the seven major international conventions described above, which Australia has ratified. They form the human rights framework in Australia.

4.2 As shall become apparent, each of the Acts provides certain guarantees on different grounds, but none of these are specific to youth members of minority populations.

4.3 Statistics demonstrate that youth members of minority populations in Australia continue to suffer from various injustices and forms of discrimination on different grounds and in different contexts. In particular, indigenous Australians comprise 57.2% of juveniles in prisons, despite accounting for just 5.5% of the general population of Australia.186

Racial Discrimination Act 1975 (Cth) (RDA):

4.4 The RDA implements Australia’s obligations under the CERD.

4.5 Pursuant to section 9 of the RDA, it is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on:

(a) race;
(b) colour;

which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

4.6 The protection against racial discrimination under the RDA extends to areas such as employment, provision of goods and services, the right to join trade unions, access to places and facilities, land, housing and other accommodation.

4.7 There are no specific protections against racial discrimination for the youth members of a minority population. Rather, discrimination against youth members of minority populations can be characterised under the existing RDA protections.

4.8 Despite the protections in the RDA, racial discrimination, particularly amongst Aboriginal and Torres Strait Islander children remains a significant problem in Australia. This has been closely monitored by the Committee to the Rights of the Child, which, whilst welcoming initiatives such as Australia’s Multicultural Policy and the National Anti-Racism Partnership and Strategy, has noted the prevalence of “serious and widespread discrimination” amongst these minority populations. The provision of and accessibility to basic services and significant overrepresentation in the criminal justice system, the punitive nature of Australia’s Northern Territory Emergency Response Bill (2007), and the absence of independent evaluation of indigenous child protection initiatives are indicative of the failures of the RDA to stem discrimination amongst indigenous populations.187

4.9 Whilst the RDA seeks to implement Australia’s international obligations, in our view, there are further guarantees and protections required for youth members of minority populations.

4.10 The Committee’s recommendation that Australia “strengthen its awareness raising and other preventative activities against discrimination…and if necessary, taking affirmative action for the benefit of children in vulnerable situations, including Aboriginal and Torres Islander Children”188 is essential to ensure further protection for youth members of minority populations.

Sex Discrimination Act 1984 (SDA):

4.11 The SDA implements Australia’s obligations under CEDAW and parts of the International Labour Organisation 156.

4.12 It provides that is unlawful to discriminate on the grounds of:

(a) sex (including sexual orientation, gender identity and intersex status);
(b) marital or relationship status;
(c) pregnancy (including breastfeeding); and
(d) family responsibility.

4.13 The SDA covers discrimination in the following work environments:

(a) employment / superannuation;
(b) against commission agents;
(c) against contract workers;
(d) partnerships;

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187 Committee on the Rights of the Child, paragraph 29.
188 Ibid, paragraph 30.
(e) qualifying bodies;
(f) registered organisations; and
(g) employment agencies.

4.14 It also extends to other non-work areas such as:

(a) education;
(b) goods, services and facilities;
(c) accommodation; and
(d) land.

4.15 However, the SDA has also been criticised, particularly for the lack of federal legislative protection against discrimination on the basis of sexual orientation or gender identity. Whilst the Australian Government’s passing of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identify, and Intersex Status) Act 2013* (Cth) introduced new grounds of discrimination into the SDA, there are concerns that the Australian Government continues to discriminate against same-sex couples and against people with diverse sex and genders by denying them the right to marry.

4.16 The Democratic Audit of Australia’s report, *How well does Australian democracy serve sexual and gender minorities*, explores the extent to which Australia protects and advances the rights of sexual and gender minorities. It has highlighted that there are a significant minority of Australians that do not yet have full citizenship entitlements or democratic rights, based on their sexuality and gender identity. It criticises Australia’s federal anti-discrimination laws in this respect, arguing that the “ongoing lack of protection from discrimination at the federal level leaves Australia well behind comparable jurisdictions like New Zealand, Sweden, Canada and the UK…”

4.17 Despite the amendments at a Federal level, in *Australia’s Universal Periodic Review, 2014 Progress Report - December 2014*, (Periodic Review) the Australian Council of Human Rights Authorities raised concerns that the Australian government had not yet implemented the outstanding recommendations from the 2008 Senate Enquiry into eliminating discrimination and promoting gender equality.

4.18 Discrimination on the grounds of disability covers the following types of disability:

(a) physical;
(b) intellectual;
(c) psychiatric;
(d) sensory;
(e) neurological or learning disabilities;
(f) physical disfigurement;
(g) disorders, illness or diseases that affect thought processes, perceptions of reality, emotions or judgment over results in disturbed behaviours; and
(h) presence in body of organisms causing disease or illness (e.g. HIV).

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4.19 The areas that are covered by the DDA include:

(a) employment;
(b) education;
(c) access to premises;
(d) accommodation;
(e) buying or selling land;
(f) activities of clubs;
(g) sport;
(h) administration of Commonwealth laws and programs;
(i) provision of goods; and
(j) services and facilities.

4.20 The protection of the rights of people with disabilities in Australia, particularly those that are children, has been heavily criticised.

4.21 Notably, the Committee on the Rights of the Child (Committee) has noted that the current Australian disability support system is:

“under-funded, unfair, fragmented and inefficient, and gives people with a disability little choice and no certainty of access to appropriate supports, with children with disabilities frequently failing to receive crucial and timely early intervention services, support for life transitions, and adequate support for the prevention of family or carer crisis and breakdown”.191

4.22 It is apparent that youth members of minority populations with disabilities continue to face significant obstacles, and the DDA does not address many of these issues. Of particular concern, are statistics which demonstrate disparity between educational attainments for children with disabilities compared to children without disabilities. This suggests that youth members of minority populations continue to suffer from issues on the basis of their disability.

4.23 The Periodic Review has expressed concern about the continued lack of implementation of the National Disability Strategy in Australia and the disparity in sectors between those with disabilities and non-disabilities.192

4.24 The Committee has also expressed general legislative concern that the DDA lacks a clear legislative definition of disability to encompass learning, cognitive and mental disabilities, amongst other things.193

4.25 The lack of prohibition of non-therapeutic serialisation of all children, regardless of disability was also seen to be at odds with Australia’s international obligations, as is the legislation allowing for disability on the basis of rejecting an immigration request.

4.26 The ADA is described at page 9 by the Committee as the “primary source of anti-discrimination protection for people of all ages, including young people and children”.194

191 http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf
192 Periodic Review, at [*]
193 Committee, at
194 Committee, at Page 9
As the name of the ADA suggests, it protects younger and older Australians from discrimination on the ground of age. This is obviously of paramount importance for “youth” members of minority populations.

It applies in the areas of:
(a) employment;
(b) education;
(c) access to premises;
(d) provision of goods;
(e) services and facilities;
(f) renting or buying a house or flat;
(g) administration of Commonwealth laws and programs; and
(h) requests for information.

