



Précis Paper

Developments in Child Rights in Australia

This presentation discusses developments in child rights in Australia since the 2012 Concluding Observations of the UN Committee on the Rights of the Child on Australia.

Discussion Includes

- The Reports of the UN Committee on the Rights of the Child
- The NGO Report and the role of the National Children's and Youth Law Centre
- Age of criminal responsibility and the doli incapax principle
- Children with disabilities and access to education
- Out of home care
- Cyber-bullying
- Law reform efforts in Australia
- Key principles in representing young people

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Developments in Child Rights in Australia

1. In this edition of BenchTV, Matthew Keeley (Director, National Children's and Youth Law Centre, Sydney) and Nathan Kennedy (Special Counsel, Hall & Wilcox Lawyers, Sydney) discuss the 2012 report of the UN Committee on the Rights of the Child on Australia, developments in child rights that have occurred since that report, and important issues that still need to be addressed by Australia.

The Convention on the Rights of the Child and the Reporting Process

2. It has been 25 years since Australia ratified the Convention on the Rights of the Child (opened for signature 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990). The Convention is the only international treaty that explicitly allows for non-governmental organisations (NGOs) to be involved in the reporting process.
3. The Australian Government presented its latest report to the UN Committee on the Rights of the Child in 2011. This was followed by the Australian Child Rights Taskforce's publication, entitled *Listen to Children*, which was spearheaded by the National Children's and Youth Law Centre along with UNICEF Australia. In 2012, the UN Committee on the Rights of the Child released its *Concluding Observations*.
4. The next cycle of reporting will commence in January 2018, when the Commonwealth government will have lodged its report to the UN Committee on the Rights of the Child. Following that, the report will be made public, and the NGO sector will respond with its own report again. NGOs are invited to present to the Committee in Geneva, after which time a List of Issues will be drawn up, which consists of the key issues that the Committee wants the government to address. Finally, the Committee will present its Concluding Observations.
5. The National Children's and Youth Law Centre is the only national children's legal practice, which gives the Centre special insight into issues that are affecting children and young people nationally. One example of the Centre's successful advocacy was its role in the drafting of the *Enhancing Online Safety for Children Bill 2014* (Cth), where it provided research and advocacy often based on its own practice and experience.

Key Issues in Child Rights in Australia

6. Mr Keeley noted a number of positive developments in the rights of children in Australia. Specially, the Royal Commission into Child Protection in South Australia explicitly

referenced the rights of children; the role of National Children's Commissioner has been created; and the terms of reference and immediacy of the response by the Commonwealth government into the issues in child detention in the Northern Territory suggest some positive changes.

7. Nonetheless, Mr Keeley considered that some worrying issues remain in child rights, where Australia is either stagnating or moving backwards. Key areas that he identified included the way in which criminal law applies to children and the out of home care system. The Concluding Observations of the UN Committee also drew particular attention to the overrepresentation of Indigenous youth in prison.
8. Article 37 of the UN Convention on the Rights of the Child provides that "The arrest, detention or imprisonment of a child shall [...] be used only as a measure of last resort and for the shortest appropriate period of time". Mr Keeley considered that some of the work that needs to be done to improve juvenile justice in Australia must happen on the front end, to prevent young people from coming into contact with the criminal justice system in the first place.
9. Australia is an outlier in terms of the age of criminal responsibility that is imposed, an issue that was noted by the UN Committee. In Australia, a young person aged between 10 and 13 can be held criminally responsible for their acts, whereas the minimum internationally accepted age of criminal responsibility is 12. Mr Keeley considered that delaying the age of criminal responsibility until at least 12 may help address some of the issues around the overrepresentation of Indigenous youth in the criminal justice system.
10. Moreover, Mr Keeley believed that the principle of *doli incapax*, which holds that a child should only be held criminally responsible if they truly understand the serious wrongness of their conduct, is not being implemented in practice. Criminal lawyers have reported that the safeguard of *doli incapax* is not being satisfactorily implemented by police around Australia.
11. A further issue of concern in Australia is access to education for children with disabilities. There is a growing tendency to use suspension and expulsion to evict children with disabilities from educational institutions. Particularly in rural and regional areas, this may mean that there is no alternative educational institution available to the child.
12. The *Disability Standards for Education 2005*, formulated by the Attorney-General under the *Disability Discrimination Act 1992* (Cth), set out important standards that teachers and schools should be aware of, however further teacher training may be required to draw attention to the issues facing children with disabilities.

