



Queensland University of Technology
Brisbane Australia

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Drawing the line: the legal status and treatment of 17-year-old accuseds in Queensland

Terry Hutchinson and Jamie Nuich*

The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.

— *Roper v Simmons* 543 US 551 (2005)

Introduction

Seventeen-year-olds accused of criminal offences in Queensland are adults for the purpose of their subsequent prosecution and punishment. Not only are they denied the protections of the *Youth Justice Act 1992 (Qld)* (YJA), which are afforded to all accused youths ages 10 to 16, they are treated — in all senses of that word — exactly like adults under the *Criminal Code (Qld)* (the Code), the *Police Powers and Responsibilities Act 2000 (Qld)* (PPRA), and the *Penalties and Sentences Act 1992 (Qld)* (PSA). This a direct contravention of Art 1 of the Convention on the Rights of the Child (CROC), which uncompromisingly defines a child as a person under the age of 18.

The first part of this article examines the Australian human rights framework for this treatment. Scrutiny of the relevant statistics on youth offending in Australia and Queensland reveals that there is no youth crime wave, despite the public rhetoric. In addition, the legislative history of the provision suggests that at no time has any valid rationale been provided as to why Queensland has retained the age at 17 while other jurisdictions have changed to the national standard of 18. The current approach is not only contrary to international agreements, it is also out of step with psychological studies on adolescent development and stages of maturity and the long-term cost-effective interventions to prevent recidivism. From this therapeutic standpoint, the cost of transition is warranted. The consequences of treating 17-year-olds as adults are significant.

The second part of the article analyses the practicalities of the situation in Queensland and focuses on the resulting disadvantages experienced by '17-year-old adults' at all stages in the process, from initial police contact, remand and court appearance, through to release or imprisonment.

The relevance of this article is only too evident at the end of the Queensland school year, when former grade 12 students are shedding their school ties and ponytails to attend 'schoolies' celebrations. In the current Queensland school system, many students finishing their final year of schooling in November each year are 17 or younger. This group is still on the cusp of adulthood. Yet, in the view of the

Queensland justice system, they are adults, with all the criminal responsibilities of a 30-year-old and none of the protections afforded to children.

Status as a policy

The age standard is universally accepted

A common theme in the international discussions on the CROC is the need for effective domestic safeguards to give effect to the rights therein (UN 2002; UNICEF 2003; UNCRC 1990; 2006; 2007; 1995; UNWSC 1990; Alston 1986).

This ideal faces an immediate hurdle in Australia, since under Australian law the ratification of a treaty standing alone has no effect on domestic law. This has led some jurisdictions, such as Victoria and the Australian Capital Territory, to respond proactively with the enactment of additional Charters of Rights (*Charter of Human Rights and Responsibilities Act 2006 (Vic)*; *Human Rights Act 2004 (ACT)*). Victoria even went so far as to publicly investigate the need for a Charter of Rights specific to children and young persons (Victorian Child Welfare Practice and Legislation Review Committee 1984). Queensland, on the other hand, has adopted the lowest rung and the least powerful model of giving effect to the CROC principles through the Charter of Juvenile Justice Principles in Sch 1 of the YJA.

International human rights law sets out the principles which govern all dealings between government entities and children. Children are entitled to all the protections guaranteed under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the two fundamental United Nations human rights treaties, which, together with the Universal Declaration of Human Rights, make up what is sometimes called the 'International Bill of Rights'.

The CROC focuses on children's rights as a discrete subset of human rights. It sets broad principles (such as the requirement to treat children with dignity and humanity) and laws, with a view to their practical application — for example, Arts 37 and 40 set the standards for treating accused children. These provisions require that detention be used only as a last resort, and that children at all times be treated with humanity and respect for their inherent dignity. They also guarantee the right to legal assistance, the right to the presumption of innocence, the right to appear before a competent court, and the right to privacy. Article 40.4 also encourages all states parties to develop a range of methods for dealing with young offenders in order to divert them away from the criminal justice system — and, in particular, away from detention — wherever possible (Hutchinson and Lewis 2007).

Finally, there are supporting rules, guidelines and other soft laws that deepen the meaning and relevance of this Convention specifically. They include the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (1985), the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh

Guidelines) (1990), the UN Rules for the Protection of Juveniles Deprived of their Liberty (1990) (UNRPJDL), and the UN Guidelines for Action on Children in the Criminal Justice System (1997). Together, these instruments can guide governments with ways to comply with their human rights obligations in the enactment of their juvenile justice policies and the execution of the mechanisms in pursuit of those policies.

In accordance with these rules, the Australian Law Reform Commission (ALRC) in 1997 recommended that '[t]he age at which a child reaches adulthood for the purposes of the criminal law should be 18 years in all Australian jurisdictions' (ALRC and HREOC 1997, recommendation 196). The ripple effects of this were seen in Tasmania with the *Youth Justice Act 1997* (Tas), in the Northern Territory with the *Sentencing of Juveniles (Miscellaneous Provisions) Act 2000* (NT), and in Victoria with the *Children and Young Persons (Age Jurisdiction) Act 2004* (Vic) (Hutchinson 2006, 94). Victoria has gone several steps further and introduced special sentencing options for 18–20 year olds — the 'dual track' system — as well as a new *Children, Youth and Families Act 2005* (Vic) in force since April 2007 (Australian Institute of Health and Welfare 2008). Queensland remains the only state out of step with the national approach.

Therefore, it comes as no surprise that Australia has been harshly criticised as a result of Queensland's recalcitrance. The UN Committee on the Rights of the Child gave a significant condemnation of Queensland's age standard in 2005. The Concluding Observations included the following direction to Australia:

Remove children who are 17 years old from the adult justice system in Queensland ... and ... take all necessary measures to ensure that persons under 18 who are in conflict with the law are only deprived of liberty as a last resort and detained separately from adults unless it is considered in the child's best interest not to do so. [UNCRC 2005, [74].]

Both the Child Rights Taskforce (2011) and the Australian Human Rights Commission (2011) have supported changes to the age rule in Queensland, with recommendations such as:

Recommendation 44: The Queensland Government should immediately legislate to ensure that the age at which a child reaches adulthood for the purposes of criminal law in Queensland be 18 years, consistent with other states and territories. [AHRC 2011, 44.]

The Australian government's next five yearly review by the UN Committee on the Rights of the Child is scheduled for May 2012.

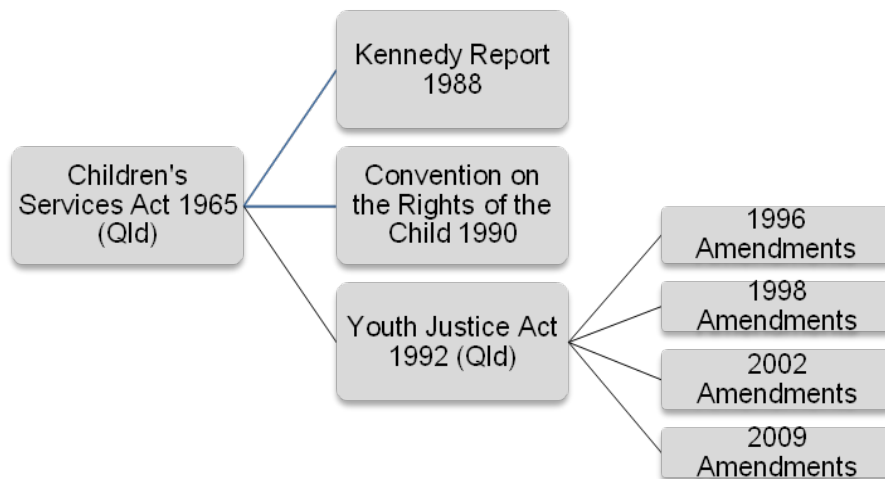
Perhaps the appointment of a federal government position of Commissioner for Children and Young People, under the guidance of its champion, Senator Sarah Hanson-Young, the Greens spokesperson on youth, may provide added impetus for change (Hanson-Young 2010; Senate Legal and Constitutional Affairs Committee Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010, 2010). However, the legal issues here fall under the purview of the Queensland government, which has not positively expressed a likemindedness with

