

YOUNG PEOPLE AND THE LAW

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YOUNG PEOPLE IN AUSTRALIA

'Young people,' a term that includes children, means people who are under 25. 'Children' are defined in Australian law as young people who have not turned 18. Age limits are just useful legal milestones marking the limits of society's tolerance for the mistakes young people make because they have not finished their biological, social and emotional development.

Children are deemed by law to be human beings without capacity to make important decisions. As people 'under a disability' their rights and interests have to be protected by adults until they are capable. The law gives this responsibility to their 'natural' guardians – parents – and, as a last resort, will act as *parens patriae* ('father of the nation'). The **United Nations Convention on the Rights of the Child** ('the Convention'), which has been signed by every world government including Australia, requires governments to give special protection to the human rights of people under 18. It is not part of Australian law. Australia has special policies for young people, recognizing that maturity does not arrive gift-wrapped on a particular birthday.

Young people's confidence and capacities are constantly changing. The law recognizes this. Toddlers, pre-pubescent children, adolescents, and young people who look like adults have very different worldviews and vulnerabilities. All young people develop at their own pace. Young people are a diverse group and the community has a fuzzy understanding of their rights and vulnerabilities. The public perception that adolescents who seem adult-like ought to be punished as severely as adults, for example, has encouraged some state governments to make laws that send offenders as young as 16 to adult courts and correctional facilities instead of Children's Courts and services. The **Convention** requires governments to set up separate juvenile justice systems for all 'children'. Young Victorian offenders aged 17 were processed through the adult criminal justice system until mid 2005, as is still the case in some other states. This was corrected, but the Victorian Children's Court can't make orders to protect the safety and

welfare of 17 year olds because they are not legally 'children' for child protection purposes.

It is sometimes convenient to treat young adults as though they were children. For instance the Commonwealth government social security system assumes that parents continue to maintain and support young people up to the age of 25 – the same young people who can drive cars and join military forces under 18; vote, marry and go to adult jails – which reduces their income entitlements under that age.¹

Discrimination against young people is endemic, and permissible. Most equal opportunity and industrial laws that prohibit 'age discrimination' in employment, for example, make a special exception that permits employers to pay young people, whether they are living at home or not, lower wages than older adults.

Australian laws do make special provision for the protection of young people's rights, but with curious anomalies such as these.

HOW WELL DOES THE LAW PROTECT YOUNG PEOPLE'S RIGHTS?

Some people argue young people don't have rights unless they can enforce them. That was why refugee advocates stepped in and asked the Family Court in early 2004 to order the release of asylum-seeking children imprisoned indefinitely in detention centres in conditions that were doing them major psychological and emotional damage. As 'illegal non citizens' their parents could not approach the court. State child protection authorities could not intervene because the children were in federal detention.

The Family Court ordered the children's release in their best interests because of the child protection promises Australia made when it signed the **Convention**, but the High Court said it was wrong: the Family Court has no jurisdiction over children detained under the **Migration Act**, for constitutional reasons. The Constitution gives the Commonwealth government the power to make any laws, even cruel ones, about

¹ About 145,000 young people are thought to be living in poverty, mostly at home -see Mission Australia's poverty fact sheet on www.missionaustralia.com.au. Most young people say it is far too hard to qualify for and not inadvertently 'breach' the Commonwealth's 'Youth Allowance'.

immigration, and the **Convention** and other international human rights treaties are not a part of Australian law without a local law making them so.²

There is a view that young people can't possess legal rights unless they are also fully responsible. If they are 'not responsible' – because of their age, dependency or lack of proof of maturity, then they can't have rights, either. It is illogical: adults possess rights even when they are thoroughly irresponsible, just because of their age and status. There is another popular view that young people (particularly children) 'can't' have rights because this would undermine parents' and teachers authority over them. Yet the Common Law has always acknowledged³ that children *gradually* develop competence and confidence and judgment about protecting their own interests, and that a 'mature' child who understands the nature and implications of a decision to be made can lawfully make them.

SOME EXAMPLES OF AUSTRALIAN LAWS

DISCRIMINATION

Young people are entitled to live in a society ruled by law without discrimination. Yet the law entrenches discrimination. For example the Victorian **Equal Opportunity Act 1995** (and most other state and territory equal opportunity legislation) prohibits age discrimination, but it explicitly excludes discrimination against children in their best interests, where the law already discriminates (e.g. young people's contracts may be void) and youth wages, already mentioned, which are much lower than adult wages, all because of assumptions made about young people's dependency and need for supervision.