However, the ADA does not apply to a number of areas including various age-specific Commonwealth laws such as social security, and other state laws.

Despite the ADA, and other protections aimed at protecting children, Australia has been criticised for its progress in protecting and promoting the rights of the child. The ACHR criticised the Australia’s Government’s failure to form a formal position on the Optional Protocol to the Convention, which establishes a communications procedure.195

Children in Australia continue to face many issues in different areas, which suggests that the protections provided by the ADA have not succeeded in preventing discrimination. The “youth” in Australia, particularly minority groups such as Aboriginal and Torres Strait Islander children, encounter numerous difficulties by virtue of their age in areas which include, but are not restricted to:
(a) discrimination experienced by Aboriginal and Torres Strait Islander children (page 11 of August 2011 submission);
(b) basic health and welfare, including access to health care services;
(c) adolescent mental health and HIV/AIDS;
(d) general standard of living;
(e) sexual exploitation and trafficking;
(f) substance abuse;
(g) an overrepresentation of Aboriginal and Torres Strait Islander children in child protection and out of home care, particularly as reflected through the long-term child protection orders in the NT;
(h) the disability service system is systematically flawed;
(i) high prevalence of mental health problems for particular groups of vulnerable young children, including Aboriginal and Torres Strait Islander Children;
(j) poor educational outcomes;
(k) low school attendance rates nationally among Aboriginal and Torres Strait Islander children;

195 See Information Concerning Australia and the Convention on the Rights of the Child submissions by the AHRC in 2011 and 2012 (Submissions)
bullying and discrimination in schools and the use of physical and chemical restraint of children with a disability;

children in immigration detention;

child homelessness; and

trafficking.\(^\text{196}\)

**Australian Human Rights Commission Act 1986 (Cth) (AHRC):**

4.32 The AHRC protects against breaches of human rights by any Commonwealth body or agency and discrimination in employment on the basis of:

(a) race;
(b) colour;
(c) sex;
(d) religion;
(e) political opinion;
(f) national extraction;
(g) social origin;
(h) age;
(i) medical record;
(j) criminal record;
(k) marital status;
(l) impairment;
(m) disability;
(n) nationality;
(o) sexual preference; and
(p) trade union activity.

4.33 Of particular relevance to the protection of youth members of minority populations, is the power to appoint a National Children’s Commissioner to deal with concerns about monitoring the implementation of children’s rights. Given the propensity of issues of discrimination which emerge for youth members, particularly of minority populations, the National Children’s Commissioner has a fundamental role in raising awareness and responding to many of the above concerns.

4.34 The National Children’s Commissioner was established on 29 April 2012, with a “broad advocacy role to promote public awareness of issues affecting children, conduct research and education programs, consult directly with children and representative organisations as well as monitor Commonwealth legislation, policies and programs that relate to children’s rights, well being and development”. The whole initiative to create a National Children’s Commissioner was a result of concerns that there was no dedicated body at the national level which was taken with the monitoring and advocating for children’s rights.\(^\text{197}\)

\(^{196}\) See Submissions, 2011 and 2012.

\(^{197}\) See Submission, 2012.
In particular, the second statutory report of the National Human Rights Commissioner provides an overview of the human rights of children and young people in Australia.\textsuperscript{198} It focuses on issues, such as children engaging in intentional self-harm with and without suicidal intent, which can be better protected under Australia legislation. The main conclusion is that too much continues to be unknown and this is impedes the prediction and prevention of injury and death resulting from intentional self-harm with or without suicidal intent in children and young people.\textsuperscript{199}

The AHRC has also released a recent report through the *Human Rights Commission* on the Australian Government’s policy of placing child asylum seekers in detention.\textsuperscript{200} This raises significant question marks over the safety of minority children, and suggests that there is a fundamental problem in preventing discrimination against them.

Whilst the above aims to provide statutory protection on specified grounds, there have also been various initiatives which extend the protection levels, which are positive. In particular, the *Human Rights (Parliamentary Scrutiny) Act 2011*, requires that prior to being passed, all the State party’s legislation be subject to a compatibility assessment, with the human rights and freedoms recognised or declared, in the seven core international human rights instruments to which Australia is party. As highlighted in the Commissioner’s reports, there have been various bills which have been subjected to this.

The National Framework for Protecting Australia’s Children 2009-2020 and its third Three Year Action Plan, along with the Royal Commission to investigate Institutional Responses to Child sexual abuse have also been welcomed, as has the establishment of Victoria’s first commissioner for Aboriginal Children and Youth.\textsuperscript{201}

### 5. Anti-discrimination legislation in Australia - States and Territories

5.1 As yet, there is no State or Territory legislation in Australia which offers protections to youth members of minority populations specifically. All Australian States and Territories have enacted legislation prohibiting discrimination and this anti-discrimination legislation provides general guarantees and protections which extend to protect youth members of minority populations in Australia.

5.2 State and Territory anti-discrimination legislation singles out certain grounds or attributes and makes it unlawful to use those grounds or attributes, in specific areas, in ways which cause disadvantage to a person on the basis of the specified ground or attribute. Generally, there are certain exemptions to the prohibitions. In addition, many of the State and Territory anti-discrimination legislation prohibits related conduct, such as harassment and vilification.\textsuperscript{202}

5.3 However, this means that State and Territory anti-discrimination laws tend to be individualistic and focus on specific requirements and conduct. It is arguable that this approach of focusing on individual rights “is an inadequate way to address concerns that apply to all members of a group and not just individual members of a group”,\textsuperscript{203} including youth members of minority populations.

5.4 State and Territory anti-discrimination legislation is complaint-based, meaning that the aggrieved person must complain to an administrative agency for recourse. This means that the enforcement of State and Territory anti-discrimination laws generally tends to be litigious and reactive or complaints-based, rather than pre-emptive or proactive.

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199. See Periodic Review
201. See Periodic Review.
5.5 This model, which relies on individuals to assert their rights, significantly limits the effectiveness of State and Territory anti-discrimination legislation in the protection and guarantee of safety, stability and empowerment for youth members of minority populations in Australia. In particular, it is unlikely that youth members of minority populations would be willing, or understand the process, to lodge a complaint where they have faced discrimination. This means that discrimination will continue, until it is challenged.

5.6 One option would be to adopt a more proactive approach, similar to the Victorian State model (discussed further below). This is also consistent with international practice, such as South Africa, the United Kingdom, Canada and the United States which has a proactive duty in anti-discrimination laws.204

Victoria (VIC)

5.7 The main anti-discrimination legislation in VIC is the Equal Opportunity Act 2010 (VIC) (VIC Act). The purpose of the VIC Act is to encourage identification and elimination of discrimination, sexual harassment and victimisation and their causes, and to promote and facilitate the progressive realisation of equality.205 The VIC Act replaced the Equal Opportunity Act 1995 (Vic).