Senator Hanson-Young, nor positively responded to the vehement recommendations of the Queensland Commission for Children and Young People and Child Guardian (CCYPCG). The latest CCYPCG Policy Paper has called for the government to make a time-specific commitment to transfer 17-year-olds from adult prisons (CCYPCG 2010a). So far, it is reported that Communities Minister Karen Struthers had asked her department 'to investigate and report on the potential impact of bringing 17 year olds into the youth justice system' (Dibben 2010). Yet, the results of this investigation have not yet been made public and, as it stands, the Queensland government is yet to positively act here.

Legislative history in Queensland

The origin of this age standard in Queensland remains controversial because its inconsistency with the age of majority of 18 was obvious at the time of the enactment of the *Juvenile Justice Act 1992 (Qld)* (Warner 1992, 6130). Section 36 of the *Acts Interpretation Act 1954 (Qld)* defines an adult as an individual aged 18 or over. The *Children's Services Act 1965 (Qld)* first defined 17-year-olds as adults for welfare purposes (see figure 1). This was criticised as an arbitrary standard in the 1988 Kennedy Report (Kennedy 1988). When the *Children's Services Act 1965 (Qld)* was replaced by the *Child Protection Act 1999 (Qld)*, a child was defined in s 8 as 'an individual under 18 years'. The Queensland legislature retained the 17-years-old threshold when it passed the *Juvenile Justice Act 1992 (Qld)*, though provision was made for the definition to be seamlessly changed following the Act's enactment. Minister Ann Warner even conceded the need to amend this age standard after the passage of the Bill to avoid 'such children being exposed to the effects of adults in prisons ... [as it increases] their chances of remaining in the system and becoming recidivists' (Warner 1992, 6130). This statement was 'at odds' with the clear legislative intention in the Bill and the Explanatory Memorandum (Spence 2002; Struthers 2009; *Juvenile Justice Bill 1992 (Qld)*, Explanatory Memorandum). The failure to amend the age standard invited criticism locally (Queensland Anti-Discrimination Commission 2006), nationally, and, as has already been mentioned, internationally (Cleary 2006).

Figure 1: Significant legal reforms with bearings on Queensland's 17-year-old accuseds



The 2009 amendments to the renamed *Youth Justice Act 1992 (Qld)*, in force since March 2010, made no reference to the status of 17-year-olds, nor did the amendments materially alter their treatment (*Juvenile Justice and Other Acts Amendment Bill 2009 (Qld)*, Explanatory Memorandum). The same occurred previously without explanation in the 1996 (*Juvenile Justice Legislation Amendment Bill 1996 (Qld)*), 1998 (*Juvenile Justice Legislation Amendment Bill 1998 (Qld)*), and 2002 (*Juvenile Justice Amendment Bill 2002 (Qld)*) amending Bills and their Explanatory Memoranda (*Juvenile Justice and Other Acts Amendment Bill 2009 (Qld)*) and the corresponding Queensland criminal laws (*Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010 (Qld)*).

The legislature's indifference has fuelled public debate on the subject since 1992. Despite vehement opposition from community groups, the government announced in 2007 that the 2007 review of the *Juvenile Justice Act 1992 (Qld)* would not consider public opinion on the status of 17-year-olds in the criminal justice system (Pitt 2007).

Rationales against reform

Several reasons have been put forward by politicians for not changing the status quo.

When the issue was raised in 2007, the then Communities Minister, Warren Pitt, was keen to argue that 17-year-olds in adult prisons have access to more specialised programs, including 'educational, vocational, substance abuse treatment, anger management, life skills like budgeting and applying for jobs, as well as programs to address specific offending behaviour' (Pitt 2007). According to the CCYPCG:

The Youthful Offenders Unit at the Brisbane Correctional Centre accommodates up to 20 seventeen year old offenders who are segregated from the adult prisoner population. The unit operates under a structured day which allows for a number of educational and other programs,

such as drug and alcohol programs, to be delivered over the course of a day. Once a young offender turns 18 they are transitioned into the adult prison population. [CCYPCG 2010b, 117.]

There are many more programs and facilities available to children within the youth centres. These provide educational and age-appropriate opportunities for rehabilitation which young people lose when placed in adult facilities.

Another argument put forward was that 17-year-old males in the adult system may be able to be accommodated in prison facilities closer to their homes and community than they would if they were in juvenile detention facilities (Pitt 2007). There are only two youth detention centres in Queensland, one in Brisbane and the other in Townsville. In comparison, adult prisoners are held in 10 high-security correctional centres (eight government and two private)¹ and seven low-security centres spread across Queensland (Queensland Department of Community Safety).² However, it would seem that a greater proportion of the 17-year-olds are held in the Brisbane facility, and that:

These young people's interaction with their family and friends is also significantly restricted in adult prisons. Prisoners at the Brisbane Correctional Centre are permitted up to two hours of visits per week from Monday to Sunday. [CCYPCG 2010a, 22.]

The CCYPCG reports that the youth centres are more flexible in relation to community contacts:

Visits with family and friends at the Brisbane Youth Detention Centre are permitted between 6.00pm and 7.15pm on Mondays, Tuesdays, Thursdays and Fridays and between 11.30am to 1.00pm and 2.30pm and 3.45pm on Saturdays and Sundays.

Also, s.269 of the *Youth Justice Act 1992* allows for a young person to be granted a leave of absence to visit family for a specific purpose and period of time and subject to conditions. This is not permitted under the *Corrective Services Act 2006* for 17 year old prisoners.

Seventeen year olds in adult prisons also do not have access to the Commission's Community Visitors who independently monitor the treatment of young people and the provision of services in youth detention centres. [CCYPCG 2010a, 22.]

Mention was also made of the 'transition support and reintegration processes' available to 17-year-olds in adult prisons (Pitt 2007). Programs such as the Transitional Support Service and Advance2work are available for adult prisoners.

¹ Arthur Gorrie Correctional Centre (privately run), Borallon Correctional Centre (privately run), Brisbane Correctional Centre, Brisbane Women's Correctional Centre, Capricornia Correctional Centre, Lotus Glen Correctional Centre, Maryborough Correctional Centre, Townsville Correctional Centre, Wolston Correctional Centre and Woodford Correctional Centre.

² Capricornia Correctional Centre, Darling Downs Correctional Centre, Helana Jones Correctional Centre, Lotus Glen Correctional Centre, Numinbah Correctional Centre (male facility annexed to Darling Downs Correctional Centre and female facility annexed to Brisbane Women's Correctional Centre), Palen Creek Correctional Centre (annexed to Wolston Correctional Centre) and Townsville Correctional Centre.

Equivalent services are provided in the youth justice sector by staff specially trained to work with young people. Such services are geared so as to best achieve the young person's successful rehabilitation and reintegration into the community.

