

INSIGHT SERIES

Children's Human Rights in Queensland

Emily McIlmurray



Acknowledgement of Country

Anglicare Southern Queensland acknowledges Aboriginal and Torres Strait Islander peoples as the first Australians and recognises their culture, history, diversity, and deep connection to the land. We acknowledge the Traditional Owners and Custodians of the land on which our service was founded and on which our sites are operating today.

We pay our respects to Aboriginal and Torres Strait Islander Elders both past and present, who have influenced and supported Anglicare Southern Queensland on its journey thus far. We also extend that respect to our Aboriginal and Torres Strait Islander staff, clients and partners (past, present and future) and we hope we can work together to build a service that values and respects our First Nations people.

We acknowledge the past and present injustices that First Nations people have endured and seek to understand and reconcile these histories as foundational to moving forward together in unity.

Anglicare is committed to being more culturally responsive and inclusive of Aboriginal and Torres Strait Islander people and we are committed to embedding cultural capabilities across all facets of the organisation.

About Anglicare Southern Queensland

Anglicare Southern Queensland (Anglicare) has responded to the needs of our community through more than 150 years of delivering innovative, quality care services. More than 3,000 Anglicare staff and volunteers operate across southern Queensland and in Townsville. Our comprehensive, integrated range of community services includes community aged care; residential aged care; and community support programs, including youth justice, child safety, disability support, counselling and education, mental health, homelessness, and chronic conditions. Our services are designed to 'wrap around' clients in a comprehensive way, recognising their health needs but also addressing the social needs which contribute to wellness.

About the Insight Series

<http://anglicaresq.org.au/research/insight-series>

The Anglicare Southern Queensland Insight Series is a new series written by Anglicare staff, for Anglicare staff, and for those with an interest in Anglicare's core areas of work. Based on research, essays in the Insight Series share ideas, encourage dialogue, and generate feedback on issues related to Anglicare's key areas of service delivery and organisational operations.

The Insight Series is edited by the Research, Evaluation & Advocacy team within the Mission Research & Advocacy portfolio.

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Cover image

Crowd on Busy Street. Urban Life, 5 December 2024. Credit: Carlos Castilla, Shutterstock.

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Introduction

Throughout the evolution of human rights over time, children have been determined as an inherently vulnerable population due to their immaturity in development, and the upholding of their rights being incumbent on adults (Cuneen et al., 2016; Freeman, 2002; Ife et al., 2022; Smith, 2018). This paper will explore the intersection of the United Nations *Convention on the Rights of the Child* (1989), the *Human Rights Act 2019* (Qld), the *Youth Justice Act 1992* (Qld), and the human services practice area of youth justice in Queensland. As set out in the *Convention on the Rights of the Child* (1989), children – that is, every human under the age of 18 years (Art 1) – must be treated with respect and dignity within the criminal justice system, and have the right to be free from violence, abuse, and neglect.

This paper will examine the influence of the *Convention on the Rights of the Child* (1989), specifically the fundamental of the best interests of the child being paramount (Art 3), using detention for children involved with the justice system as a last resort (Art 37), and the application of an acceptable minimum age of criminality for children (Art 40) on youth justice law, policy, and practice, and the role of social workers in Queensland.

Part 1: The United Nations Convention on the Rights of the Child and the Human Rights Act 2019 (Qld)

Article 37(b) of the *Convention on the Rights of the Child* (1989) sets out that children should not be deprived of their liberty unlawfully or arbitrarily, and any arrest, detention or imprisonment of a child should be used as a last resort for the shortest appropriate amount of time. Article 40(1) of the *Convention on the Rights of the Child* (1989) sets out that children involved with the justice system should be treated with dignity, in the context of their age and stage of development. Article 40(3a) of the *Convention on the Rights of the Child* (1989) requires that each State establishes a minimum age of criminality for children. Article 40(4) of the *Convention on the Rights of the Child* (1989) requires that each State establish adequate alternatives to detention to ensure their wellbeing.

The *Human Rights Act 2019* (Qld) sets out that human rights in Queensland are in addition to other rights and freedoms, recognising the Commonwealth Constitution, common law, and rights under other international conventions (Pt 2, Div 1, s 12), thereby enacting the *Convention on the Rights of the Child* in domestic law in Queensland. The *Human Rights Act 2019* (Qld) sets out that children involved in criminal processes must be segregated from adults, be brought to trial as quickly as possible, and be treated in an age-appropriate way (Pt 2, Div 2, s 33). The *Criminal Code 1899* (Qld) states that a person under the age of 10 years is not criminally responsible, nor is a person under the age of 14 years unless it is proven that they had capacity to determine that the act or omission was criminal (Sch 1, Pt 1, Ch 5, s 29). The *Youth Justice Act 1992* (Qld) sets out alternatives that the Queensland Police Service (QPS) must consider when policing children, including taking no action, administering a caution, restorative justice processes, and/or diversionary programs as opposed to arresting, detaining and sentencing children to detention (Pt 2, Div 1, s 11, subs 1).