CORPORAL PUNISHMENT:

A more fundamental discriminatory law is the exception to the basic Common Law rule, that nobody is allowed even to touch another person without their consent, let alone hurt or hit them: parents are allowed to hurt their children so long as it is 'reasonable

² **Gillick v West Norfolk & Wisbech Area Health Authority** [1986] AC 112 – a decision by the House of Lords that a mother of a 16 year old could not forbid local doctors from giving her daughter contraceptive and other medical advice and treatment without her approval. This is now part of Australian law.

chastisement'. The European Court of Human Rights pointed out to the UK government at the end of 1998 that this kind of law is inadequate to protect children's human rights to protection from cruel treatment⁴. This is still the law in most of Australia –recently NSW changed the law to make it clear that some kinds of assaults by parents – on very young children, using an implement, or causing an injury – are not 'reasonable'. Imagine passing a law making it lawful for a husband to batter his wife provided he used only his fists!

PROMOTING DECISION-MAKING AND PARTICIPATION:

Article 12 of the **Convention** obliges Australia to respect the views of children in decisions that affects them. Australian law does not require this. A 'mature child' – the principle in the **Gillick** case, just mentioned, which was about an adolescent able to make her own decisions about her sexual health without involving her parents – has adult capacity. This is now part of Australian law, but the **Convention** requires respecting all children's views: this is not.

Governments 'consult' with young people in a tokenistic way. For many years the federal government funded a national peak youth group, the Australian Youth Policy and Advocacy Coalition, to help young people participate in the development of its policies, programs and services and make sure their views were taken into account. It was abandoned in 1998 and instead there is a range of 'consultative' mechanisms, such as occasional state and territory 'youth parliaments', and the Commonwealth's National Youth Roundtable which calls together 50 young people twice a year, only 13 of them under 18 in 2004, and the average age was 20. Many young people are not impressed by its effectiveness.

Schools may set up Student Representative Councils or their equivalent to give students a say, but they are usually limited to trivial daily concerns such as playground litter, not 'big' policy decisions. Surveys of young people over the last twenty years constantly evoke students' perception that adults discourage their

⁴See **A v.UK**. Details in www.endcorporalpunishment.org (cases on the legality of hitting children)

input and give little weight to their opinions of members and that their effectiveness depends on individual teachers and resources.⁵

In the Family Court children's best interests are supposed to be paramount, but not their wishes, which are delivered third hand through family reports, i.e. by a court, appointed expert. Courts must take those wishes into account and give them appropriate weight, but they can be overridden. Children have a statutory entitlement to initiate their own cases, but they rarely do, and 'young people' over 18 do not even have the right to intervene in their parents' legal disputes, even though they may affect them deeply, too. Courts may appoint a 'separate representative' for a child who does not have to do what the child wishes, but adds his or her view of what is 'best' for the child to the lawyers, parents and other adults.⁶ In one 2002 case, a separate representative agreed to an order that his client, an intelligent and articulate 11 year old boy who did not want to see his father, should be apprehended at school by police and carried away struggling and protesting.

PROTECTION FROM HARM:

Every state and territory has its own child protection laws and systems and usually require that children may not work under a certain age and must go to school. The number of child abuse and neglect notifications jumps every year – there were more than 219,000 notifications across Australia in 2003, and more than 41,000 of them were substantiated⁷ If these laws were effective, children's rights to be protected from the most common forms of maltreatment, emotional and physical abuse and neglect, would be dropping.

⁵ See the report of the Vinson **NSW Public Education Inquiry** 2004.

⁶ See Australian Law Reform Commission and Human Rights and Equal Opportunity Commission joint report, **Seen and Heard: Priority for Children in the Legal Process**. Report No. 84, Canberra 1997; and the report of the Family Law Council, **Pathways for Children: a Review of Children's Representation in Family Law**. August 2004.

⁷ David Brown and Endekov, Z. **Childhood Abused – the Pandemic Nature and Effects of Abuse on Children**. La Trobe University, Madeline and Alannah Foundation, 2005.