Pitt also argued that '17-year-olds would not necessarily be better off if they were transferred to the juvenile justice system', because 'when being sentenced as an adult, the court can take into account prior offences but only where a childhood conviction was recorded, whereas when being sentenced as a child, all findings of guilt including where a conviction was not recorded can be taken into account', and whereas there are 'reduced penalties' in the juvenile system, there is also 'an increased likelihood of being sentenced to detention' (Pitt 2007).

In fact, statistics demonstrate that the juvenile detention rates are flattening, whereas the rates of adult detention are increasing proportionate to the population (Productivity Commission 2007). From 1981 to 2007, 'the overall detention rate for juveniles fell by 51%, from 65 to 32 per 100,000.' (Australian Institute of Criminology, *Juvenile Detention Statistics*). Additionally, many of the juveniles in detention are being held there on remand, rather than as a result of a sentencing process (Richards 2011b, 7). Recent statistics also demonstrate that 'the proportion of people under adult corrective services who were in detention was higher than the corresponding proportion of those under juvenile justice supervision' (Australian Institute of Health and Welfare 2011, 7).

It was also argued that some judges 'may be reluctant to sentence a 17 year old to detention in the adult system, but be more inclined to do so in the youth system' (Pitt 2007). In fact, this argument is circular. It is not at all clear that the judiciary is exercising discretion in this manner. In March 2011, a 17-year-old appealed a three-year sentence for armed robbery (*R v Loveridge*, 2011). The appeal against the sentence was in fact unsuccessful. However, Margaret McMurdo P, in a dissenting judgment, noted the concerns expressed by the international human rights agencies and others about the anomaly in the Queensland law. McMurdo P viewed the applicant's age as a 'significant mitigating feature' (at [4]), and commented: 'In my view, his prospects of rehabilitation were promising, despite his recent chequered criminal history' (at [11]). The conservative law-and-order lobby, which canvasses for harsher sentences, might view a situation where a greater number of 17-year-olds are sentenced to youth detention centres as a positive outcome.

Similar arguments to those advanced in 2007 have been put forward more recently by Communities Minister Karen Struthers:

There are 17-year-olds in the juvenile system but they've generally committed lesser crimes. The 17-year-olds being held in the youth offenders unit within the adult system have committed serious murders, serious sexual assaults, serious armed robberies and I'm not convinced that mixing them in with 12, 13, and 14-year-olds who have committed far lesser crimes is the best way to go. [Glennie 2009.]

On the contrary, the CCYPCG has reported that:

It is also important to note that only a very small portion of the population has been sentenced or remanded in custody for declared serious violent offences or sexual assault. Young people in adult prisons are predominantly incarcerated for breaking and entering, robbery or assault-related offences.

The Queensland Police Service Statistical Reviews indicate that the majority of offences committed by 17 year olds between 2006 to 2009 were 'other' offences, which include, traffic-related, drug, weapons, trespassing or liquor offences. [CCYPCG 2010a, 24.]

In any case, a number of those being placed on remand in the adult facilities may subsequently be acquitted of the charges (Glennie 2009).

Politics, populism and the tough-on-crime agenda

Media reporting of youth crime contributes significantly to levels of concern in the community (Joint Standing Committee of Constitutional and Legal Matters 2005, 2.140). This, in turn, can translate into calls for the police to be less sympathetic in their interactions with teenagers. The Queensland Crime and Misconduct Commission (CMC) warns:

'Moral panics' created and perpetuated by political campaigns and the media that represent young people as lawless and violent, involved in 'crime waves' and 'ethnic gangs', can instil a general fear of crime within the community. The result of this fear is greater pressure on police to 'clean up the streets' so that young people do not 'get into trouble'. [CMC 2009, 2.]

Legal Aid Queensland has argued that a false sense of fear about levels of youth offending is prevalent in the community (Legal Aid Queensland 2005).

Reform in youth justice is a politically sensitive issue. Both political parties are keen to be seen as tackling any public order concerns. A 2006 Coalition media release described an isolated incident of a youth homicide and was critical that 'the Beattie Labor Government has clearly failed to reassure the community that it can ensure they live in a safe community' (Queensland Coalition 2006). Headlines such as 'New youth crime laws "toughest in Australia"', featuring hardline rhetoric like 'We've got the toughest laws in Australia and we're getting tougher — people are feeling unsafe and we're not going to cop this any longer' (Howells 2010), stir public disquiet that is arguably unjustified. In a media release on the 2009 amendments to the *Youth Justice Act 1992* (Qld), Karen Struthers said that '[t]he Bligh Government is tough on youth crime and tough on its causes' and '[t]he changes we have made are based on evidence and community feedback' (Struthers 2010).

Such rhetoric towards youth, underpinned by Garland's 'culture of control' (Garland 2001), can lead to ill-informed and punitive community views. In March 2011, Terry Sweetman wrote a newspaper article titled 'Counterproductive to jail 17-year-old offenders like adults' (Sweetman 2011). Unfortunately, the majority of the 88 comments posted in response on the *Courier Mail* website supported sending 17-year-old offenders to an adult prison. These populist reactionary views towards juvenile offending and delinquency tend to overshadow the human rights

implications of treating 17-year-olds as adults. As the Committee for an Inquiry into Crime in the Community observed: 'There is ... a need to ... obtain accurate information regarding risk and to ensure that the information is made available to the community' (Joint Standing Committee of Constitutional and Legal Matters 2005, 2.140).

There is no juvenile crime wave

The relevance of these human rights instruments to Queensland is bolstered by the statistics demonstrating that only a small percentage of childhood offences are at the more serious end of the spectrum. In fact, the studies show that the overall offending rates have been decreasing. In the 2000–01 Annual Report of the Children's Court of Queensland, Judge O'Brien remarked that:

The statistics do not support any significant increase in youth crime, indeed the substantial decrease in the number of defendants appearing before the Children's Court of Queensland and the District Court, suggest a reduction in more serious crime by youth. [O'Brien 2002, 3.]

This trend has continued. Statistics since 1981 show a 'flattening' and even a steady decline in the rates of offending for children aged between 10 and 17 years (Richards 2009, 29; 2011b, 2).

According to police data, 'juveniles (10 to 17 year olds) comprise a minority of all offenders who come into contact with the police' (Richards 2011b, 2). This is despite the fact that research demonstrates that juveniles 'are more likely than adults to come to the attention of the police', because they are less experienced and commit offences in groups and in public areas, or close to where they live (Cunneen and White 2007). According to Queensland Police statistics, the police apprehended juveniles (ages 10 to 17) in relation to only 18 per cent of all offences during the 2008–09 financial year (Richards 2011b, 2). The data available for other state jurisdictions is similar, with the percentages ranging from Victoria with the highest rate at 21 per cent to the Northern Territory with the lowest rate at 8 per cent (Richards 2011b, 2).

In addition, the majority (58 per cent) of offences for which juveniles were apprehended by Queensland police were property offences, and figures available for Victoria and South Australia demonstrate a similar offence profile (Richards 2011b, 3). Two-thirds of defendants appearing before Children's Courts in Australia during 2007–08 were there in relation to 'acts intended to cause injury (16%), theft (14%), unlawful entry with intent (12%), road traffic offences (11%) and deception (fare evasion and related offences — also 11%)' (Richards 2011a, 3). Therefore, current trends on offending and detention do not seem to warrant heightened public concern and outrage.