5.8 Importantly, the VIC Act introduced a positive duty held by all organisations covered by the Act, to take reasonable, proportionate and proactive steps towards eliminating discriminating.206

Section 15

(1) This section applies to a person who has a duty under Part 4, 6 or 7 not to engage in discrimination, sexual harassment or victimisation.

(2) A person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible

... 

(4) A contravention of the duty imposed by subsection (2) may be the subject of an investigation undertaken by the Commission...

5.9 This duty is unique to State and Territory anti-discrimination legislation. Imposing this positive duty on persons is a significant step towards addressing and preventing the systemic discrimination of, amongst others, youth members of minority populations in Australia.

5.10 Like other State and Territory legislation, the VIC Act does not prescribe specific protections to youth minority populations. The VIC Act prohibits both direct and indirect discrimination on the grounds of sex, sexual orientation, gender identity, pregnancy, breastfeeding, marital status, carer status, age, race (including colour, nationality, ethnic or national origin), parental status, physical features, religious or political belief or activity, disability, industrial activity, lawful sexual activity or personal association with persons having any of the above attributes. The VIC Act also prohibits sexual harassment.

5.11 The VIC Act prohibits discrimination in the areas of employment, education, goods and services, accommodation, land sales and transfers, clubs, sport and local government.207

New South Wales (NSW)

5.12 In NSW, the main legislation which deals with anti-discrimination is the *Anti-Discrimination Act 1977 (NSW)* (NSW Act). The NSW Act is not limited to specific protections for the youth minority population in Australia.

5.13 The NSW Act protects individuals from discrimination on the grounds of race (including colour, nationality and national or ethnic origin), sex (including pregnancy), marital status, disability, homosexuality, age (compulsory retirement only), transgender and carer’s responsibility. The NSW Act also makes specific conduct unlawful, including sexual harassment and vilification on the basis of race, homosexuality, transgender and HIV/AIDS status.

5.14 The NSW Act prohibits discrimination in numerous areas, including employment, partnerships, trade unions, qualifying bodies, employment agencies, education, access to places and vehicles, the provision of goods and services, accommodation and registered clubs.

Australian Capital Territory (ACT)

5.15 In the ACT, the main legislation dealing with anti-discrimination is the *Discrimination Act 1991 (ACT)* (ACT Act). Like other State and Territory legislation, the ACT Act provides broader protections which cover both youth and minority populations in Australia, but does not proscribe specific protections to youth members of minority populations in Australia.

5.16 The ACT Act prohibits discrimination on the following grounds - sex, sexual harassment, sexuality, transsexuality, age, profession, trade, occupation or calling, relationship status, status as a parent or carer, pregnancy, race, racial vilification, religious or political conviction, impairment, membership or non-membership of association of employers or employees, breastfeeding, spent convictions, disability, religious practice in employment, having had one of the enumerated attributes in the past or association with a person with an above attribute.

5.17 The ACT Act prohibits discrimination in the areas of work, employment agencies, education, access to premises, goods, services or facilities, accommodation, clubs, qualifying bodies, professional or trade organisations and requests for information.

Northern Territory (NT)

5.18 The main anti-discrimination legislation in the NT is the *Anti-Discrimination Act 1996 (NT)* (NT Act). Like other State and Territory legislation, it does not prescribe specific protections for youth members of minority populations.

5.19 The NT Act prohibits discrimination on the grounds of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association activity, religious belief or activity, irrelevant criminal record, political opinion, affiliation or activity, irrelevant medical record, or association with a person with an above attribute. The NT Act also prohibits sexual harassment and victimisation.

5.20 The NT Act prohibits discrimination in the areas of education, work, accommodation, goods and services, facilities, clubs, insurance and superannuation.

Queensland (QLD)

5.21 The main anti-discrimination legislation in QLD is the *Anti-Discrimination Act 1991 (QLD)* (QLD Act). The purpose of the QLD Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas.

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Like other State and Territory legislation, it does not prescribe specific protections to youth minority populations. The QLD Act prohibits both direct and indirect discrimination on the grounds of sex, relationship status, pregnancy, parental status, breastfeeding (goods and services only), race, age, physical impairment, religion, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities, or association with a person who has any of these attributes. The QLD Act also prohibits sexual harassment.

The QLD Act prohibits discrimination in the areas of work, education, goods and services, superannuation and insurance, disposal of land, accommodation, club membership, administration of state laws and programs, local government, existing partnership and in pre-partnership.

South Australia (SA)

The main anti-discrimination legislation in SA is the *Equal Opportunity Act 1984* (SA) (SA Act). The purpose of the SA Act is to promote equality of opportunity for all people living in South Australia by preventing discrimination against people and to give them a fair chance to take part in economic and community life.

Like other State and Territory legislation, it does not prescribe specific protections to youth minority populations. The SA Act prohibits discrimination on the grounds of sex, sexuality, marital status, pregnancy, race, age, physical and intellectual impairment, mental illness, association with a child, chosen gender, caring responsibilities, religious dress (in work or study) and spouse or partner’s identity. The SA Act also prohibits sexual harassment.

The SA Act prohibits discrimination in the areas of employment, partnerships, clubs and associations, qualifying bodies, education, provision of goods and services, accommodation, sale of land, advertising (including employment agencies), conferral of qualifications and superannuation.

Tasmania (TAS)

The main anti-discrimination legislation in TAS is the *Anti-Discrimination Act 1998* (TAS) (TAS Act). It prohibits both direct and indirect discrimination. Like other State and Territory legislation, it does not prescribe specific protections to youth minority populations.

The TAS Act prohibits discrimination on the grounds of age, breastfeeding, disability, family responsibilities, gender, industrial activity, irrelevant criminal record, irrelevant medical record, lawful sexual activity, marital status, relationship status, parental status, political activity, political belief or affiliation, pregnancy, race, religious activity, religious beliefs or affiliation, sexual orientation, association with a person who has, or is believed to have, any of these attributes. The TAS Act also prohibits certain conduct, including sexual harassment, inciting hatred on the basis of race, disability, sexual orientation or religion.

The TAS Act prohibits discrimination in the areas of employment (paid and unpaid), education and training, provision of facilities, goods and services, accommodation, membership and activities of clubs and in relation to administration of any law of state, employment awards, enterprise agreements and industrial agreements.

Western Australia (WA)

The main anti-discrimination legislation in WA is the *Equal Opportunity Act 1984* (WA) (WA Act). Like the other State and Territory legislation, it does not prescribe specific protections to youth minority populations.