Australia's consenting signatory to the *Convention on the Rights of the Child* is critical to upholding the rights of children and has had a positive impact on development of domestic law in Queensland, in that its articles and foundational principles have been directly translated into various pieces of legislation inclusive of the *Human Rights Act 2019* (Qld) and *Youth Justice Act 1992* (Qld). Equally, Australia's dualist legal system negatively impacts the realisation of the *Convention on the Rights of the Child* in Australia, as this international instrument must be translated adequately into domestic law in each jurisdiction to be enforceable, and then must be subsequently authentically enforced (Hall, 2019; Islam, 2013; Rice & Day, 2018). Amendments have been made to the *Youth Justice Act 1992* (Qld) over time, demonstrating regrettably that while the legislation seeks to emulate the

Convention on the Rights of the Child (1989, Arts 3, 37 and 40), government policy has failed to embody this in practice leading to widespread failure to uphold the human rights of children involved in the youth justice system (Cuneen et al., 2016; Islam, 2013; Malvaso et al., 2024).

While the *Convention on the Rights of the Child* (1989) does not provide a specific minimum age of criminal liability under Article 40 (3a), it is widely accepted that children aged 10 years is an inappropriately young age for applying criminal liability to this vulnerable population (Clauss-Ehlers et al., 2020; Malvaso et al., 2024; Smith, 2018). It also provides a clear definition of a child being a person under the age of 18 years, while the definition set out in the *Criminal Code 1899* (Qld) and the *Youth Justice Act 1992* (Qld) prior to amendment in 2016 did not apply to persons aged between 17 and 18 years. Therefore, those children were being transferred into the adult criminal justice system, including adult prisons, directly contravening the human rights of those young people as set out in the *Convention on the Rights of the Child* (1989) and the *Human Rights Act 2019* (Qld) (Pt 2, Div 2, s 33).

A positive influence of the *Convention on the Rights of the Child* in this context, however, is the passing and enforcement of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld) which amended the child's age regulation and introduced provisions for all persons aged 17 years to be removed from adult prisons and referred back to the youth justice system. This addressed some of the dissonance between domestic law and the *Convention on the Rights of the Child* (Clauss-Ehlers et al., 2020; Cuneen et al., 2016; Malvaso et al., 2024).

Part 2: Implications for Social Work Practice

Social workers supporting children involved in the youth justice system are responsible for facilitating and advocating for those children to access justice and have their human rights upheld at a micro, meso, and macro level (Allan et al., 2009; Byrnes & Renshaw, 2018; Cocker & Hafford-Letchfield, 2022; Ife et al., 2022). Despite the concepts of the *Convention on the Rights of the Child* being translated into relevant legislation, children continue to experience widespread and systemic oppression in the youth justice system (Ewenson & Naylor, 2021; Malvaso et al., 2024).

A benefit of Australia being a signatory to the *Convention on the Rights of the Child* is that its fundamental principle – that is, the best interests and wellbeing of children is paramount – has been translated into a large volume of domestic law across the country (Cuneen et al., 2016; Ewenson & Naylor, 2021; Maylea, 2019; Rice & Day, 2018). Domestic law in Queensland sets out that children have the right to not be mistreated or wrongly, unlawfully, or arbitrarily punished by the state, and be treated in a manner that is appropriate for their age that ensures and promotes their wellbeing. However, children accused of alleged offending behaviour in Queensland are being held in QPS watch houses or placed in detention from the age of 10 years old in a manner that is incongruent with their age and stage of development, without being referred to adequate alternatives, and without access to age or developmentally appropriate supports, demonstrating a systematic and prevalent failure to uphold the human rights of these vulnerable children (Clauss-Ehlers et al., 2020; Ewenson & Naylor, 2021; Malvaso et al., 2024).

Children should have access to adequate alternatives to detention or criminal proceedings, including youth justice conferencing, family led decision making, restorative justice, or diversionary and community programs (Freeman, 2002; Maylea, 2019; Malvaso et al., 2024). Despite these clearly ratified human rights, children in Queensland continue to be detained in the first instance due to a lack of adequate resources, as well as a perceived 'youth crime crisis' and moral panic in the community. This is fuelling public discourse and driving government policy that contravenes the human rights of this vulnerable population (Ewenson & Naylor, 2021; Malvaso et al., 2024).