The cost of changing this rule is warranted

Other reasons canvassed by then Communities Minister Pitt in 2007 suggested that a general lack of resources and deficiencies within the current juvenile facilities were leading to a slow response on this issue:

For instance, we need to address current overcrowding in our youth detention centres, which would only be exacerbated by bringing in those 17-year-olds who are now part of the adult system.

...

Resources and costs are not transferable from one system to the other. The capital costs alone for building the new detention centre capacity needed to support such a move into the future would run into hundreds of millions of dollars. [Pitt 2007.]

Infrastructure costs, along with the expenses incurred in implementing special measures for juvenile offenders, may be expensive in the short term. Certainly, during the passage of the Juvenile Justice Bill 1992 (Qld), concerns were voiced about 'the magnitude of the task in establishing the necessary infrastructure to implement this legislation as it applies to children using current definitions of age' (Warner 1992, 6130). Therefore, the Queensland government has had 20 years to address the resource issues.

Research supports the additional costs of the youth system. The research has found that, 'although juvenile crime is typically less serious and less costly in economic terms than adult offending' (Cunneen and White 2007), juvenile offenders often require 'more intensive and more costly interventions than adult offenders' (Richards 2011a, 5). As Richards relates, 'juvenile offenders often have more complex needs than adult offenders' and all are 'compounded by juveniles' psychosocial immaturity' (Richards 2011a, 5). Juvenile offenders require a higher duty of care than adult offenders because 'incarcerated juveniles of school age are required to participate in schooling and staff-to-offender ratios are much higher in juvenile than adult custodial facilities'. But, importantly, 'many juveniles grow out of crime', so therefore they are not 'lost causes' (Richards 2011a, [6]) and any outlays should prove cost-effective.

Facilities in the two youth detention facilities are being improved. The Brisbane Youth Detention Centre is located in the western suburbs of Brisbane and accommodates all females throughout the state and males from Rockhampton south. The Brisbane centre has the capacity to accommodate 102 young people. The Cleveland Youth Detention Centre is located in Townsville and accommodates males from north of Rockhampton. The Cleveland centre 'has the capacity to accommodate 60 young people and is currently being expanded to accommodate 96 young people, including females'. (CCYPCG 2009, 5). This expansion of the facility is costing the government \$83 million, with completion scheduled for 2012–13 (Queensland Government 2010, 23).

According to data provided to the CCYPCG by the Department of Communities, a total of 741 young people were held in Queensland's youth detention centres

between 1 July 2007 and 30 June 2008 (CCYPCG 2009, 5). If there are barely 200 places in the centres, it would seem that most of the children are being held there for short periods on remand. Statistics in fact demonstrate that the average daily number of juveniles in detention for Queensland in 2006–07 is 143, which is within the capacity of the centres (Richards 2009, 97). The figure for Victoria is 61 (Richards 2009, 97). By comparison, Victoria has three facilities that have a combined capacity of 222 children and employ approximately 350 staff (Department of Human Services (Victoria) 2010). The costs per bed per day in these centres for the period 2006–07 are Melbourne Youth Justice Centre, \$500.60; Parkville Youth Residential Centre, \$408.7; and Malmsbury Youth Justice Centre, \$424.50 (Victorian Auditor-General 2008, 46). These costs are definitely higher than the costs for adult detention. However, the number of additional offenders that would need to be housed in the existing Queensland centres is not large. The statistics detail that there are approximately 35 youth offenders under 18 years of age being held in adult facilities each day (Australia Bureau of Statistics 2010, 4517.0). Arguably, any additional cost in augmenting the Queensland youth facilities would have to be compared to the broader costs of inappropriate treatment of young people being held in adult facilities.

In arguing against a change of policy, Warren Pitt commented:

... transferring 17-year-olds from the adult system to the juvenile system would not be limited to those offenders sentenced to detention, but would apply across the board.

It would also result in increased numbers of court appearances in the Children's Court, expanded Children's Court support services, and more youth justice conferences and community based court orders – all of which would have to be resourced. [Pitt 2007.]

The use of diversion under the YJA is intended to conserve police and community resources in the long term. However, bringing the 17-year-old group within the provisions of the YJA could potentially make more work for the police (Hutchinson 2006). Minister Ann Warner noted that cautioning 'is usually a sufficient deterrent to further offending' (Warner 1992). The rationale for cautioning is to divert children from appearing in court. The Queensland Police caution the majority of juvenile offenders involved in minor offences (Alder, O'Connor, Warner and White 1992). Reform of the current structure might add to immediate workloads for the police and the Children's Court, but should result in a diversion of significant numbers from the adult courts in the future.

Empirical studies on recidivism rates do not support treating juvenile offenders harshly

In Australia, Richards's research demonstrates that many juveniles grow out of crime and adopt law-abiding lifestyles as young adults (Richards 2011a, [6]). Moreover, 'the potential exists for a great deal of harm to be done to juveniles if

ineffective or unsuitable interventions are applied by juvenile justice authorities' (Richards 2011a, [5]). As Richards has commented:

It is widely recognised that some criminal justice responses to offending, such as incarceration, are criminogenic; that is, they foster further criminality. It is accepted, for example, that prisons are 'universities of crime' that enable offenders to learn more and better offending strategies and skills, and to create and maintain criminal networks. This may be particularly the case for juveniles, who, due to their immaturity, are especially susceptible to being influenced by their peers. As Gatti, Tremblay and Vitaro argue, peer influence plays a fundamental role in orienting juveniles' behaviour and 'deviant behavior is no exception'. Separate juvenile and adult criminal justice systems were established, in part, because of the need to prevent juveniles being influenced by adult offenders. [Richards, 2011a, 6–7, citations omitted.]

More than a decade ago, Michael Cain, in his research in New South Wales, examined the first offences and associated penalties of 16- and 17-year-old males. His recidivism study concluded that 'the persisters were more likely to have received a more severe sanction, that is one involving some form of structured intervention, than the desisters after the type of offence was controlled for' (Cain 1996, 28–29). Studies have found that 'the majority of juvenile offenders apparently desisted from criminal activity after their first proven criminal appearance' (Cain 1996, 2). In the United States, the recent studies are consistent, reporting a 'greater probability of recidivism for juveniles processed in the adult justice system compared with similar offenders retained in the juvenile justice system' (Kurlycheck and Johnson 2010, 749).

In addition, research demonstrates that children entering the justice system tend to come from a very disadvantaged and already vulnerable group. Current research details a number of risk factors for young people, including a 'lack of parental involvement and supervision in a child's life, and a parent's lack of emotional attachment or rejection towards a child', 'difficulties in school including suspension, truancy and low educational attainment homelessness or unstable accommodation, substance abuse, unemployment, poverty, family breakdown and disruption, negative peer association, poor personal and social skills, limited leisure and recreation opportunities, and mental health issues' (Hanson 2009, 3). Indigenous children and children with intellectual disabilities and mental health problems tend to be over-represented in the system (National Human Rights Action Plan Baseline Study Consultation Draft June 2011, 43; NSWLRC 2010, 21). A recent survey by the CCYPCG canvassing the views of young people in detention centres (CCYPCG 2009) reported that 62 per cent identify as Aboriginal and/or Torres Strait Islander, many 'had experienced recent homelessness (16%) and/or involvement in the child protection system (17%), and the majority reported having multiple stays in detention (75%)' (CCYPCG 2009, viii). In addition:

Most respondents (74%) reported having multiple health and social problems when they first had contact with police, reinforcing the need for interventions for young people at risk of detention to be multi-faceted. Over two-thirds of respondents (71%) reported having drug and/or alcohol problems, around half (49%) reported having emotional/psychological

problems, over one-third (40%) reported having problems at school, and a similar proportion (38%) reported having problems at home or with family. [CCYPCG 2009, viii.]