5.31 The WA Act prohibits discrimination on the grounds of sex, sexual orientation, marital status, pregnancy, race, religious or political conviction, age, racial harassment, impairment, family responsibility or family status and gender history. The WA Act also prohibits sexual harassment and racial harassment.

5.32 The WA Act prohibits discrimination in the areas of employment, partnerships, professional or trade organisations, qualifying bodies, employment agencies, applicants and employees and commission agents, application forms, advertisements, education, access to places and vehicles, provision of good services and facilities, accommodation, clubs and land.215

6. Conclusion and assessment of protection of youth minority population in Australia and required guarantees

6.1 Given the preponderance of issues amongst youth members of minority populations, it is clear that the basic guarantees for minority groups under Australian legislation are insufficient.

6.2 Issues prevalent amongst ethnic, indigenous, linguistic or asylum seeker/refugee minorities, amongst other minority groups could benefit from a “more comprehensive United Nations Declaration or Covenant on the Rights of Minorities”216

6.3 There appears to be a “implementation gap” when it comes to Australian international obligations, particularly as they relate to youth members of minority populations. Australia has sought to incorporate International Conventions, but the legal protection of youth members are “not comprehensive and nor do they provide an effective remedy for violations”.217

6.4 Australian legislation, at both a Federal and State level appears to place an emphasis on “general rights” and lack any form of recognition for the particularly vulnerable nature of minority youth populations.

217 Submission 2011, at page 5.
## Appendix A - Summary of relevant legislation

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Principal Act</th>
<th>Other relevant Acts/Legislation</th>
<th>Responsible government agency</th>
</tr>
</thead>
</table>
| Australian Capital Territory | Children and Young People Act 2008 (ACT) | Adoption Act 1993 (ACT)  
Human Rights Act 2004 (ACT)  
Human Rights Commission Act 2005 (ACT)  
Public Advocate Act 2005 (ACT)  
Family Law Act 1975 (Cth) | Community Services Directorate |
Child Protection (Offenders Registration) Act 2000 (NSW)  
Crimes Act 1900 (NSW)  
Commission for Children and Young People Act 1998 (NSW)  
The Ombudsman Act 1974 (NSW)  
Family Law Act 1975 (Cth)  
Advocate for Children and Young People Act 2014  
Children and Young Persons (Care and Protection) Amendment Bill 2009 | Department of Family and Community Services |
| Northern Territory     | Care and Protection of Children Act 2007 (NT) | Information Act 2006 (NT)  
Disability Services Act 2004 (NT)  
Criminal Code Act 2006 (NT)  
Family Law Act 1975 (Cth) | Department of Children and Families |
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<tr>
<th>Jurisdiction</th>
<th>Principal Act</th>
<th>Other relevant Acts/Legislation</th>
<th>Responsible government agency</th>
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<tbody>
<tr>
<td>Brisbane</td>
<td>Child Protection Act 1999 (Qld)</td>
<td>Child Protection Reform Amendment Act 2014 (Qld)</td>
<td>Department of Communities, Child Safety and Disability Services</td>
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<td>Public Guardian Act 2014 (Qld)</td>
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<td>Family Child and Commission Act 2014 (Qld)</td>
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<td>Education (General Provisions) Act 2006 (Qld)</td>
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<td>Public Health Act 2005 (Qld)</td>
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<td>Adoption of Children Act 1964 (Qld)</td>
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<td>South Australia</td>
<td>Children’s Protection Act 1993 (SA)</td>
<td>Young Offenders Act 1994 (SA)</td>
<td>Department of Health and Human Services</td>
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<tr>
<td>Tasmania</td>
<td>Children, Young Persons and their Families Act 1997 (Tas.)</td>
<td>The Family Violence Act 2004 (Tas.)</td>
<td>Department of Health and Human Services</td>
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<td>Family Law Act 1975 (Cth)</td>
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<td>Children, Young Persons and their Families Amendment Act 2009 (Tas.)</td>
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<tr>
<td>Victoria</td>
<td>Children, Youth and Families Act 2005 (Vic.)</td>
<td>Working with Children Act 2005 (Vic.)</td>
<td>Department of Human Services</td>
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<td>Child Wellbeing and Safety Act 2005 (Vic.)</td>
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<td>The Charter of Human Rights and Responsibilities Act 2006 (Vic.)</td>
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<td>Family Law Act 1975 (Cth)</td>
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<td>The Commission for Children and Young People Act 2012</td>
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<tr>
<td>Western Australia</td>
<td>Children and Community Services Act 2004 (WA)</td>
<td>Working with Children (Criminal Record Checking) Act 2004 (WA)</td>
<td>Department for Child Protection and Family Support</td>
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<td>Family Court Act 1997 (WA)</td>
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<td>Adoption Act 1994 (WA)</td>
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<td>Family Law Act 1975 (Cth)</td>
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<td>Child Care Services Act 2007</td>
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## Appendix B - Mandatory Reporting Requirements

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<thead>
<tr>
<th>Jurisdiction</th>
<th>State of mind</th>
<th>Nature of harm</th>
<th>Extent of harm</th>
<th>Past/present or future</th>
<th>Mandatory Reporters</th>
</tr>
</thead>
</table>
| ACT          | Belief on reasonable grounds | Physical abuse
Sexual abuse | Not specified: “sexual abuse … or non-accidental physical injury” | Past/present | A person who is: a doctor; a dentist; a nurse; an enrolled nurse; a midwife; a teacher at a school; a person providing education to a child or young person who is registered, or provisionally registered, for home education under the Education Act 2004; a police officer; a person employed to counsel children or young people at a school; a person caring for a child at a child care centre; a person coordinating or monitoring home-based care for a family day care scheme proprietor; a public servant who, in the course of employment as a public servant, works with, or provides services personally to, children and young people or families; the public advocate; an official visitor; a person who, in the course of the person’s employment, has contact with or provides services to children, young people and their families and is prescribed by regulation |
| NSW          | Suspects on reasonable grounds that a | Physical abuse
Sexual abuse
Emotional/psych | A child or young person “is at risk of significant harm if” | Both | A person who, in the course of his or her professional work or other paid employment delivers health care, |