The youth justice system in Queensland often prevents the engagement of the voice and choice of children in legal proceedings and decision making about them; therefore, they cannot fully realise their human rights or challenge oppressive processes from their own experience (Ewenson & Naylor, 2021; Malvaso et al., 2024; Maylea, 2019; Neil, 2003). Children are routinely held for prolonged or indefinite periods of time in police watch houses without proper access to guardians or support persons, which is in contravention of the *Convention on the Rights of the Child* (1989, Art 37 and 40), the *Human Rights Act 2019* (Qld), and *Youth Justice Act 1992* (Qld), which all require children to be detained as a last resort and for as short a period as possible (Cuneen et al., 2016; Ewenson & Naylor, 2021; Malvaso et al., 2024). Despite the intention of domestic legislation to enact the *Convention on the Rights of the Child*, children engaged with the youth justice system in Queensland are persistently exposed to an oppressive justice system that contravenes their human rights (Byrnes & Renshaw, 2018; Malvaso et al., 2024; Neil, 2003; Smith, 2018).

State mechanisms that social workers can activate to promote access to justice for these children include the Queensland Human Rights Commission (QHRC), and peak bodies including PeakCare Queensland and Queensland Aboriginal and Torres Strait Islander Child Protection Peak (QATSICPP). National mechanisms that social workers can activate include the Australian Human Rights Commission and the National Children's Commissioner. Social workers can also activate the United Nations Committee on the Rights of the Child. These scaffolded layers of advocacy mechanisms can be accessed to lodge complaints, appeals, and petitions to uphold or remedy contraventions to the human rights of children. It is the role of the social worker to de-centre themselves, centre the voice and choice of the child, and act accordingly to agitate for change in law, policy, and practice to promote the human rights of children through these forums (Allan et al., 2009; Maylea, 2019; Mullally, 2007; Neil, 2003; Pease et al., 2016).

A strategy for upholding human rights and accessing justice for children in Queensland in the youth justice system is the QHRC complaints process, specifically complaining against QPS or the Department of Youth Justice as public entities (Queensland Human Rights Commission, 2024). While there is no case law testing this in the Queensland jurisdiction, the scope of the *Human Rights Act 2019* (Qld) would be tested should a child make a complaint against QPS for being held in a watch house for a prolonged period of time (Pt 2, Div 2, s 33), given this would constitute being held for an indefinite period of time in a facility that is not equipped to adequately or appropriately care for children (QHRC, 2024).

The QHRC requires that all complaints be made in the first instance directly to the public entity, who must respond within 45 days, and after which time a further complaint can be lodged in writing to the QHRC. Initially, the role of the social worker in supporting a child to complain about their treatment in the youth justice system would be to follow the complaints processes of either QPS and/or the Department of Youth Justice. If the child expressed wanting to make a further complaint, the role of the social worker would be to support the child to navigate the QHRC complaints process. Despite this mechanism being in situ in Queensland, the QHRC does not have any legal powers to prosecute public entities or action any court processes under the *Human Rights Act 2019* (Qld), and complaints can only be actioned under other pieces of legislation such as the *Anti-Discrimination Act 1991* (Qld). Equally, while changes to domestic law have brought about mechanisms such as the QHRC, processes for accessing justice for children is not child friendly or child centred, further oppressing and marginalising them and contravening their right to participate in decisions being made about them (Cuneen et al., 2016; Edwards, 2018; Ewenson & Naylor, 2021).

Further systemic strategies that a social worker could engage could include engaging PeakCare Queensland or QATSICPP for peak body and sector-wide advocacy, therefore lobbying the government to make policy change (Bozalek & Pease, 2021; Healy, 2014; Ife et al., 2022). The current nation-wide #RaiseTheAge campaign is advocating to raise the age of criminal liability for children from 10 to 14 years in each jurisdiction across Australia. This campaign is focused on changing legislation and government policy to align to the *Convention on the Rights of the Child* and enable children access to more child centred, age appropriate and adequate alternatives to prison

when they have engaged in offending behaviour (Raise the Age, 2024). The role of the social worker in this could be to individually engage with the campaign by signing the national petition and getting involved in activism, as well as advocating for the organisation they work for to do the same (Maylea, 2019; Mullaly, 2007).

Conclusion

Accessing justice and upholding human rights for children in the Queensland youth justice system is complex, nuanced, and immature. While the international instrument of the *Convention on the Rights of the Child* has been translated into domestic law in Queensland, government policy QPS practice, and departmental systems are largely driven by moral panic in the community around youth crime as opposed to taking a child-centred approach to holding the wellbeing and best interests of children as paramount. This is manifesting in direct and systemic contravention of the human rights of children involved with the youth justice system in Queensland. The role of the social worker is to continue to centre the voice of the child and advocate for individual, collective, and systemic change where there are contraventions to children's human rights.

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