This cohort needs reliable interventions, education and health care, rather than further criminalisation through being pushed into the adult justice system.

For this reason, it is important that we as a society ensure that young people coming into contact with the youth justice system have access to the best programs available in order to intervene to prevent re-offending and break bad patterns of behaviour. Children in youth detention centres are offered a number of programs in partnership with the Department of Education and Training, Queensland Health, and various community organisations. As reported in the recent CCYPCG study:

Young people in detention participate in a school program between normal school hours, delivered by teaching staff from the Department of Education and Training. The school program includes literacy, numeracy, music and arts, and vocational curricula (including, for example, tool skills, horticulture and catering). Cultural, social and living skills programs are offered outside school hours and on weekends and are delivered by detention centre youth workers in partnership with community organisations. Health services, including sexual and oral health services and the Mental Health Alcohol Tobacco and Other Drugs Service (MHATODS), are delivered by Queensland Health medical and allied health personnel. [CCYPCG 2009, 5.]

As one young inmate reported:

It's a lot easier over there than it is here. There's no lockdown. You got more classes. You got a pool, a big oval ... a proper gym. You got music ... You got more visits over there too so it's easier for family to come and see you. But in here it's only one visit a week and like you learn things that you shouldn't learn while you're in here from other people because you're in here with a whole bunch of other criminals. Yeah it's just a school for crims. [Glennie 2009.]

The current approach is contrary to the findings of psychological studies on adolescent development and maturity

Civilised societies have drawn a line between adulthood and childhood and there are good reasons for doing this. The US Supreme Court, in a split decision in 2005, rejected the imposition of the death penalty on juvenile offenders under 18. Kennedy J, delivering the majority opinion of the court, noted the 'diminished culpability of juveniles' (*Roper v Simmons*, 2005, 571). Kennedy J noted that 'the case for retribution is not as strong with a minor as with an adult' [571], and also that 'it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles' [571]. In handing down the decision, Kennedy J took into consideration 'three general differences between juveniles under 18 and adults':

First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' ('Even the normal 16-year-old customarily lacks the maturity of an adult'). It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.' In

recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. ('[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage'). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. ('[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting').

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. [*Roper v Simmons* [569, 570], citations omitted.]

The research quoted by Kennedy J has been echoed in more recent research and commentary (Kurlycheck and Johnson 2010, 729), and is just as relevant in relation to the treatment of those offenders under 18 in Queensland.

The status of 17-year-old accuseds is anomalous with other age standards

Justice Kennedy used such research as mentioned above to argue against the imposition of the death penalty on juvenile offenders and to demonstrate that 'juvenile offenders cannot with reliability be classified among the worst offenders' (*Roper v Simmons* [569]). The US Supreme Court decided that a line must be drawn:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn ... The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. [*Roper v Simmons* [574].]

The age of majority is:

An age generally specified by statute, at which time an individual converts or emancipates from being a minor or child to adult, and is given the full gamut of legal rights and responsibilities generally available to an adult of sound mind, such as the right to own property, to contract or to consume alcoholic beverages. [*Duhaime Legal Dictionary*.]

In Australia, the age of majority is 18. Civil participation, such as serving on a jury, and the right to vote in an election commences at 18. An 18-year-old is an adult in the eyes of the civil law and is therefore able to enter into contracts, sue and be sued, make a will, or act as an executor of an estate.

Until the age of majority, there are constraints on young people. They cannot obtain a passport without their parents' consent. They cannot marry without their parents' consent. They must be in school, working or training of some type. The new *Education (General Provisions) Act 2006* (Qld) means that in Queensland a child must be 'earning or learning' until the age of 17. Lifestyle habits — such as gambling,

purchasing alcohol, purchasing cigarettes and tobacco, and being able to pay for tattoos – are restricted to adults, meaning those over 18. Thus, for example, as Glennie reported, '[c]igarettes are generally allowed in jail but smoking is illegal for the boys in the young offenders unit because they're only 17' (Glennie 2009).

The treatment of 17-year-olds as adults in the criminal justice system is clearly out of step with other areas of law. This is evident in table 1.

Table 1: Anomalies of age standards

Aspects of maturity	Action or event	Ages which can legally partake in the action/event		
		=/<16	=17	=/>18
Every context	Age of majority			<i>Law Reform Act 1995</i> (Qld), s 17; <i>Acts Interpretation Act 1954</i> (Qld), s 36
Civil participation	Serve jury duty			<i>Jury Act 1995</i> (Qld), s 4; <i>Acts Interpretation Act 1954</i> (Qld), s 36
	Vote			<i>Electoral Act 1992</i> (Qld), s 101; <i>Acts Interpretation Act 1954</i> (Qld), s 36
Self-determination	Choose not to attend school			<i>Education (General Provisions) Act 2006</i> (Qld), Ch 9
	Seek refuge (as a refugee)			<i>Family Law Act 1975</i> (Cth), s 4; <i>Social Security Act 1991</i> (Cth), ss 995, 1207A
	Sign/administer a will or estate			<i>Public Trustee Act 1978</i> (Qld), ss 37(b), 43(1), 44, 48(i), 48(ii)(B), 50, 58, 65–75
	Sue or be sued	Only if action brought/defended by litigation guardian (<i>Uniform Civil Procedure Rules 1999</i> (Qld), s 93(1)), or to make/accept an offer to settle (<i>Uniform Civil Procedure Rules 1999</i> (Qld), s 359)		<i>Uniform Civil Procedure Rules 1999</i> (Qld), s 359; <i>High Court Rules 2004</i> (Cth), r 21.08; <i>Federal Court Rules</i> (Cth), O 43 rr 1(1), 1(2); <i>Federal Magistrates Court Rules 2001</i> (Cth), r 11.08
	Independent foreign travel	Only if parent or guardian consents		<i>Child Protection Act 1999</i> (Qld)
	Marry	Only if parent or guardian consents (<i>Marriage Act 1961</i> (Cth), ss 13, 14)		<i>Marriage Act 1961</i> (Cth), s 50(2); <i>Births, Deaths and Marriages Registration Act 2003</i> (Qld), s 25(1)
	Enter into contracts	Only for contracts for necessities (<i>Bojczuk v Gregorcowicz</i> [1961] SASR 128) or beneficial service		UN Economic and Social Council 1997

		(<i>Roberts v Gray</i> (1913) 1 KB 520)	
Lifestyle and maturity	Purchase or consume alcohol	Only if the consumption is in a private place	<i>Tobacco and Other Smoking Products Act 1998</i> (Qld), ss 9–11, 16, 19A, 40
	Gamble		<i>Liquor Act 1992</i> (Qld)
	Get a tattoo		<i>Summary Offences Act 2005</i> (Qld), s 19
	Purchase or consume tobacco		<i>Tobacco and Other Smoking Products Act 1998</i> (Qld), ss 9–11, 16, 19A, 40
Criminal responsibility	Commit a criminal offence as adult		<i>Criminal Code 1889</i> (Qld), s 1
	Have offence heard at the Children’s Court	<i>Youth Justice Act 1992</i> (Qld)	Only with court’s discretion

Source: *Legal Aid Queensland et al 2007*, 3.2.