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<tr>
<th>Jurisdiction</th>
<th>State of mind</th>
<th>Nature of harm</th>
<th>Extent of harm</th>
<th>Past/present or future</th>
<th>Mandatory Reporters</th>
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<tbody>
<tr>
<td>Protection) Act 1998 (NSW) ss 23, 27, 27A</td>
<td>child is at risk of significant harm</td>
<td>holological abuse Neglect Exposure to domestic violence</td>
<td>current concerns exist for the safety, welfare or wellbeing of the child or young person because of the presence, to a significant extent, of … basic physical or psychological needs are not being met … physical or sexual abuse or ill-treatment (…) serious psychological harm”</td>
<td>Both</td>
<td>welfare, education, children’s services, residential services or law enforcement, wholly or partly, to children; and A person who holds a management position in an organisation, the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children’s services, residential services or law enforcement, wholly or partly, to children</td>
</tr>
<tr>
<td>NT (Care and Protection of Children Act (NT) ss 15, 16, 26)</td>
<td>Belief on reasonable grounds</td>
<td>Physical abuse Sexual abuse Emotional/psychological abuse Neglect Exposure to physical violence</td>
<td>Any significant detrimental effect caused by any act, omission or circumstance on the physical, psychological or emotional wellbeing or development of the child</td>
<td>Both</td>
<td>Any person</td>
</tr>
<tr>
<td>QLD (Public Health Act 2005 (Qld) ss 158, 191; Education (General Provisions) Act 2006 (Qld) ss 364, 365, 365A, 366, 366A; Child Protection Act 1999 (Qld) ss 9, 148, 22,</td>
<td>Becomes aware, or reasonably suspects</td>
<td>Physical abuse Sexual abuse</td>
<td>Significant detrimental effect on the child’s physical, psychological or emotional wellbeing</td>
<td>Both</td>
<td>An authorised officer, a public service employee employed in the department, a person employed in a departmental care service or licensed care service, doctors; registered nurses; teachers; police officers; child advocates</td>
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<td>Jurisdiction</td>
<td>State of mind</td>
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<tr>
<td>SA (Children’s Protection Act 1993 (SA) ss 6, 10, 11)</td>
<td>Suspects on reasonable grounds</td>
<td>Physical abuse Sexual abuse Emotional/psychological abuse Neglect</td>
<td>Any sexual abuse; physical or psychological abuse or neglect to the extent that the child “has suffered, or is likely to suffer, physical or psychological injury detrimental to the child’s wellbeing; or the child’s physical or psychological development is in jeopardy”</td>
<td>Past/present</td>
<td>Doctors; pharmacists; registered or enrolled nurses; dentists; psychologists; police officers; community corrections officers; social workers; teachers in educational institutions including kindergartens; family day care providers; employees/volunteers in a government department, agency or instrumentality, or a local government or non-government agency that provides health, welfare, education, sporting or recreational, child care or residential services wholly or partly for children; ministers of religion (with the exception of disclosures made in the confessional); employees or volunteers in a religious or spiritual organisations</td>
</tr>
<tr>
<td>Tas. (Children, Young Persons and Their Families Act 1997 (Tas.) ss 3, 4, 14)</td>
<td>Believes, or suspects, on reasonable grounds, or knows</td>
<td>Physical abuse Sexual abuse Emotional/psychological abuse Neglect Exposure to family violence</td>
<td>Any sexual abuse; physical or emotional injury or other abuse, or neglect, to the extent that the child has suffered, or is likely to suffer, physical or psychological harm detrimental to the child’s wellbeing; or the child’s physical or psychological</td>
<td>Past/present</td>
<td>Registered medical practitioners; nurses; midwives; dentists, dental therapists or dental hygienists; registered psychologists; police officers; probation officers; principals and teachers in any educational institution including kindergartens; persons who provide child care or a child care service for fee or reward; persons concerned in the management of a child care service licensed under the Child Care Act 2001; any other person who is</td>
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<tr>
<td>Jurisdiction</td>
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<td>Nature of harm</td>
<td>Extent of harm</td>
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<tr>
<td>Vic. (Children, Youth and Families Act 2005 (Vic) ss 162, 182, 184)</td>
<td>Belief on reasonable grounds</td>
<td>Physical abuse, Sexual abuse</td>
<td>Child has suffered, or is likely to suffer, significant harm as a result of physical injury or sexual abuse and the child’s parents have not protected, or are unlikely to protect, the child from harm of that type</td>
<td>Both</td>
<td>Employed or engaged as an employee for, of, or in, a government agency that provides health, welfare, education, child care or residential services wholly or partly for children, and an organisation that receives any funding from the Crown for the provision of such services; and any other person of a class determined by the Minister by notice in the Gazette to be prescribed persons.</td>
</tr>
<tr>
<td>WA (Family Court Act 1997 (WA) ss 5, 160) Children and Community Services Act 2004 (WA) ss 124A-H</td>
<td>Belief on reasonable grounds</td>
<td>Physical abuse, Sexual abuse</td>
<td>Not specified: any sexual abuse</td>
<td>Past/present</td>
<td>Court personnel; family counsellors; family dispute resolution practitioners, arbitrators or legal practitioners representing the child’s interests, nurses, doctors, midwives, teachers, police.</td>
</tr>
<tr>
<td>Commonwealth (Family Law Act 1975 (Cth) ss 4, 28)</td>
<td>Suspects on reasonable grounds</td>
<td>Abuse, Ill-treatment, Psychological</td>
<td>Not specified: any assault or sexual assault; serious</td>
<td>Both</td>
<td>Registrar or a Deputy Registrar of a Registry of the Family Court of Australia, or of the Family Court of Australia.</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>State of mind</td>
<td>Nature of harm</td>
<td>Extent of harm</td>
<td>Past/present or future</td>
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<td>67ZA)</td>
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<td>harm</td>
<td>psychological harm; serious neglect</td>
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<td>Western Australia; a Registrar of the Federal Circuit Court; a family consultants; family counsellors; family dispute resolution practitioners; arbitrators; lawyers independently representing a child’s interests</td>
</tr>
</tbody>
</table>
Appendix C: An analysis of laws relating to Cross Borders and Conflict

1. Existing guarantees and protections in place for youth refugees in Australia

1.1 The following section shall analyse the existing guarantees and protections for youth refugees, with reference to Australia’s international obligations and domestic legislation.

Migration Act 1958 (Cth)

1.2 Australia is a party to the Refugee Convention which defines a “Refugee” under Article 1A(2) as:

“someone who owing to a well-founded fear of being persecuted for reasons of race; religion; nationality; membership of a particular social group; political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

1.3 Australia’s obligations under the Refugee Convention are ratified at the domestic level through the Migration Act 1958 (Cth) (“Migration Act”) which gives effect to the legal obligation of non-refoulement. Section 36(2) of the Migration Act sets out the conditions under which protection visas can be granted to non-citizens in Australia to whom the Minister is satisfied that Australia has protection obligations under the Refugees Convention, as amended by the Refugees Protocol.

1.4 Where a refugee is denied an application for protection visa and he or she has exhausted all avenues of merits review, he or she may ask reconsideration from the Minister for the grant of such visa on humanitarian grounds in accordance with Section 417 of the Migration Act.