13. Mr Keeley and Mr Kennedy also drew attention to the important issue of out of home care. In Australia, around 20 percent of Aboriginal and Torres Strait Islander children are put into out-of-home care, and 33 percent of those children are put with non-Indigenous carers. Many parents with disabilities have their children pre-emptively removed. Problems with out of home care are significant and abuse is commonplace. Mr Keeley also noted that insufficient funding and support is provided for families where the parents have a disability and need to learn parenting skills.
14. Mr Kennedy also noted the issue of cyber bullying, an area around which the National Children's and Youth Law Centre has provided significant advocacy in recent years. A child subjected to cyber bullying is more likely to commit suicide than traditional bullying, and cyber bullying affects Aboriginal and Torres Strait Islander children at a higher rate than non-Indigenous children. Mr Keeley explained that his Centre has developed a significant practice to help combat cyber bullying, which includes sending "cease and desist" letters to perpetrators of cyber bullying, identifying their illegal behaviour and threatening to report it to police.
15. Finally, Mr Keeley noted that his Centre's practice includes criminal records discrimination, and there is a significant impact of juvenile criminal records on subsequent life. He commented that some young people are advised to plead guilty to offences that they would have been better off defending, and often insufficient advice is given about the consequences of pleading guilty to certain offences, such as registration on the Sex Offenders Registry.

Law Reform Efforts in Australia

16. Recent law reform efforts in the area of child rights include the enactment of the *Enhancing Online Safety for Children Act 2015* (Cth) and the creation of the Office of the Children's e-Safety Commissioner. However Mr Keeley believed that there has not been comprehensive and sensible uniform reform on the law reform front, and young people are still concerned and confused by differences in the laws of different states and the federal law.
17. The UN Committee recommended that a Child Rights Commissioner be established, as well as a National Plan for children, however neither of these recommendations have been adopted. Mr Keeley considered that the Commonwealth needs to lead on this issue and bring in the States and Territories, and Australia is not consciously addressing the recommendations of the UN Committee.

Key Principles in Representing Young People

18. The National Children's and Youth Law Centre grew out of a concern to implement in Australia the Convention on the Rights of the Child. However Mr Keeley explained that their work in acting for children does not occur in a vacuum, as there are a range of guidelines in NSW and other jurisdictions that guide how legal practitioners should implement their legal practice. In NSW, these guidelines are the *Representation Principles for Children's Lawyers* (4th Ed, 2014), produced by the Law Society of NSW. The Guidelines reflect key child rights principles set out in the Convention, including:
- A child has the right to survive and develop.
 - A child has the right to participate in decisions that affect him or her.
 - A child has the right to non-discrimination on the basis of any characteristic.
 - A child has the right to have his or her best interests taken into account in any decision that affects them.
19. Mr Keeley noted that many lawyers representing children still insist on an adult being present when legal representation is being provided, which creates a significant barrier for children in accessing legal services.
20. He also commented that although courts will often turn their mind to what is in the best interests of the child, the Centre has at time experienced situations in which capable children are not permitted by the Family Court to be heard independently. Mr Keeley considered that it is inconsistent that children can be held criminally responsible at age 10 but are unable to be heard in civil or family proceedings at age 17.
21. Ultimately, Mr Keeley believed that there are many institutional difficulties and significant inertia that need to be overcome in order to address legal issues facing young people. He saw the next reporting cycle to the UN Committee on the Rights of the Child as an opportunity to address this, and the Centre will be liaising with a range of experts and consulting with young people in an effort to draw attention to the many issues facing young people in Australia.

BIOGRAPHY

Matthew Keeley

Director, National Children's and Youth Law Centre, Sydney

Matthew Keeley is the director of the National Children's and Youth Law Centre at the University of NSW. Matthew is a disability and children's rights advocate and researcher, with a background leading advocacy both internationally and domestically. He previously worked as the Principal Solicitor at the NSW Disability Discrimination Legal Centre and Corporate Counsel at the NSW Department of Ageing, Disability and Home Care.

Nathan Kennedy

Special Counsel, Hall & Wilcox Lawyers, Sydney

Nathan is Director of Pro Bono & Community at Hall & Wilcox and is responsible for developing and implementing the firm's national pro bono and community plan. Nathan holds an LLM (Human Rights and Social Justice) and appeared before the UN Committee on the Rights of the Child as part of the Child Rights Taskforce. Nathan is also an experienced insurance litigator with over 16 years' experience advising insurers on CTP and liability claims.

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Legislation

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