There are inconsistencies too arising from the different age rules between the Australian jurisdictions. For the purposes of federal offences, a child is ‘a person who is under 18’ pursuant to s 15YA of the *Crimes Act 1914* (Cth). So the pre-adjudication treatment of 17-year-olds charged with a federal offence should be in accord with the treatment of their younger counterparts in a similar situation. Interestingly, if a 17-year-old is convicted of a federal offence and sentenced to detention, they are required to serve their detention order in their state detention centre, according to s 20C of the *Crimes Act 1914* (Cth). Therefore, whether a charge is for a federal or Queensland offence can determine if a 17-year-old is treated as an adult or child.

Another example of a difference in treatment of the two groups occurs with the interstate transfers of youths. A young offender for the purposes of interstate transfer is a person under the age of 18 (*Young Offenders (Interstate Transfer) Act 1987* (Qld), s 3; compare *Juvenile Justice Amendment Act (No 2) 2001* (NT)). Under s 17 of the *Young Offenders (Interstate Transfer) Act 1987* (Qld), 17-year-olds from interstate are transferred into detention centres, not prisons. Therefore, out-of-state offenders aged 17 are treated like children in Queensland. This demonstrates the arbitrariness of treating 17-year-old offenders in Queensland as adults when their interstate peers are treated differently.

In summary, additional infrastructure costs, general community outrage, and the fear of youth offending have led to a lack of government support for change. There is a lack of political will to change a rule that would have no, or even negative, effect on government support and the number of election votes, despite any inconsistencies with other legislative frameworks or with other state jurisdictions. It may be 'the right thing to do' in terms of the international Conventions, but it is a relatively minor matter which has serious financial consequences. It is basically an administrative issue, but one with significant detrimental effects to those 17-year-olds caught within its provisions.

Practical outcomes

The consequences for 17-year-olds are significant.

Police reports from 2009 indicate that Queensland police had contact with juveniles in relation to 49,682 offences overall, 'including 38,282 offences (77%) involving 10 to 17 year old males and 11,400 offences involving 10 to 17 year old females (23%)' (Richards 2009, 29). Ten- to 14-year-olds in Queensland were 'apprehended in relation to 33 percent of offences, 15 year olds in relation to 19 percent of offences, 16 year olds for 22 percent of offences and 17 year olds for 26 percent of offences' (Richards 2009, 41). This article is especially concerned with the 17-year-olds, numbering approximately 13,000, in these statistics and will analyse the ways in which their treatment as adult accuseds is contrary to human rights laws. This group should be given the protections provided by the YJA rather than being thrown into an adult system, which can stunt their ability to rehabilitate and increase their chances of re-offending.

Why is it essential that these protections are extended to 17-year-olds? It is this group of 13,000 17-year-olds who come into contact with the justice system (many of them for the first time), the majority of whom do not end up with custodial sentences, who are the real cause for concern. The YJA covers dealings with offences committed by children under the age of 17 years. It covers interactions with the police, including cautions, youth justice conferences, bail, court jurisdiction and proceedings, appeals, sentencing, detention, confidentiality, and general provisions regarding parents' rights in relation to their child in custody. A harsh reality of the current situation is that those over 17 years are dealt with under the remaining body of criminal laws in Queensland, such as the Code, the PPRA, the PSA and the *Drugs Misuse Act 1986 (Qld) (DMA)*.

Adult criminal laws are not designed to apply to children. While there is contested debate about the sentencing of youth offenders, the treatment of 17-year-old accuseds is a neglected consequence of the disjuncture between the international age standard and Queensland's failure to adopt it. Therefore, the pre-adjudication treatment of 17-year-olds does not follow the basic standards set out in the CROC.

The following discussion centres on a comparison of these pre-adjudication stages and covers several important preliminary stages in the justice process, including interactions with the police, prosecution, access to support, court appearance and identification of offenders, and remand procedures.

Interactions with the police

The police have been referred to as 'the system's gatekeepers', as they are generally the first point of contact between young people and the criminal justice system (Blagg and Wilkie 1997, 1). This first contact can have important long-term ramifications. Research in Queensland has found that:

... first time offenders between the ages of ten and 16 who were cautioned were less likely to have additional contact with the juvenile justice system before age 17 than those whose first offence had led to a court appearance. This suggests that perceptions of, and interactions between, young people and the police may either escalate or divert future involvement by young people in the criminal justice system. [Dennison, Stewart and Hurren, quoted in CMC 2009, 4.]

The protection and recognition of the rights of children in their encounters with police is essential to their fair treatment in the criminal justice system (Beijing Rules, r 10.3). The PPRA governs police contact with offenders. For children, these sections are tempered by the Charter of Youth Justice Principles (contained in Sch 1 of the YJA) and Pt 2 of the YJA, headed 'Special provisions about policing and children'. The Charter provides that interventions are to be pursued *primarily in the interest of the youth*, guided by fairness and equity (Riyadh Guidelines, r 5(c)). Police must consider any vulnerability and avoid unnecessary additional harm (Beijing Rules, r 10.3). At present, 17-year-olds in Queensland are not given these special considerations.

The police should 'avoid harm' to children. 'Harm' can encompass not only physical violence, but also use of harsh language, threats, or sexual intimidation. 'Harm' would also encompass the use of capsicum spray and tasers. A 2008 study of the use of tasers by Queensland police reports an 11 per cent (n=18) usage rate against 15- to 19-year-olds. The tasers were drawn in ten instances and actually used in eight instances involving this age group (QPS and CMC 2008, 18). Commissioner's Circular No 15/2009 states that tasers should not be used 'against children or persons of particularly small body mass, except in extreme circumstances where there is no other reasonable option to avoid the imminent risk of serious injury' (QPS 2009). No doubt it is difficult for the police in heightened tension interactions to know exactly how old a person is, but common sense must prevail and lines should be drawn. Tasers should not be used on children under 18 years of age.

Blagg and Wilkie highlight the prevalence of the 'trifecta' in interchanges between police and young people — that is, the charges of 'resisting arrest, using obscene language, assaulting police'. These charges against young people often arise out of

the police intervention itself (Blagg and Wilkie 1997). Schoolies is a typical environment where young people might behave in a 'disorderly' or 'offensive' way that 'interferes with the use or enjoyment of public places' so as to fall within the provisions of s 6 of the *Summary Offences Act 2005* (Qld). However, the provision itself is unclear and provides no guidance as to what conduct might amount to a breach, although prima facie it carries strict liability (*Coleman v Power*, 2004, at 42). When accompanied by 'resisting arrest', the seriousness of the offence may escalate and so police interaction can become a 'slippery slope' that can beckon greater police attention towards a 17-year-old youth.

The disparities in treatment between the two groups can also arise during police interviews, during personal searches, and in relation to participation in lineups and requirements for fingerprinting. Pursuant to s 26 of the YJA, police interviews of children cannot validly take place without the presence of a parent or a Justice of the Peace (*R v Coe*, 1997). Generally, if a child is accused of an indictable offence, any statement they make is not admissible unless a support person is present (YJA, s 29(1)). Justice Hidden in *H (a child)*, 1996, at 486–487, excluded the record of interview of a child for not being 'voluntary in a legal sense', given that:

The primary aim ... [of a such a provision] is to protect children from the disadvantaged position inherent in their age, quite apart from any impropriety on the part of the police. That protective purpose can be met only by an adult who is free, not only to protect against perceived unfairness, but also to advise the child of his or her rights. As the occasion requires, this advice might be a reminder of the right to silence, or an admonition against further participation in an interview in the absence of legal advice.