1.5 The Minister for Immigration under the Migration Act is considered to be the “legal guardian” for children asylum seekers. The Minister’s role is such:

“Refugees aged less than 18 who are accepted for resettlement in Australia and who are not accompanied by a parent, are classified as either ‘unattached’ or ‘detached’. Unattached minors are those who are neither in the care of, nor proceeding to, a parent or close adult relative. Such children and young people enter Australia under the guardianship of the Commonwealth Minister for Immigration. The Minister delegates most powers and functions concerning them to participating State welfare authorities while remaining the legal guardian. Detached minors, on the other hand, are those either in the care of, or proceeding to, a close adult relative other than a parent. The same responsibility does not accrue to the Minister in respect of detached minors.”

Immigration (Guardianship of Children) Act 1946 (IGOC)

1.6 Australia has also specific legislative protections in place for children who enter the country (whether as a result of cross borders and conflict or not) under IGOC and the Migration Act.

1.7 IGOC provides legal status for children (under the age of 18 years) who enter Australia without a legal guardian. Such children may, if the Minister deems that it is necessary in the interests of the children to do so, direct, in writing, that certain children shall be placed under the Minister’s guardianship. Thereafter, the concerned children have to undergo several support services in partnership with State welfare authorities.

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219 “The Situation of Young Refugees”,
**Australia’s Refugee and Humanitarian Programme**

1.8 The IGOC Act also provides support for unaccompanied refugee children entering Australia through the Federal Government’s Refugee and Humanitarian Programme (“Humanitarian Programme”). The Australian Department of Immigration and Border Protection has initiated the Humanitarian Programme for refugees and others in refugee-like situations, which typically involve those escaping cross border conflict in war torn situations. Australia’s Humanitarian Programme provides protection and resettlement to refugees and others in humanitarian need from all parts of the world.

1.9 The Humanitarian Programme has two important functions:

(a) an onshore protection/asylum component which fulfils Australia’s international obligations by offering protection to people already in Australia who are found to be refugees according to the United Nations Convention relating to the Status of Refugee; and

(b) an offshore resettlement component which expresses Australia’s commitment to refugee protection by going beyond these obligations and offering resettlement to people overseas for whom this is the most appropriate option.

1.10 The onshore protection grants the refugees opportunity to apply for a Protection visa allowed under the IGOC Act. The offshore component, however, permits refugees to apply for permanent visas under two categories:

(a) **Refugees** - for people who are subject to persecution in their home country, who are typically outside their home country, and in need of resettlement. The majority of applicants who are considered under this category are identified and referred by UNHCR to Australia for resettlement; and

(b) **Special Humanitarian Programme** (“SHP”) - for people outside their home country who are subject to substantial discrimination amounting to gross violation of human rights in their home country, and immediate family of persons who have been granted protection in Australia. Applications for entry under the SHP must be supported by a proposer who is an Australian citizen, permanent resident or eligible New Zealand citizen, or an organisation that is based in Australia.

1.11 In 2012–2013, the Humanitarian Programme was increased to 20,000 places from 13,750 places in 2011–2012. A total of 20,019 visas were granted under the Humanitarian Programme, of which 12,515 visas were granted under the offshore component and 7,504 visas were granted under the onshore component.

**Support services for young refugees**

1.12 Some private institutions including non-profit organisations and agencies also extend support programs for young refugees. For example, Australia for UNHCR, vows to protect refugees, internationally displaced people, victims of natural disaster, returnees, stateless people, and asylum-seekers.

1.13 There are also various Australian agencies (governmental and non-governmental) which aim to protect and safeguard the rights of refugees including Department of Human Services, Australian Human Rights Commission, Department of Immigration and Border Protection, Refugee Council of Australia, Refugee Advice and Casework Service, Amnesty International Australia, Australian Refugee Association and the Jesuit Refugee Service Australia, amongst others, which follow:

(a) **Australian Refugee Association (ARA)**

ARA programs are supported by the Australian Government Department of Social Services through the Settlement Grants Programme. They help young people aged 16-30 years old

from refugee backgrounds, providing one-on-one support and group programs to help the youth with their education and employment pathways, as well as their safety, wellbeing and settlement in South Australia. The programs consist of the following: \(^{222}\)

i. **The Homework Club program**, which provides free support to young people in high school from refugee backgrounds with their education. Assistance range from tutorial and friendship to students;

ii. **The Case Management Services**, which offers the assistance of social workers and youth workers to support young people in a one-on-one capacity to help with a variety of issues that affect young people;

iii. **Education Support**, includes assistance to enroll in school or relocate to a new school, to deal with bullying or issues with racism at school, subject choices, applying for higher education through SATAC, and education costs;

iv. **School Holiday Activities** includes free indoor rock climbing, adventure courses, picnics, cooking classes, sport, etc. ARA also provides Material and Financial Assistance to young people in the form of, amongst other things, stationery supplies, education fees, bills and Emergency Supplies;

v. **The youth mentoring program** pairs young adults from refugee backgrounds (aged 18 to 25 years) with members of the community for friendship, conversation and social support;

vi. **“The Privilege” Workshop** provides cultural and religious awareness training with a focus on youth; and

vii. **The Be Strong, Be Safe Program** is a series of workshops relating to the safety and wellbeing of young refugees. ARA has facilitated this successful program for over 5 years, working closely with schools and communities.

(b) **The Refugee Minor Program of the Department of Human Services (DHS)**

Children and young people who enter Australia as refugees are referred by the Department of Immigration and Border Protection to this Program, which is a Victorian based, state-wide services. Workers provide support in resettling in Victoria for the refugee minor (until the young person turns 18 years of age, or become an Australian Citizen, adopted in an Australian family court, or one or both of their parents arrive in Australia to look after them.) The program covers case management services, group work and advocacy, and referral pathways. \(^{223}\)

Partnering agencies include Centre for Multicultural Youth, Department of Immigration and Border Protection, Sudanese Community Association of Australia, Mallee Family Care, Family Care, Bethany and Youth connect. \(^{224}\)

2. **Analysis of guarantees of family care and support, safety and stability**

2.1 This section analyses the effectiveness of the above guarantees and protections in respect of family care and support, safety and stability the laws provide to children who have crossed borders.

2.2 The guarantees currently in force are limited, and ultimately inadequate for dealing with issues arising from children that are released from detention or those ultimately re-settled within the Australian community.

\(^{221}\) [www.australianrefugee.org](http://www.australianrefugee.org)

\(^{222}\) [www.australianrefuge.org](http://www.australianrefuge.org)


\(^{224}\) Ibid
2.3 As the Australian Human Rights Commission (“AHRC”) notes, there is a “significant gap between Australia’s human rights obligations under international law and the current treatment of asylum seekers and refugees.” Australia has created of the “most restrictive immigration detention systems in the world” which, in the view of the UN, amounts to cruel, inhumane or degrading treatment. This is supported by empirical data, such as the fact that between January 2011 and February 2013 there were 4,313 incidents of actual, threatened and attempted serious self-harm recorded in immigration detention facilities in Australia. In the 2012–2013 financial year there were 846 incidents of self-harm across the immigration detention network.