If the state does intervene, many young people say that they lost all sense of personal control over their own lives and destinies once the 'state' intervened. Removal from parents sometimes does much more harm than good. Until about forty years ago it was government policy to remove some children from their families in their best interests, because they were Aboriginal or Torres Strait Islander children.⁸ The wrongs done to young people with the best of intentions may last through many generations.

Another major issue not often taken seriously is young people's need for effective protection against bullying. In a recent survey⁹ one out of six young people said they were bullied at school at least once a week and bullying continues to be a grave issue in schools that does lifelong harm.¹⁰

YOUNG PEOPLE'S RIGHTS AS OFFENDERS/IN DETENTION:

Society is more lenient to offending children. But though they are 'children' until they are 18, young people can be held legally responsible for offences from as young as 10, if a court is satisfied that they understood what they were doing and that it was wrong. Sentencing options – such as not sending young people into adult jails where they will be brutalized – are generally much lighter than adults.

But in two particular cases, Australian law is remarkably deficient in protecting children's rights.

One is in its mandatory detention of young people who have either committed a set number of criminal offences – in Western Australia, 'three strikes and you're in' legislation has been in effect since 1991, though it has been found to have no effect on crime rates, and that 81% of the offences were perpetrated by Aboriginal boys aged between 14 and 17.¹¹ – or because they or their parents sought asylum without following the proper procedures and ended up in immigration detention camps.

⁸ Human Rights and Equal Opportunity Commission, April 1997: **Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families.**

⁹ Rigby, K. **What Children Tell Us About Bullying in Schools: Children in Australia** 22, 1997.

¹⁰ For details of the national anti bullying strategy see www.bullyingnoway.com.au

¹¹ **Review of Section 401 of the Criminal Code of Western Australia.** Department of Justice Policy and Legislation, Government of Western Australia, 2001.

The conditions under which we detain young people in immigration detention breach international guidelines for the detention of prisoners, let alone children, but possibly Australia's international obligations under the 1987 **Convention Against Torture or other Forms of Cruel, Inhuman, or Degrading Treatment and Punishment**.. This defines "torture" as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on someone by way of punishment, the intimidation or coercion of themselves or a third person, or for a discriminatory reason, inflicted by or at the instigation of or with the consent or acquiescence of a person acting in an official capacity. We jail children in appalling conditions to deter people smugglers they have never met.

YOUNG PEOPLE'S USE OF PUBLIC SPACE:

Most young people have been ordered by police or security staff to move out of certain areas of public space, with their friends. There may even be legally mandated exclusion zones, in some states or towns. Authorities argue that it is legitimate to restrict young people's right to associate freely and peaceably, to ensure public safety and order including the safety of children and to prevent children from offending.

Laws allowing this are proliferating, discriminatory and have no demonstrable effect in limiting young people's involvement in offending, a small percentage of young people anyway.¹²

In Queensland, for example a refusal to move on under section 38(1) of the **Police Powers and Responsibilities Act 2000** is a criminal offence: police can apprehend and relocate a young person because they are out at night and no crime. Young people at a Queensland youth sector forum in 2004 noted that the new police powers discriminate against young people, and were used to limit not regulate their use of public space.

¹² White, Robert. **No Space of Their Own**. Cambridge University Press. 1990

In Western Australia in 2003 the government directed police to move on or apprehend children seen on the streets in the Northbridge entertainment precinct without an adult guardian: if aged under 12, after dark: if aged 13-15 years, after 10 pm and any other young people who seemed to be misbehaving could be physically relocated. There was no appreciable long-term effect on youth offending and the majority of those 'moved on' were resentful, not necessarily misbehaving, Aboriginal young people.

In Victoria, a survey of young people's attitudes towards public transport found that over two thirds of nearly 300 young people felt they were not treated fairly by ticket inspectors because of their age.¹³

Discrimination on age or race is unlawful in most places around Australia. These policies clearly discriminate – even if not unlawfully - against young people, and often have a much greater effect on indigenous young people. Discrimination means being treated less favourably than another person in the same or similar circumstances because of an irrelevant characteristic or attribute such as a person's race or age, or qualities or behaviours attributed to a person because of those reasons.

CONCLUSION

Australian law does not protect young people's rights particularly well: it is right and proper that young people should advocate for real change in this area of public life.

¹³ Youth Affairs Council of Victoria and Inner City Regional Youth Committee. **Young people and public transport in the inner city**. 2004