Surely, if a 17-year-old signs an interview statement in the absence of a support person, then the statement's legitimacy must be called into question. Seventeen-year-olds would not normally have capacity to sign a binding agreement without a guardian. They are not able to independently enter into validly binding commercial contracts (Riyadh Guidelines, r 5). That said, there is still an absence of any principles in support of excluding such statements on the basis of the accused being a 17-year-old adult.

There is general recognition in the human rights conventions that young offenders should be treated in such a way that will encourage their self-respect and not damage their self-worth (ICCPR, Art 17). Section 631 of the PPRA includes special safeguards for children who are to be subjected to strip searches. However, ss 157 and 624–632 of the same Act provide police with extensive powers under search warrants for the general adult populace. While this is a necessary police power, 17-year-olds are a particularly vulnerable group, and it is unfair that they do not have recourse to the personal safeguards written into the YJA.

Queensland children do not have to take part in a line-up (Wight 2009, 69), but can still have their photograph and fingerprints taken if convicted of an offence pursuant to s 255 of the YJA (Alder, O'Connor, Warner and White 1992). Section 617 of the PPRA prescribes that 17-year-olds must comply with all of these processes if

requested. At international law, it could be argued that this is a detraction from the rights and dignities of those youths. Practically speaking, to the youth it might seem like unnecessarily aggressive behaviour, suggesting that the police are not there to help them and that they must docilely obey the police's instructions. This in itself is disrespectful to those youths.

Prosecution

Police powers of arrest are important as a preliminary step in the prosecution of youths. In international law, children have the right to be treated in a manner consistent with the promotion of their sense of dignity and worth (CROC, Art 40(1)). The YJA preserves that right, in conjunction with the Queensland Police Service's cautioning program, through the use of alternatives to arrest when dealing with youth offenders. Inaction, cautioning, and even the exercise of move-on powers (HREOC 1989), which are found in ss 11 and 49 of the YJA, are preferred over the arrest of youths (Commission of Inquiry into the Nature and Extent of the Problems Confronting Youth in Queensland and Demack 1975).

According to s 12 of the YJA, for example, the police 'must start the proceeding by way of complaint and summons or notice to appear' for all other than serious offences, and under s 11 of the YJA the police must consider alternatives to proceeding, including taking no action. Chapter 14 of the PPRA contains no such constraints on police powers to arrest 17-year-olds. In this respect, 17-year-olds do not enjoy treatment appropriate to their age, despite the persuasive rationale behind such measures.

The use of a police caution in lieu of an arrest can have important repercussions on a young offender. Section 14 of the YJA states that cautioning a young person for an offence indicates that their behaviour is unacceptable, which leaves arrest as a last resort (CROC, Art 37(b)). However, s 14 also states that cautioning in Queensland is reserved for children. Therefore, police do not have this same option when dealing with 17-year-olds, which would relieve that group from the stigma associated with conviction and 'contamination' through contact with recidivist adult offenders (Blagg and Wilkie 1997). The different treatment has a degree of arbitrariness, because an arresting officer would need to know the age of the offender before giving a caution. This means that the outcomes are directly related to the offender's age when they commit an offence.

As a further safeguard, if the prescribed requirements of a caution found in s 20 of the YJA are not followed, s 21 allows the Children's Court to dismiss the charges. Obviously, a failure to read that same statement to a 17-year-old accused will have no legal consequence under the YJA. Rather, as with all adults, if the police fail to provide an equivalent caution to the accused, then the best the 17-year-old accused can do is to utilise the rules of evidence to exclude any illegally obtained information

in relation to the failure to give a caution (*Commissioner of Police v Clements*, 2006). This represents an important example of where the laws for adult accuseds overlook the vulnerability of 17-year-olds and the preference at international law to issue them with warnings and avoid their arrest.

The well-being and age of a child should guide criminal prosecution (Beijing Rules, r 10; CROC, Art 40; ICCPR, Art 14(5)). This means that children ought to be treated differently from adults (Beijing Rules, r 2.2(a)). The decision to prosecute children is to be considered as a last resort and the child's best interest ought to be a primary consideration (Department of Justice and Attorney-General 2003; CROC, Art 3(1); Van Bueren 1998, 45). Therefore, the YJA provides that interventions must be primarily in the interest of the youth, guided by fairness and equity (Riyadh Guidelines, cl 5(c)). However, this provision does not apply to indictable offences, according to s 42(IA) of the *Justices Act 1886* (Qld), nor is there any exception in laws for adult offenders in Queensland.

The Queensland Director of Public Prosecutions has a general discretion whether or not to prosecute based on public interest criteria (Department of Justice and Attorney-General 2003, guideline 4). These relevant criteria do include youth, in addition to culpability, perceptions of counter-productivity to the interests of justice, public concern, availability of alternatives to prosecution, and effect on public order and morale (Department of Justice and Attorney-General 2003, guideline 4). These discretionary principles are more aligned with the international laws in the protection of youth offenders, yet are not used for this purpose – to the disadvantage of 17-year-old accuseds.

It has been observed that the Queensland police culture may hinder full prosecutorial disclosure (Moynihan 2008, 93). Prosecutorial conduct would be under greater scrutiny in a Children's Court, where the court's inquisitorial approach works to some extent in favour of the accused child. An important control on police practice is the retrospective exclusion of evidence by courts and the referral of a complaint to relevant police authorities. Because the efficacy of court review depends, at a minimum, on the matter being brought to the court's attention through the young person challenging voluntariness of the confession, unrepresented 17-year-olds are especially disadvantaged if they cannot identify prosecutorial misconduct (*R v Thomas (No 2)*, 1990; MacMillan 1998; O'Connor and Sweetapple 1988; HREOC 1989).

Access to support

Children are required to have access to legal and other support services pursuant to Sch 1, s 15 of the YJA. Section 35(2) of the YJA further states that the Children's Court will not allow the prosecution of a child unless that child has had reasonable opportunity to obtain or refuse legal representation. In practice, this means that an

accused child is not guaranteed legal aid, but they must be informed of the right to obtain legal advice, and they must have reasonable information about how to obtain it and a reasonable opportunity to do so, in accordance with s 35(2) of the YJA.

Indigenous 17-year-olds (as adults) are particularly disadvantaged, as there is no positive legal requirement for them to have access to Indigenous support officers (Australian Institute of Health and Welfare 2009, 124; Snowball 2008), which contravenes Art 30 of the CROC. Similarly, non-Indigenous 17-year-olds (as adults) will not gain court support if they are unrepresented and do not qualify for legal aid (*Dietrich v R*, 1992), which renders the courts unable to assist 17-year-olds in attaining a just outcome. This adds weight to the need for reform.

The CROC recognises the importance of the availability of non-judicial intervention in dealing with young offenders (Art 40(3)(b); Beijing Rules, r 11.2). Diversion is intended to avoid the danger of trapping young people with a previously good record in a pattern of offending behaviour (Findlay, Odgers and Yeo 1994, 267; ALRC and HREOC 1997, 18.36). Indeed, the ALRC noted that '[d]iversion of a juvenile offender away from the criminal justice system to community support services is the optimal response to the problem of juvenile crime' (ALRC and HREOC 1997, 18.36). For this reason, 'Youth Justice Conference and Drug Diversion Assessment Programs' under s 11(1)(d) of the YJA are available to children in lieu of a determination by a court.