2.4 This section will demonstrate the failure of Australia’s existing guarantees in relation to cross borders and conflict, with reference to:

(a) the dangers associated with indefinite detention of children;
(b) the difficulties of the TPV system; and
(c) access to welfare issues for asylum seeker children.

2.5 It also will also focus on the need to reform human trafficking and forced marriage laws to deal with the existing empirical data on human trafficking involving partner migration.

The dangers associated with indefinite detention of children

2.6 Despite Australia’s international obligations, and the protections in place concerning asylum seekers and refugees, it continues to be the only country in the world which has a policy in place of indefinite detention of refugee children. As at December 2014, there were over 800 children in mandatory closed and indefinite detention - a group which is described as “most vulnerable sub-group”, with high rates of preventable conditions, including psychosocial morbidity, due to poor access to health services.

2.7 The United Nations Human Rights Committee (“UNHCR”) has argued that Australia’s existing protections in place for children are largely insufficient, and the status quo is in clear violation Australia’s binding obligations under, amongst others, Article 9(1) of the International Covenant on Civil and Political Rights (“ICCPR”) and Article 37(b) of the Convention on the Rights of the Child (“CROC”) to ensure that no one is subjected to arbitrary detention.

2.8 The indefinite detention of children breaches the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the right of people detained to be treated with dignity. The prohibition on arbitrary detention includes detention which, although lawful under domestic law, is ultimately unjust or disproportionate. For the detention of a person not to be arbitrary, it must be a reasonable and necessary measure in all the circumstances. The multitude of dangers, and preponderance of empirical data which indicates that mandatory detention is harmful for the wellbeing and not in the best interests of children, strongly suggests that indefinite detention of children is unjust.

2.9 Academic literature to date and the expert reports unequivocally indicate that prolonged detention of children leads to “serious negative impacts on their mental and emotional health and development.”

Issues pertaining to the protection of children is something that has been closely monitored and analysed by the Australian Human Rights Commission (“AHRC”), most notably in their recent report, *The

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228 Towards better health for refugee children and young people in Australia and New Zealand: The RACP Perspective https://www.racp.edu.au/index.cfm?objectid=B567121F-A973-3C4C-B4CD0D6F6A6ABACA.

Forgotten Children: National Inquiry into Children in Immigration Detention (2014) which utilises empirical data to note that there are particular challenges relating to the situation of children in immigration detention. These challenges include:

(a) children in detention have significantly higher rates of mental health issues than other children in Australia;
(b) indefinite detention removes the right of education;
(c) forcible transfer of children on Christmas Island is a breach of fundamental human rights, and the obligation to act in the best interest of the child;
(d) children have been subjected to assault, sexual assaults, and self-harm;
(e) some children born in immigration are essentially stateless and may be denied their right to nationality and protection;
(f) some children of parents assessed as security risks have been detained for over two years without release; and
(g) children indefinitely detained in Nauru are suffering from extreme levels of physical, emotional, psychological and developmental distress.

2.10 The impacts of indefinite detention on refugee children are not felt only when the child is in detention, but when the child is eventually released (if at all). There are studies which have found a strong association between past detention, particularly detention for over six months, and ongoing poor mental health in people now living in the community. In some cases, the medical cost of treating mental illnesses are exacerbated or initiated by prolonged detention and can be on average $25,000 per person for treatment.

2.11 The ongoing impacts of mandatory detention are particularly compounded by virtue of a child’s inherent vulnerability. The AHRC report states that “while children show noticeable improvements in social and emotional wellbeing once released from detention, significant numbers of children experience negative and ongoing emotional impacts after prolonged detention.” Given that Australia’s obligations to protect children asylum seekers also extends to their release, it appears plausible to argue that Australia lacks the guarantees and sufficient protections to ensure that they the health and psychological wellbeing of the children are maintained due to indefinite and mandatory detention.

Failure of TPVs and associated effects

2.12 The Government’s reintroduction of TPVs in December 2014 highlights the need for further protections and guarantees for refugee children. TPVs are available to those asylum seekers arriving in Australia without visas which are found to be owed protections by the Australian government. In contrast to Permanent Protection Visas, they permit the holder to remain in Australia for up to three years.

2.13 The available empirical data highlights that temporal limitations and indefinite status are the hallmarks of TPVs issued to children (once released from detention) creates considerable uncertainty about their future. In fact, most TPV holders will only ever be eligible for successive temporary visas, exacerbating the situation of uncertainty for TPV holders placing them in a status of “psychological limbo.”

2.14 The issues associated with TPVs has been discussed at length in various reports, such as the AHRC’s 2004 report “A Last Resort? National Inquiry into Children in Immigration Detention” which highlights that the conditions attached to TPVs have a detrimental impact on refugee children, with the lack of access to permanent protection leading to significant uncertainty about the future for child TPV holders. This uncertainty is more likely to “compound mental health problems than facilitate

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rehabilitation from past trauma and integration into Australian society.”

This can have enormous long-term and direct impact on their capacity to settle in the Australian community, as TPVs “create enormous instability for unaccompanied minors and impacted on their ability to establish long term goals and a stable future while the spectre of deportation or indefinite temporary visa status is the governing basis of their stay in Australia.”

The 2004 AHRC inquiry has previously found that the impact on refugee children of the conditions attached to a TPV results in significant breaches of Australia’s international obligations, including breaches of Articles 3(1), 6(2), 10(1), 20(1), 22(1), 24(1) and 39 of the CROC. The services provided to families and unaccompanied children released from detention on a TPV are largely inadequate.

The main criticisms of the TPVs are related to the impact the temporary status of the visas have on their ability to settle into the Australian community through their ongoing psychological issues and the extra services needed to cater for those difficulties. The 2004 AHRC inquiry states in its publication that they are concerned about the following in respect of TPVs:

(a) mental health impact of TPVs - the temporary nature of TPV protection granted creates uncertainty and insecurity in the life of refugees. In particular, the ongoing possibility of forcible removal to their home countries where they fear persecution adds to feelings of insecurity and ongoing mental health problems amongst TPV holders. Indeed, torture and trauma counselling services have reported that the uncertainty created by TPV holders inhibits the recovery of former detainee children from trauma suffered prior to and during detention. The environment created by temporary protection policies is “more likely to compound the effect any traumas sustained in detention, rather than contribute to successful recovery”;

(b) prolonged separation from family members - family reunion prohibitions and restrictions on travel outside of Australia (due to loss of TPV status) are practically not in the best interests of the child, particularly in the context of mental health and family unity (and may constitute a breach of Australia’s human rights obligations). For example, children on TPVs whose parents are outside Australia are essentially prevented from seeing them for the duration of their visa. This might mean extremely long periods and potentially indefinite periods of separation;

(c) discrimination and penalisation - whilst under international human rights law, asylum seekers who arrive without a visa have a right to non-discrimination, it could be argued that TPV’s are inherently discriminatory. Unless the criteria for differentiation underpinning the TPV regime were reasonable, objective, and for a legitimate aim, which in our view, it is not, there are serious question marks over the legal veracity of the entire regime. For example, the general conditions of the TPV system continue to operate as a barrier to participation in education meaning that holders receive a lower level of education than regular Australian children;

(d) services provided to children and their parents after they are released from detention - these are insufficient to meet the requirements of the CROC, and shall be more closely examined in the next sub-section.