However, 17-year-olds do not enjoy these diversionary measures, and the punitive nature of criminal justice processes does not always recognise their vulnerabilities (ALRC and HREOC 1997, 18.367). The YJA also provides the additional opportunity for an apology to the victim associated with the caution, which may have very positive effects on recidivism for a young person, and this is also not available to 17-year-olds.

Court appearance and identification of offenders

Children's offences are heard in the Children's Court, or the Magistrates Court in certain circumstances contained in s 65 of the YJA. The Children's Court generally determines all offences summarily, including indictable offences pursuant to s 77 of the YJA (*R v R*, 1993). However, under s 81 of the YJA, it may hold committal proceedings or, pursuant to s 64, a preliminary examination in some situations. If a child is committed for trial, s 76(1) of the YJA allows them to elect to have the matter dealt with by a Children's Court judge rather than by judge and jury, while a 17-year-old does not have that option. What court a 17-year-old will appear in depends on the seriousness of the offence with which they are charged. The indictable charges of 17-year-olds remain indictable in whichever court they appear.

The arbitrary or unlawful interference with a youth's privacy is prohibited under international law (CROC, Art 16; ICCPR, Art 17). The privacy of an accused youth

must be respected at all stages of criminal proceedings in order to avoid harm caused by undue publicity (CROC, Art 40(2)(b)(vii); ICCPR, Art 14; Beijing Rules, r 8.1). The interests of children require non-publication of court proceedings and judgments (ICCPR, Art 14(1)), as affirmed by the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) (HREOC 2007, [17]). That situation normally applies in the Children's Court, as mandated by s 154(2)(a) of the *Justices Act 1886* (Qld). This is because, as the Riyadh Guidelines note, labelling a young person often contributes to the development of a consistent pattern of undesirable behaviour (Riyadh Guidelines, Principle 5).

Anyone who is not the child, the child's guardian, a witness, a victim or a representative is excluded from Children's Court proceedings (s 20(1), *Children's Court Act 1992* (Qld)). It is, of course, necessary to maintain transparency in court proceedings for the sake of the rule of law. The 2009 amendment (Pt 9) to the YJA augmented what is colloquially known as the 'name and shame' provision. Children have anonymity in closed court and have their names suppressed from publication, unless there is a deliberate decision to name and shame them justified under s 234(a) of the YJA. Publication orders may occur where the child has committed a serious offence according to s 176(3)(b) and the court considers that it would be 'in the interests of justice to allow the publication'. The court may exercise its discretion to use this exception if the offence is heinously violent, which is plainly out of sync with international law and arguably only spurs a sensationalised portrayal of youth offending.

This naming provision exists in the YJA as a serious sanction for child offenders, while it is a normal aspect of the court processes for a 17-year-old. Court proceedings involving adults (and 17-year-olds) do not operate under this standard (Code, Ch 8). Adults (including 17-year-olds) are openly identified in court. This is not part of a special sentencing order. It is not an additional penalty. The minor misdemeanours of 17-year-olds are automatically public. Effectively, where public disclosure of identity operates as a sanction for children, it operates as common practice for adults and 17-year-olds.

Remand procedures

A judge or other competent official (Beijing Rules, r 10.2) must consider the issue of release (Beijing Rules, r 10.2; compare ICCPR, Art 9(3)) without delay. In addition, detention pending trial should only be used as a last resort (Beijing Rules, r 13.1). An accused child is entitled to a speedy trial (ICCPR, Art 10(2)(b)), ostensibly so that they serve as little time as possible detained in remand (CROC, Art 37(b)). Although this is a general expectation for all those accused of offences (*Smith v R*, 1991), this right is contained specifically in Arts 7(a) and 11 of the Charter of Youth Justice Principles, contained in Sch 1 of the YJA. No such safeguards apply to 17-year-olds. Indeed, there are no overlapping provisions in practice that invoke the principle of

avoiding proceeding with the prosecution of a 17-year-old offender because of their age.

There are sound reasons for keeping children out of watch houses (Queensland Corrective Services Commission 1997). Child offenders need to be held separately from adults and treated in a way appropriate to their age in order to ensure 'reformation and social rehabilitation' (ICCPR, Art 10(3)). Separation encourages the development of measures that promote the well-being of the child (Beijing Rules, r 13.1). The Charter of Youth Justice Principles provides that a child detained should be held in a facility suitable for children, provided with a safe and stable living environment (Art 20(a)), and assisted in maintaining relationships with their family and community (Art 20(b)).

In Queensland, in contrast, 17-year-olds are detained with other adult offenders over 18 years of age. Consequently, this group may experience criminal contamination because they are exposed to adult offenders and are therefore more likely to become part of that group (Blagg and Wilkie 1997). If 17-year-olds are detained in remand with adults, this presents dangers to their well-being and safety. The Australian Institute of Criminology statistics indicate that 37 juvenile deaths occurred in police custody during 1998–2007, including 14 deaths of 17-year-olds, although nine of these resulted from motor vehicle pursuits (Richards 2009, 105). Seventeen-year-olds who remain at the watch house are in a similar position to youth offenders who are sentenced and placed in detention. They have not even been convicted, yet they are still deprived of the right to be separated from adults (Dambach 2008).

These disparities can carry through to the release of an accused and bail provisions. A court may order a conditional release order for a child under s 220(1) of the YJA. Conditional release is preferred over remand because of the child's vulnerability (Beijing Rules, r 28.1), especially if the period of remand becomes excessive. Section 51(2) of the YJA allows an accused child to be released without bail into the custody of their parents or at large, as long as the suitability requirements in the section are met. No equivalent consideration exists for adult offenders or 17-year-olds (ss 6 and 19C of the *Bail Act 1980* (Qld)).

This discussion of the provisions covering pre-adjudication stages of the criminal process in relation to arrest, court proceedings, and remand, release and bail as applied to children and 17-year-olds demonstrates the inequities and anomalies in the present law in Queensland.

Conclusion

This article has examined the context for the present anomalies in Queensland's treatment of its 17-year-old offenders, along with the relevant statistics and legislative history. In particular, it examined the pre-adjudication treatment of young offenders in Queensland and the many ways in which this very vulnerable group is

disadvantaged in comparison to those who come under the banner of the YJA or, indeed, 17-year-old offenders in all other Australian jurisdictions. Such an examination demonstrates that the current approach is not only contrary to international agreements, it is also out of step with modern research on adolescent development and effective measures to prevent recidivism in young offenders.

The article has argued that the reform of this rule is essential. Any systemic changes must be accommodated. Victoria, for example, has taken positive steps to implement systemic change in order to rehabilitate young offenders, rather than seeking to introduce them into the adult system. The Queensland government must put a definite timeframe in place in order to implement this basic reform. A forward-looking Queensland government would look to best practice in other Australian jurisdictions in order to undertake this task. In December 2010, the Australian Human Rights Commission's *Submission to the Senate Legal and Constitutional Affairs Committee in its inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010* advocated the establishment of a national Children's Commissioner in Australia (AHRC 2010). Such a role would provide national advocacy to reinforce calls for action by the CCYPCG in Queensland (CCYPCG 2010a). It is now time to bring Queensland into conformity with the rest of Australia. It is time for the Queensland government to set an agenda for the change to be finalised by 2012, marking the 20-year anniversary of the YJA.

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* Terry Hutchinson is Associate Professor, School of Law, at the Queensland University of Technology Faculty of Law. Email: <t.hutchinson@qut.edu.au>.

Jamie Nuich is a law student at the Queensland University of Technology and Queensland Convenor of Australian Lawyers for Human Rights.