Access to welfare and support services / settlement services available to children released from detention

The Commonwealth is under an obligation under Article 24(1) of the CROC to provide medical and associated support services to promote the physical and psychological recovery, rehabilitation and reintegration of children who have had their mental health affected by their time in detention. This is the basis for the AHRC’s recommendation that government-funded mental health support be provided not only to children currently in detention, but also to those who have previously been detained at any time

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\(^{232}\) Ibid
\(^{233}\) Ibid.
since 1992. Accordingly, it seems plausible to argue that there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, particularly in instances where there are clear violations of Australia’s international obligations.

2.18 Whilst some services do exist, and are detailed in Section 4 of this paper, the general consensus is that the existing services of counselling are of limited assistance in dealing with refugee symptoms. Even where there is provision of mental health care for children released from detention, without the systematic provision of general settlement services, basic settlement services are essentially undermining effectiveness of welfare and support services. Empirical data suggest that TPV holders are denied access to almost all of these settlement services due to restrictions for former detainees, which has a significant impact on children as their families have considerably greater difficulty in establishing themselves in the Australian community.”

2.19 The fact that there are significant restrictions to refugee children’s access to Commonwealth-funded services places greater reliance on community-based organisations and State Governments, which detracts away from the effectiveness of overall services for children. State governments and community based organisations had been forced to meet the gaps in provision of service to children caused by lack of Commonwealth funding.

**Forced marriage and human trafficking**

2.20 Australia’s recent reforms to forced marriage and human trafficking offences are welcomed, and ultimately more in line with existing international obligations and treaties. However, recent reports by the Australian Institute of Criminology (AIC) indicate that a fundamental weakness in Australia’s legal response to forced marriage and human trafficking is the failure to focus on the exploitation of migrant brides. The use of migrant brides to recruit or attract women to Australia for the purposes of exploitation as domestic servants, to provide private or commercial sexual services and / or to be exploited in the home as wives is a largely ignored aspect of Australia’s legal regime, which is largely due to the lack of data and information on human trafficking involving marriage and partner migration.

2.21 Empirical data suggests that marriage and partner migration have been used to facilitate the trafficking of people into Australia. This means that a separate category of human trafficking exists, in which the exploitation element is neither considered sexual exploitation nor labour exploitation, but the exploitation of the personhood of the victim survivor. This category is particularly pertinent for those younger migrant brides escaping border conflict, as victims / survivors have complex motivations for migrating to Australia for marriage.

2.22 For example, there are cases where women as young as 17 have arrived in Australia with the promise of a happy marriage, and have ended up being exploited by their partners. Rather than treating these scenarios as cases of domestic violence, it could be argued that it would be more effective to treat them as human trafficking and slavery offences. This would attract a far greater penalties than domestic violence crimes and respond to nature of the crime. 234

3. **Conclusions and Recommendations for Reform**

**Children Asylum Seekers**

3.1 Mandatory detention of refugee children, and the reintroduction of TPVs have been widely criticised as being in violation of Australia’s human rights obligations. In order to fulfil its international responsibilities, it’s strongly recommend that the AHRC’s recommendations for reform are adopted to ensure effective guarantees of family care and support, safety and stability in Australia’s laws provide to children who have crossed borders. These include (but are not restricted to):

(a) that all children and their families in immigration detention in Australia and detained in Nauru be released into the Australian community as soon as practicably possible;

(b) amendments to the Migration Act to provide that children and parents may only be detained for strictly limited periods for health, identity and security checks (and where continued detention is imposed, only by individual and periodic court assessment);

(c) processing of refugee applications as soon as reasonably possible, with Protection visas to be granted to those found to be refugees (i.e. no TPVs);

(d) no child is to be taken to a regional processing country for detaining, unless that country has a rule of law based regime for assessment and only if the conditions of detention meet international standards;

(e) closure of all immigration detention facilities on Christmas Island;

(f) an independent guardian to be appointed for unaccompanied children seeking asylum in Australia;

(g) independent reviews in the approvals of use of force to transfer unaccompanied children;

(h) the requirement of sufficient CCT or other camera footage for all detention centres;

(i) ASIO reviews of the case of each family in detention with a parent that has received an adverse security assessment;

(j) children currently in detention continue to be assessed at regular periods using established mental health assessment tools to ensure consistency;

(k) that children currently and previously detained at any time since 1992 have access to government funded mental health support;

(l) those children held on Christmas Island who have been denied adequate education be assessed to determine the support they require to meet for learning benchmarks appropriate for their age and stage of development;

(m) all families and unaccompanied children in immigration detention to receive information about organisations that provide free legal advice and have regular access to technology;

(n) that the CROC be implemented by legislation as directly applicable to Australian law;

(o) a royal commission be established to further examine the impacts of detention on the physical and mental health of children in immigration detention, remedies for any breaches and the reasons for continued use of detention of children; and

(p) an independent review to identify implementation of each of the above recommendations.

**Forced Marriage:**

3.2 AIC studies have shown that cases of human trafficking involving partner migration have often been misidentified as domestic violence, with victim survivors likely to have needs beyond the resources of domestic violence service providers. As stated by the UN Office of the High Commissioner for Human Rights, “correctly identifying trafficked people is also the first step toward protecting their human rights and failing to identify a trafficked person correctly is likely to result in a further denial of that person’s rights.”

3.3 The recommendations provided by the AIC to prevent and respond to human trafficking involving partner migration, and more broadly to ensure effective guarantees of family care and support, safety

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and stability in Australia’s laws provide to children who have escaped cross-border conflict as migrants for the purposes of marriage. These include, but are not restricted to:

(a) improving the provision and delivery of information to migrating partners;
(b) improving community awareness of human trafficking and slavery through government and non-government initiatives;
(c) educating government, law enforcement and domestic violence service providers about human trafficking and slavery;
(d) enhancing education and training for migration agents to incorporate human trafficking;
(e) enhancing immigration policy to incorporate these findings;
(f) regulating international marriage brokering agencies;
(g) respond using a multiagency approach as best practice;
(h) conducting further research to enhance knowledge and the nature and extent of human trafficking and slavery in Australia; and
(i) enhanced monitoring programs on human trafficking and slavery